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The Encyclopedic Digest of Virginia and West Vir- ginia Reports

BEING A COMPLETE

**Encyclopedia and Digest of all the Virginia and West Vir-
ginia Case Law up to and including Vol. 103
Virginia Reports and Vol. 55 West
Virginia Reports**

UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

VOLUME VI

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CROSS REFERENCES.

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I. Statement of Fellow-Servant Rule.

When a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service. *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 856, 14 S. E. 692; *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Norfolk, etc., R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604; *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667, 44 S. E. 898; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 24 S. E. 278; *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260, 12 S. E. 512, 517; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 287; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140; *Cooper v. Pittsburg, etc., R. Co.*, 24 W. Va. 37; *Beuhring v. Chesapeake, etc., R. Co.*, 37 W. Va. 502, 16 S. E. 436.

An employee or servant can not recover for injuries received from the negligence of other employees or servants when the principal is not at fault. *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 856, 14 S. E. 692.

A master is not liable to his servant for negligence of his fellow servant while engaged in the same common employment, unless he has been negligent in the selection of the servant in fault, or in retaining him after notice of his incompetency. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 21.

In other words, the master is exempt from liability to his servants for the fault of their fellow servants. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71, 87.

"By 'fellow servancy' we mean that where there are two servants or employees of a common master or employer, and one of them, from the negligent act of the other, receives injury, the master is not liable for the same." *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 287.

Where the injury is caused by an employee acting in the discharge of a duty that renders him inferior to or co-ordinate with the injured employee, the master or company is not liable. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596, 603.

II. Reasons for Rule.

Assumption of Risks.—The general rule resulting from considerations, as well of justice as of policy, is that he who engages in the employment of another, for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The perils arising from the carelessness and negligence of those who are in the same employment, are not exceptions to this rule. *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. Co. v. Lindamood*, 1 Va. Dec. 748, 751; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Eckles v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368; *Beuhring v. Chesapeake, etc., R. Co.*, 37 W. Va. 562, 16 S. E. 436; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870; *Young v. West Virginia, etc., R. Co.*, 42 W. Va. 112, 24 S. E. 615; *Core v. Ohio River R. Co.*, 38 W. Va. 496, 18 S. E. 596, 603; *McVey v. Clair Co.*, 49 W. Va. 412, 38 S. E. 14; *Jackson v. Norfolk, etc., R. Co.*, 43

Va. 380, 27 S. E. 218; *Cooper v. Pittsburgh, etc.*, R. Co., 24 W. Va. 37.

"The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment." *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596, 603.

But an instruction which assumes that the employee "takes all risks," is erroneous. The servant's contract is based on implied undertaking of company to provide safe machinery, and competent agents, and to have its roadway and structures in safe condition when he is required to go over them. *Moon v. Richmond, etc.*, R. Co., 78 Va. 746.

Public Policy.—In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience and to draw them such rules as will in their practicable application best promote the safety and security of all parties concerned. Where several persons are employees in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is generally an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not use such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. *Norfolk, etc.*, R. Co. *v. Donnelly*, 88 Va. 853, 861, 14 S. E. 692.

"The master can not answer for the negligence of all his servants hurting one another. This would be an em-

bargo on business. It would destroy any employer in any calling." *Beuh-ring v. Chesapeake, etc.*, R. Co., 37 W. Va. 502, 16 S. E. 436.

III. Liability of Master for His Own Negligence.

A. IN GENERAL.

See the title MASTER AND SERVANT.

B. IN PROVIDING SERVANTS.

It is the personal duty of the master to provide a sufficient force of competent servants to manage and safely conduct the business in which he is engaged. The master must select, with due and reasonable care, careful, responsible and trustworthy coemployees; he must on engaging a man make reasonable investigation into the character, skill and habits of life of the person. If this is not done, it is negligence, and he may be held liable for an injury to another employee occasioned either by his negligence, incapacity or intemperance. *Norfolk, etc.*, R. Co. *v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; *South West Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365; *Norfolk, etc.*, R. Co. *v. Ampey*, 93 Va. 108, 25 S. E. 226; *Norfolk, etc.*, R. Co. *v. Thomas*, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906; *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857; *Moon v. Richmond, etc.*, R. Co., 78 Va. 745, 746; *Trigg v. Lindsay*, 101 Va. 193, 43 S. E. 349; *Eckles v. Norfolk, etc.*, R. Co., 96 Va. 69, 25 S. E. 545; *Unfried v. Baltimore, etc.*, R. Co., 34 W. Va. 260, 12 S. E. 512, 517; *Criswell v. Pittsburgh, etc.*, R. Co., 30 W. Va. 798, 6 S. E. 31; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596; *Norfolk, etc.*, R. Co. *v. Graham*, 96 Va. 430, 31 S. E. 604; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 27, 45 S. E. 740.

Duty to Provide Sufficient Servants to Operate Dangerous Machinery.—The general rule, which exempts the master from liability to his servants

for injuries received by them in the course of the employment, does not apply where he undertakes to run dangerous machinery with insufficient help, in consequence of which the servant is injured, for such conduct on the part of the master is negligence, and constitutes a recognized exception to the general rule. *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365.

For example, the plaintiff, a boy thirteen years of age, was in the service of the defendant corporation, being engaged in the weaving department of its cotton mills, "to sweep the floor, carry water, and fill the buckets with quills." The dangerous machinery of the weaving department was at the time being operated with insufficient help, and an employee of the defendant, acting as its agent, called on the plaintiff for help, and ordered him into a position of danger, the result of which was irreparable injury to him. The defendant corporation was held liable in damages for the injury thus sustained by the plaintiff. *Jones v. Old Dominion Cotton Mills*, 82 Va. 140.

Duty of Railroad Company to Provide Competent Engineer.—It is the duty of a railroad company to see that the persons in charge of their engines and trains are competent to fill their respective positions. Accordingly it is held, that where an engineer, without authority so to do, places an inexperienced and incompetent fireman in charge of an engine, the company is liable for unavoidable injuries that result to other employees by such fireman's unskillful management of the engine, for the reason that it is a breach of the duty the company owes its employees to exercise ordinary care in providing and retaining competent servants. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

An engineer, with the knowledge and permission of the conductor, who was the representative of the company, left his engine to be operated by an inexperienced fireman. While making a

flying switch, by the improper management of the engine by that fireman, the brakeman was killed. It was held, that the company was liable. *Norfolk etc., R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906.

Competency of Surgeon Employed to Attend Servants.—If a master assumes the responsibility of employing a surgeon to attend his servants, he must use reasonable care in the selection of the surgeon. The presumption is that the master discharged his duty, and the burden is on the servant to prove negligence in selecting and continuing an unfit surgeon. *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740. See the title **PHYSICIANS AND SURGEONS**.

To hold a master liable for the incompetency of a surgeon employed by him, but who is paid by monthly contributions from the servants' wages, to attend his servants, it must be alleged and proved that the injury complained of resulted from the incompetency of the surgeon, and further, that there was a want of reasonable care in his selection, or that he was retained in service after actual notice of his unfitness, or proof of such acts of negligence as would have affected the master with notice had he exercised due oversight and supervision. The act complained of may of itself be sufficient to establish the incompetency, but not the master's knowledge thereof. *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740.

Whether a surgeon is registered as a physician in the clerk's office of the county court of the county in which he practices is immaterial on an issue involving his competency as a surgeon. *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740.

Incompetency of Fellow Servants Must Be Alleged in Declaration.—In an action to recover damages for an injury inflicted by a defendant it is generally sufficient to aver in the declaration that the injury was inflicted

by the wrongful act, neglect, and default of the defendant, without giving the particulars of his misconduct, but if the cause of action is alleged to have been the carelessness or negligence of the defendant, in employing or retaining in his service an unfit and incompetent servant, it is necessary to aver that the servant was guilty of some act of negligence or unskillfulness directly contributing to the injury. *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 27, 45 S. E. 740.

A servant can not recover damages of his master for an injury inflicted on him in consequence of the incompetency of a fellow servant, or of defective machinery and appliances, in the absence of any allegation in the declaration of such a cause of action. The plaintiff can not allege one cause of action in his declaration, and prove another. The object of the declaration is to set forth the facts of the case so that they may be understood by the defendant who is to answer them, by the jury which is to try the case, and by the court which is to enter judgment. *Eckles v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545.

Where the declaration detailed the facts of an accident resulting in the death of a servant, and alleged that at the time thereof the engine was under the management of an incompetent and inexperienced fireman who was operating it in the absence of the engineer, it is sufficient, and notifies the company that it will have to defend for failure to keep a competent engineer. *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906.

Evidence.—The burden of proving negligence in selecting and continuing an unfit servant is on the plaintiff. He must prove the specific act of negligence on which the action is founded, and this, of itself, may in some cases prove incompetency, but not notice

thereof to the master. Where there was no evidence of unfitness except the act which was the foundation of the action, and of this the master could not have had notice, it was held, that the evidence was insufficient. *Trigg Co. v. Lindsay*, 101 Va. 193, 43 S. E. 349.

When an action is founded on the incompetency of a fireman temporarily in charge of an engine, the plaintiff must prove that the fireman was so inexperienced in the management of an engine that it was not an exercise of ordinary care to place him in charge thereof, he not being reasonably safe and fit for the employment; that he was guilty of mismanagement of the engine by reason of his inexperience and unskillfulness; that such mismanagement was the proximate cause of the plaintiff's injury. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

Evidence of only one other negligent act of the servant in fault is not usually sufficient. *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 27, 45 S. E. 740.

Where the declaration alleges that the plaintiff was one of the "steel gang" and charges that his injuries were inflicted by reason of the negligence, incompetency and want of skill of the defendants, their agents and employees, and that the defendants' foreman was without ordinary competency and skill for the performance of his duties, it is error to refuse to permit the foreman, when examined as a witness on the trial, to answer the question: "Did you assign to the steel gang any but experienced men?" *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

C. CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT.

In General.—Where the injury to the servant is occasioned by the default of a fellow servant, concurring with the negligence of the master, the latter is liable as though he only were at fault. *Norfolk, etc., R. Co. v. Nuckols*,

91 Va. 193, 208, 21 S. E. 342; Norfolk, etc., R. Co. v. Phelps, 90 Va. 665, 19 S. E. 652; Norfolk, etc., R. Co. v. Cromer, 90 Va. 763, 40 S. E. 54; Norfolk, etc., R. Co. v. Thomas, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906; Richmond, etc., R. Co. v. George, 88 Va. 223, 13 S. E. 429; Norfolk, etc., R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Goodman v. Richmond, etc., R. Co., 81 Va. 576; McCoy v. Norfolk, etc., R. Co., 90 Va. 132, 139, 37 S. E. 788; Norfolk, etc., R. Co. v. Brown, 91 Va. 668, 22 S. E. 496; Richmond, etc., R. Co. v. Tribble, 97 Va. 495, 24 S. E. 278; Norfolk, etc., R. Co. v. Phillips, 100 Va. 303, 378, 41 S. E. 726; Norfolk, etc., R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578; Norfolk, etc., R. Co. v. Cromer, 101 Va. 667, 44 S. E. 898.

The servant, although he assumes the ordinary risks of the business including the negligence of fellow servants, does not contract against the combined negligence of a fellow servant and of his employer. Richmond, etc., R. Co. v. George, 88 Va. 223, 230, 13 S. E. 429.

"The rule of law is well settled, that where the servant is injured through the failure of the master to perform any of the duties which the law imposes on him personally, such as providing, inspecting, and keeping in repair and good order reasonably safe and suitable machinery, instrumentalities and appliances for the use of a servant in his employment, and such fault proximately contributes to the injury, it is no defense for the master that the negligence of a fellow servant also contributed to the injury. Norfolk, etc., R. Co. v. Ampey, 93 Va. 108, 130, 25 S. E. 226." McCoy v. Norfolk, etc., R. Co., 99 Va. 132, 139, 37 S. E. 788.

Proximate Cause.—"But to establish a case of concurring negligence in which the master will be held liable, notwithstanding the negligence of the fellow servant, it must appear that the master's negligence proximately con-

tributed to the injury. If the injury resulted from a certain wrongful act or omission, but only through or by some intervening cause, from which last cause the injury follows as a direct and immediate consequence, the law will refer the damages to the last or proximate cause, and refuse to trace it to that which is remote." Cooley on Torts, p. 73; Norfolk, etc., R. Co. v. Brown, 91 Va. 668, 675, 22 S. E. 496; Richmond, etc., R. Co. v. Tribble, 97 Va. 495, 24 S. E. 278, 279." McCoy v. Norfolk, etc., R. Co., 99 Va. 139, 37 S. E. 788.

Where a fireman was injured within the limits of a railroad yard by a collision between his train and some empty cars that had drifted on to the main line, the engine on which the plaintiff was engaged was running at a rate of speed of at least thirty miles an hour, when the rules of the company required, under such circumstances, that the train be run with great care and under the control of the engineer, and had it been so run the accident would not have occurred; it was held, that there could be no recovery by the fireman's representative. Norfolk, etc., R. Co. v. Cromer, 101 Va. 667, 44 S. E. 898.

Where the proximate cause of the servant's injury is the negligence of a fellow servant, and defects existing in the machinery and appliances are the remote or secondary cause of the accident, there can be no recovery. Richmond, etc., R. Co. v. Tribble, 97 Va. 495, 24 S. E. 278; Norfolk, etc., R. Co. v. Brown, 91 Va. 668, 22 S. E. 496; Norfolk, etc., R. Co. v. Cromer, 99 Va. 763, 40 S. E. 54.

Thus where the defendant, a mining company, was negligent in permitting gas to accumulate in its mine in which the plaintiff was working, and a fellow servant of the plaintiff, contrary to the express rules of the company, went into the mine with an ordinary lamp instead of a safety lamp and thereby caused the gas to ignite and seriously

injure the plaintiff, it was held that the plaintiff could not recover, as he assumed the risks of damages arising from the negligence of his fellow servants at the time of entering into the contract of service. *Berns v. Gaston Coal Co.*, 27 W. Va. 285. See generally, the title NEGLIGENCE.

Failure of Master to Perform Personal Duties Combined with Fellow Servant's Negligence.—If a servant is injured through the fault of the master to perform any of those duties which the law imposes on him personally, such as providing, inspecting, and keeping in repair and good order safe and suitable machinery, instrumentalities, and appliances for the use of the servant in his employment, and such fault of the master proximately contributes to the injury, it is no defense for the master that the negligence of a fellow servant also contributed to produce the injury. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 137, 25 S. E. 226; *McCoy v. Norfolk, etc., R. Co.*, 99 Va. 132, 37 S. E. 788.

IV. Liability of Master for Negligence of Vice Principal.

A. WHO ARE VICE PRINCIPALS.

1. In General.

Where the master delegates to some one else the performance of his personal or nonassignable duties, the person to whom they are delegated is a vice principal, standing as to these duties, in the place of the master, and if he fails in the performance of them, in any respect, and damage results to another servant, the master is liable. *Moon v. Richmond, etc., R. Co.*, 78 Va. 746; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Richmond, etc., R. Co. v. George*, 88 Va. 223, 13 S. E. 429; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Norfolk, etc.,*

R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 646, 27 S. E. 509; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Russell, etc., Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Southern R. Co. v. Mauzy*, 98 Va. 692, 699, 37 S. E. 285; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 378, 41 S. E. 726; *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857; *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33; *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000; *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37; *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; *Criswell v. Pittsburgh, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31, 51; *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260, 12 S. E. 512; *Daniels v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870; *Beuh-ring v. Chesapeake, etc., R. Co.*, 37 W. Va. 502, 16 S. E. 435; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596; *Haney v. Pittsburgh, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

The true rule for determining who are fellow servants is to be determined not from the grade or rank of the offending or injured servant but is determined by the character of the act of the offending servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employee is not a servant but an agent; but as to all other acts they are fellow servants. *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692.

The test whether a master is liable to one servant for the negligence of another servant is the character of the negligent act. If it be in the doing of

an act incumbent on the master as a duty of the master to the servant, the master is liable; otherwise not. *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

When a railroad company delegates to another the performance of a duty to its servants, which it has impliedly contracted to perform itself, or which rests upon it as an absolute duty, it is liable for the manner in which that duty is performed by the middleman whom it has selected as its agent, and to the extent of the discharge of these duties by the middleman he stands in the place of the company, but as to all other matters he is a mere coservant. *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145; *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31, 51.

The question in such case is not whether the company reserved to itself any oversight or discretion, but whether it did in fact clothe the middleman with power to perform its duties to the servant injured. *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145.

Servant May Be Vice Principal as to One Act and Fellow Servant as to Another.—One servant, however, may be, in relation to a coservant, a vice principal in one relation and a fellow servant in another, depending on the particular duties he is discharging at the time. Whether he is the one or the other, must be determined by an inquiry into the nature of the service which he was performing at the particular time of his alleged negligence. *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 378, 41 S. E. 726, citing *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 287.

If the vice principal, in the particular act in which his negligence occurs, is not acting in the line of his duty, but is performing an act in the line of one

who would be a fellow servant with the injured servant, the master is not liable for the negligence of the vice principal, as he is, as to this act, a fellow servant with the injured one. *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 218, 287, 31 S. E. 258, 46 L. R. A. 337, and note; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596; *Russell, etc., Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140.

2. Servants Providing Place of Work

It is the personal duty of the master to exercise reasonable care to provide a safe place for the performance of the work in which his servants are engaged, and one to whom he delegates this duty is a vice principal for whose negligence in the performance of it, he is responsible. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 24 S. E. 509; *Russell, etc., Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162; *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37; *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260, 12 S. E. 512; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 287; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

A section master and a night watchman whose duty it is to guard the track at a point where rock may fall upon it, are charged with the performance of a duty incumbent upon the company to perform and are to that extent the representatives of the company, and if, after notice to them of danger from the presence of a rock on the track, no steps are taken to avert an accident, the

company is liable for injury sustained by an express messenger upon the company's train occasioned by a collision with the rock. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71.

Place Rendered Unsafe by Negligence of Boss or Foreman.—If the place is reasonably safe in the first instance, and is afterwards rendered unsafe by the negligent manner in which the boss or foreman of a gang of hands directs the work to be done, in doing which an injury is inflicted, the master is not liable for such injury. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Russell, etc., Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

Where the place of work was reasonably safe in the first instance, but was rendered unsafe afterwards by the negligent manner in which the "mine boss" directed the work to be done, or the needed precautions to be taken, whereby the servant was injured, the master was not liable. Nor is the master liable for injuries resulting from risks assumed by the servant, or from failure to keep in a reasonably safe condition the place in which he is to work, when the condition of the place was constantly changing, and the duty of keeping it in safe condition devolved both upon the servant and his "mine boss." *Russell, etc., Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

3. Servants Providing Machinery and Appliances.

The duty of furnishing safe machinery and appliances being another of the nonassignable duties of the master, it follows that servants charged with the duty to provide machinery and appliances, while engaged in the performance of this duty, represent the master, and their negligence in performing this duty renders the master liable. *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260, 12 S. E. 512; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 600; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E.

1028, 1030; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 622; *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 287; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Richmond, etc., R. Co. v. George*, 88 Va. 223, 13 S. E. 429; *Moon v. Richmond, etc., R. Co.*, 78 Va. 745; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 578, 41 S. E. 726.

The duty of providing safe machinery and appliances, and of keeping the same in proper repair, is the personal duty of the master, and where, under the rules of a railroad company, the duty of seeing that the couplings and brakes of the cars of his train are in good order before starting, and of inspecting them when his train stops for water or other trains, is delegated to a conductor of a freight train while his train is between terminal points, and the brakemen of such train are placed under the direction of such conductor, the conductor is not, in the matter of inspecting and seeing that the couplings and brakes of the cars of his train are in good order, a fellow servant with said brakeman; and if one of such brakemen, in pursuance of orders of said conductor, between terminal points, attempts to couple cars which have been in a wreck, and thereby had the deadlocks crushed and the drawheads twisted, and in such attempt sustains injury, the company is liable therefor. But whether fellow servant or not, under the facts of the case at bar, the proximate cause of the injury was the defective condition of the machinery, and the company is liable. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

Plaintiff, a brakeman in defendant company's employ, attempted to get down from a car on front end of train,

to uncouple engine. The bottom rung of the car ladder was missing, and while feeling for it in the dark with his foot, the engineer, without awaiting the usual signal, suddenly backed the engine against plaintiff and injured him. The bumper on end of car was broken off so that the tender came close to it. Plaintiff was not aware the bumper was broken. The train was made up under the supervision of the regular car inspector. It was held, that the defective condition of the car was the proximate cause of the injury; that the fellow servant doctrine had no application; and that the defendant was liable. *Richmond, etc., R. Co. v. George*, 88 Va. 223, 13 S. E. 429.

An employer, whose duty it is to provide reasonably safe appliances, can not escape liability for his negligence by employing incompetent or unsuitable persons to discharge it, or by showing that the negligence of a fellow servant concurred with the negligence of the master to perform the duty of supplying, inspecting, and keeping in a reasonably safe condition appliances reasonably suitable for the work he requires to be done, which resulted in an injury to a fellow servant. *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 378, 41 S. E. 726.

4. Servants Charged with Duty of Inspection or Repair.

Another of the personal duties of the master is to exercise reasonable care in inspecting the place of work and the machinery and appliances, and to make suitable repairs when necessary. And one to whom this duty is delegated is a vice principal, whose negligence in its performance will render the master liable for damages sustained in consequence thereof. *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37, 64; *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 562, 41 S. E. 726; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

Application of Rule to Railroads.—

It is the duty of a railroad company not only to furnish reasonably well constructed and safe machinery and appliances for its cars for the use of its employees engaged in operating its road, but also to exercise continued supervision over the same to keep them in good and safe repair. *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37; *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726.

It is the duty of railroad companies to guard their employees from injuries resulting from unsound, unsafe and defective engines, cars and appliances by having the same continuously inspected by persons competent to perform that duty; and the negligence of such inspector in the discharge of this duty is the negligence of the company. *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37, 64.

Effect of Delegation of Duty.—A railroad company can not divest itself of this duty, so as to relieve itself from responsibility for the nonperformance thereof, by delegating the duty to any of its servants in any of its departments; and if it does delegate this duty to any of its servants and vest him with controlling or superior authority in regard thereto, the negligence of such servant is the negligence of the company. *Cooper v. Pittsburgh, etc., Co.*, 27 W. Va. 145, 166; *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37, 64.

If such company or its servant, to whom it has delegated the performance of this duty, suffer such machinery, cars or appliances either from long continued use or any other cause to become unsound, unsafe or defective, and this unsoundness and defective condition are known to the company, or by the exercise of due care and diligence on its part they might have become known to it, and injury therefrom results to one of its employees without any fault of his, while in the

performance of his duty, the company is responsible to such servant so injured. *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37, 64.

If a brakeman in the employ of a railroad company while in the performance of his duty and without any fault on his part is injured by the breaking loose or giving way of a handhold or any other appliance attached to its car and used to assist such brakeman in the performance of his duty, and such defect was one that could have been discovered by a careful inspection of the car by a competent inspector and repaired, such railroad company is liable to such brakeman for the injury sustained by him, although the proximate cause of the injury was a result of the negligence of the inspector or the master mechanic respectively charged with the duty of respectively inspecting and keeping such handhold in repair. *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37.

Inspector a Vice Principal of Brakeman.—A brakeman employed on one of the freight trains of a railroad company and such inspector or the master mechanic charged with the duty of keeping such machinery, cars and appliances in repair can not be regarded as fellow servants in such a sense, as to prevent the brakeman from recovering of the company for an injury sustained by him because of the negligence of such inspector or master mechanic. *Cooper v. Pittsburg, etc., R. Co.*, 24 W. Va. 37.

5. Servants Charged with Duty of Warning or Instructing.

The master must exercise reasonable care in warning or instructing young or inexperienced servants of dangers incident to the employment, and for a neglect of this duty he is responsible, although the duty has been delegated to another employee. *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 169, 32 Am. St. Rep. 870; *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

If the place of work was originally safe, but has become unsafe during the absence of the servant, and he is ignorant of this fact, and can not discover it by the exercise of ordinary care, it is the duty of the master to inform him of it, and, in his absence, this duty devolves upon the foreman of the gang as a vice-principal, and his statements, made in the presence of the servant, as to the condition of the premises, are admissible as evidence in an action by the servant against the master for injuries resulting from such unsafe condition. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

When a conductor, in charge of a railroad train, with a right to command and to control its movements, leaves his engine and train standing on the track of the main line, along which a train, due, and expected by him, has a right at that time to pass, and such conductor fails to use ordinary care to warn or notify in any way the expected train of such obstruction in its way, whereby a collision takes place, and a brakeman on the coming train is injured, and such negligence of the conductor is the direct and proximate cause of such injury, such brakeman being without fault or the means of preventing such negligence, or of avoiding its consequences, is not the fellow servant of the conductor, and the company will be held responsible for the injury to the brakeman, caused by the negligence of the conductor in such manner. *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870.

But it has been held, that a master is not liable for an injury inflicted on an experienced servant in the possession of all of his faculties where it appears that the immediate cause of the injury was his exposure of himself to an open and obvious danger, and the failure of a fellow servant to give him timely warning. *Norfolk, etc., R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604.

6. Servants Charged with Duty of Hiring or Discharging Other Servants.

It is the duty of the employer to select and retain servants who are fitted and competent for the service, which is to be performed, and this duty he can not delegate to a servant so as to exempt himself from liability for injuries to another servant by its omission. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 137, 25 S. E. 226; *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596, 603; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 622; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 287; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028, 1030; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 169, 32 Am. St. Rep. 878. See ante, "In Providing Servants," III, B.

Where an engineer, with authority so to do, places an inexperienced and incompetent fireman in charge of an engine, the company is liable for unavoidable injuries that result to other employees by such fireman's unskillful management of the engine, for the reason that it is a breach of the duty the company owes to its employees to exercise ordinary care in providing and retaining competent servants. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

Where a railroad engineer, with the knowledge and permission of the conductor in charge of the train, leaves his engine to be operated by an inexperienced fireman, and a brakeman of the train is injured through the negligence of such fireman, the railroad company is liable for the injury. In such case the conductor is the representative of the company, and not a fellow servant with the brakeman. *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884.

But where the boss or foreman of a gang of men has no power to employ or discharge members of the gang, his duty being to report their delinquencies to a superior, he is a fellow servant with the members of the gang, although he is charged with control of the gang, and directs the work to be done by them. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

7. Servants Charged with Duty of Providing Rules.

The duty of making and promulgating necessary and proper rules for the conduct of the business, being a personal duty of the master, it follows that he is liable for the failure of a servant, to whom this duty has been delegated, to properly perform it. *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 169, 32 Am. St. Rep. 870; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 287; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596, 603; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028, 1030; *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31.

In *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232, it was held, that the foreman in charge of a stone quarry which was being operated by a company, who had general superintendence over the workmen, and made rules for their guidance, and abrogates them at his pleasure; who divided the workmen into squads, and appointed foremen for the squads, and who was the highest officer in rank of the company at the quarry, was not a fellow servant with one of the workmen in the quarry, but occupied to him the relation of vice principal, and the company was liable for injuries inflicted through his negligence. See also, *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31.

3. Particular Employees as Vice Principals.

a. In General.

"One to whom an employer commits the entire charge of his business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, has nevertheless been generally considered not a fellow servant with those who are employed by him." *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31.

Where a person is placed in charge of the "construction or repair of machinery," the "dispatching of trains," the maintenance of way," etc., he is not a fellow servant with those under him, nor with those in a different department of the company's service. He is the agent of the company, which has assumed, through him, the performance of duties which are absolute and imperative; the omission or the negligence of performing which the law will in no wise excuse. *Moon v. Richmond, etc., R. Co.*, 78 Va. 745.

b. Railroad Conductor.

It has been held, that a railway conductor having the entire control and management of a train is the personal representative or vice principal of his employer, for whose negligence such railroad company is answerable to subordinate servants. *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596, 603; *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132; *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. 582; *Moon v. Richmond Co.*, 78 Va. 745; *Johnson v. Richmond, etc., R. Co.*, 84 Va. 713, 5 S. E. 707; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990; *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33.

Where it is the province of the conductor to control the placing and assigning to duty of the trainmen, and the coupling and make up of the train, and the train is not made up in the usual and proper manner, the conductor is not a fellow servant, but the superior of the trainmen, and an accident results, whereby one of said trainmen is injured, the burden of proving affirmatively that the accident did not result from the negligence of the company or of any agent for whose conduct it is responsible, rests on the company. *Moon v. Richmond, etc., R. Co.*, 78 Va. 745.

While train was standing, conductor required plaintiff, a brakeman, to get up on a freight car and let off a brake. Unknown to him the ladder's upper round was broken, and as he was attempting to get on the top, conductor signalled engineer to back up, and a dead block being taken out, the cars came together and crushed plaintiff. It was held, that the defendant company was liable, because the injury was caused by the negligence of conductor in starting the train, knowing plaintiff's position. *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990.

Brakeman was ordered by conductor to make a coupling to a car over the end whereof lumber projected. In obeying the order, brakeman, who knew the danger, was caught between the lumber and the next car; seeing which, conductor signalled engineer to "jar ahead quickly;" which was done, causing brakeman to fall; and the coupling having been made, the wheels passed over and killed him. Upon demurrer to the plaintiff's evidence it was held, that the plaintiff was entitled to recover, the death being caused by the negligence of the defendant's conductor in giving the signal without looking to see if the coupling had been made. *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. 582.

Where the conductor of a train ordered a brakeman to carry freight from

a box car to the freight depot, across a railroad track, upon which the conductor subsequently ran a train which injured the brakeman, without any fault upon his part, it was held, that the company was liable. *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132.

Where at trial of such action it appeared that the brakeman, a minor, on his first trip, was coupling freight cars by the conductor's order, the latter was so situated that he could not see the opening between the cars, nor the brakeman, so as to give the proper signal to slow up, and thus the brakeman was killed by the cars coming together with great force. It was held, that the death was caused by the conductor's negligence, and the defendant company is liable. *Johnson v. Richmond, etc., R. Co.*, 84 Va. 713, 5 S. E. 767.

Where a collision is caused by the negligence of the conductor in failing to notice the signals displayed at a station, and by reason thereof a car collides with another standing on the track, where it had a right to be, with forty or fifty of the railroad section hands on board, and one of them jumps from the car to the ground to avoid the effect of the collision, and in so doing receives an injury which results in his death, the company is liable for the damages thus sustained as the conductor can not be regarded as a fellow servant of the section hand. *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748.

Conductor Held Not to Be Vice Principal.—In several cases it has been held, that conductors are not vice principals. *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278. See post, "Railroad Employees," VII, B, 2.

"Now, our cases of *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; *Daniel v. Chesapeake, etc., R. Co.*,

36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870; and *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748, holding that a conductor is a superior servant or vice principal, and not a fellow servant with other employees, spring from the *Ross* case, and, I am compelled to say, are not sound in principle." *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 287.

c. Telegraph Operator.

The telegraph operator in charge of a signal station, who has control, by means of signal orders, of the running of trains over a block section of a railroad, is not the fellow servant of a brakeman injured on such block section by reason of such operator's negligent management of the running of such trains. *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610.

d. Yardmaster.

A yardmaster is not a fellow servant of a brakeman but occupies the relation of a vice principal. *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Southern R. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862.

A yardmaster, in lawful command and control of a train as a conductor for the occasion, is a conductor within the meaning of the rule which renders the company liable for the acts of the conductor. *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870.

e. Foreman.

When a railroad company puts a foreman in charge of a gang of laborers with power to discharge them subject to the approval of the supervisors, and makes it his duty to see that these laborers faithfully perform their duty, such foreman must, in the performance of all his duties to those laborers under him, be regarded as the representative of the railroad company; and

if, through his neglect of duty, one of these laborers, in the performance of his duty, is injured, he may recover of the railroad company the damages he has sustained, caused by the negligence of such foreman. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31.

If one of the rules of the railroad company, furnished him for his guidance, provides that "extra trains may pass over the road at any time, without previous notice, and the foreman must be always prepared for them;" and another rule provides "he must run the hand cars with great caution, and he must not permit them to be used unless he accompany them;" and another rule requires him "to compare his time piece with the clock at the nearest telegraph office, or with the conductor on the train,"—these rules, as well as the law, require him to use the opportunities thus daily afforded, or any other opportunities, to ascertain what trains are expected to run over his section of the track by previous arrangement, and when so, that he may be prepared for them as well as he can be, and thus diminish the risk of a collision of extra trains with the hand car. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31.

If he neglects this duty, and without any fault of one of the laborers under him, his hand car comes in collision with an extra train, which, had he performed his duty, would not have occurred, and the laborer on the hand car is killed or injured, the railroad company will be liable for the damages so sustained. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31. See post, "Foremen and Bosses," VII, B, 1.

9. A Mixed Question of Law and Fact.

Whether the negligent servant was the representative of the master when the injury was received, or whether he was a fellow servant with the plaintiff, is a mixed question of law and fact, to

be decided by the jury under suitable instructions from the court; and it is not proper to instruct the jury that the plaintiff and the negligent servant did on that occasion stand in the relation of coemployees, or that they did not stand in the relation of subordinate or superior. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578.

B. CONCURRENT NEGLIGENCE OF VICE PRINCIPAL AND FELLOW SERVANT.

For injuries caused by the concurring negligence of a fellow servant and a vice principal, the master is also liable. *Norfolk, etc., R. Co. v. Phelps*, 90 Va. 665, 19 S. E. 652; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71.

If the misconduct of the vice principal entered into and constituted a part of the negligent act which caused the injury, then the courts will not undertake to distribute the fault, but will hold the master responsible as though it alone was guilty. *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205, 226, 49 S. E. 33.

V. Liability of Master for Negligence of Superior Servants.

See ante, "Particular Employees as Vice Principals," IV, A, 8.

Former Virginia Doctrine.—In several early Virginia cases, the court seems to favor the rule that the master is liable for the negligence of superior servants other than vice principals. Thus in several cases a railroad company has been held liable to a brakeman who was injured while discharging his duties as brakeman, in obedience to orders from the conductor, by reason of the latter's negligence. *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. 582; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E.

990; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132. See also, *Torian v. Richmond, etc., R. Co.*, 84 Va. 192, 4 S. E. 339; *Moon v. Richmond, etc., R. Co.*, 78 Va. 745; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232.

Later Doctrine.—In the more recent cases upon this subject, however, the court has rejected the superior-servant limitation. The first case in which this doctrine was rejected was that of *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692, in which it was said that, "All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaging in the same general business, although in different grades or departments are fellow servants, and take the risk of each other's negligence." The decision in this case was approved in *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285.

So it is now well settled in Virginia that the question of fellow service is not determined by gradation in employment. The mere fact that one servant is superior in authority to another, with power to employ and discharge that other, does not have the effect of changing his relation of fellow servant, unless his superiority places him in the category of vice principal. *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578.

In *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578, it was held that a brakeman who had been injured in a collision which had been caused by the negligence of the conductor of the train on which he was employed could

not recover of the railroad company for his injuries. In the opinion of the court in this case, it is said: "The negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risk of negligent acts or omissions on the part of one class of servants, and not those of another class. Nor, on the grounds of public policy, could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be submitted to risks. Sound policy seems to require that the law should make it for the interest of the servant that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practical, and be reported to his employer, if needful; and, in this regard it can make little difference what is the grade of a negligent servant, except as the superior authority may render the negligence more dangerous."

"Where the execution of work directed to be done by the master or his representative is entrusted to a gang or group of hands, it is necessary that one of them should be selected as the leader, boss, or foreman, to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made in a proper case. He, therefore, makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him in that respect in the precise position of his other fellow servants." *Richmond Locomotive*

Works v. Ford, 94 Va. 627, 27 S. E. 509. See also, *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578.

In speaking of the cases which had adopted the superior-servant limitation, the court, in *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578, said that, "they rested mainly upon *Moon's Case* [*Moon v. Richmond, etc., R. Co.*, 78 Va. 745] and the case of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, which latter decision has been completely overturned by the more recent decisions of the same court, and which are in thorough accord with the decision of this court in *Donnelly's Case*, and *Nuckols' Case*."

West Virginia Rule.—It was held, in several cases in West Virginia that two servants of the same master are not fellow servants when one acts in a superior capacity to the other, in regard to some duty from the master, and the master is liable for any injuries to the subordinate, caused by the carelessness or negligence of the superior. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31, 51; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 622; *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260, 12 S. E. 512; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870; *Beuhning v. Chesapeake, etc., R. Co.*, 37 W. Va. 502, 16 S. E. 436.

And in the application of the rule it was held that the conductor of a train is a superior servant or vice principal, and not a fellow servant of other employees. *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870; *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748.

And it was held, that when a railroad company puts a foreman in charge

of a gang of laborers with power to discharge them subject to the approval of the supervisor, and makes it his duty to see that these laborers faithfully perform their duty, such foreman must, in the performance of all his duties to those laborers under him, be regarded as the representative of the railroad company; and if, through his neglect of duty, one of these laborers, in the performance of his duty, is injured, he may recover of the railroad company the damages he has sustained, caused by the negligence of such foreman. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 81.

But in a recent case it was held, that the master's liability to one servant for the negligence of another is not dependent on the grade of the servants, nor on the fact that one has authority over the other, but on the character of the negligent act. In other words that a servant who is not engaged in performing a nonassignable duty of the master, is a fellow servant even though he is superior to the others. *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 287. See also, *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145.

As the question of fellow servantry depends on the character of the act, the grade or rank of the negligent and injured servant or whether one had authority or control over the other, is immaterial, and this rule is supported by the better reason, and the latest and best authority of text writers and court decisions. *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

VI. Liability of Master for Negligence of Servants in Different Departments.

In several cases it has been held, that the fellow servant or coemployee for whose negligence the company is not liable is one who is employed in the same shop or same place

with, and having no authority over the one injured, and who is no more charged with the discretionary exercise of powers and duties resting on the company than is the one injured. *Moon v. Richmond, etc., R. Co.*, 78 Va. 745; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990.

Engineer and Car Overhauler.—Under this limitation of the rule an engineer and a person employed in overhauling cars, are not fellow servants of each other. Thus where the plaintiff, whilst overhauling cars on a branch track, sustained an injury through the collision of the line of cars under which he was at work, with another car, which was shifted onto the same track, it was held that the company was not liable for the negligence of the engineer, since he and the plaintiff were engaged in different departments of the service. *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211.

Track Repairers and Trainmen.—A section boss in charge of a squad of hands engaged in repairing the railroad track can not be regarded as a fellow servant of a brakeman on the train of the railroad company. Thus where a section boss saw a train approaching a piece of track which he knew to be dangerous, and failed to signal to stop, though it was proved that he could have done so in ample time, in consequence of which the brakeman on the train was injured, it was held that the company was liable. *Torian v. Richmond, etc., R. Co.*, 84 Va. 192, 4 S. E. 339. To the same effect is *Moon v. Richmond, etc., R. Co.*, 78 Va. 745.

Where it appears in evidence at the trial of an action for damages against a railroad company for the negligent killing of plaintiff's intestate whilst in its employment as brakeman on material train, that the immediate cause of his death was the rapid running of the train, suddenly accelerated by ad-

ditional steam, over a track left in an uneven and weakened condition by other employees of the company, who were employed to repair the said track, and who failed to give warning of the condition of the road; it was held, that the defendant company is liable for the negligence of its employees, whose duty it was to repair road and give notice of its condition, and those employees were not fellow servants of plaintiff's intestate. *Torian v. Richmond, etc., R. Co.*, 84 Va. 192, 4 S. E. 339.

Trainmen and Telegraph Operators.—It has been held, that a conductor of a train, and a telegraph operator at a station can not be regarded as fellow servants of a section hand. *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748.

Where the engineer upon one train is injured by the negligence of the conductor of another train of the same company running in an opposite direction, or by the fault of one of the company's telegraphic operators in transmitting an order to such conductor, the engineer being wholly without fault or the means of providing for such negligence or of avoiding its consequences, applying this limitation of the rule, the engineer is not a fellow servant with the conductor; nor is he a fellow servant with the operator, in regard to acts and telegraphic orders between the operator and the conductor, within the rule which exempts the company from the liability of the negligent acts of fellow servants. *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. St. Rep. 695.

Rejection of Different Department Rule.—But it has been held, both in Virginia and West Virginia, that the fact that the servants were engaged in separate and distinct branches of service does not render the master liable, as all who are engaged in the same common service, from the highest to the lowest, and who are subject to the same general control, are fellow

servants within the rule. *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260, 12 S. E. 517; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578.

In *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342, it was held, that the liability of the master does not depend upon the fact that the injured servant may be in a different department of service from the wrongdoer. The true test is, were the departments so far separate from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employees of the different departments? If they are so separated, then the servant is not to be demed to have contracted with reference to the negligent performance of the duties of servants in such other department. For example a track repairer and an engine-man, though in different departments, are, by the very nature of their employment, brought into frequent contact, and the risk of negligence by the one must, therefore, be considered to have been in contemplation of the other when the service under the common master was accepted.

VII. Who Are Fellow Servants.

See ante, "Who Are Vice Principals," IV, A; "Liability of Master for Negligence of Superior Servants," V; "Liability of Master for Negligence of Servants in Different Departments," VI.

A. DEFINITIONS.

All serving a common master, working under same control, deriving authority and compensation from same source, and engaged in the same general business, although in different grades or departments, are fellow servants, and take the risk of each other's negligence. *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; *Richmond Locomo-*

tive Works v. Ford, 94 Va. 627, 27 S. E. 509; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 295; *Triggs v. Lindsay*, 101 Va. 193, 43 S. E. 349.

"It is generally held, that all servants in the employment of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are to be held fellow servants in the same common employment." *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692.

"The definition of 'fellow servants,' as defined and settled by recent decision, is, those 'who are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority the one over another.'" *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028, citing *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 622.

All servants engaged in the common service of the same master in conducting and carrying on the same general business, in which the usual instrumentalities are employed, are fellow servants. A proper test of this rule is whether the negligence of the one is likely to occur and inflict injury on the other. *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

A fellow servant is generally held to be any one serving the same master and under his control, whether equal, inferior, or superior. *Criswell v. Pittsburgh, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31, 51.

B. INSTANCES.

See ante, "Who Are Vice Principals," IV, A.

1. Foremen and Bosses.

See ante, "Liability of Master for Negligence of Superior Servants," V.

In General.—The boss or foreman of a gang of hands with whom he works, who has no power to employ or discharge members of the gang, but reports their delinquencies to a superior, is a fellow servant with members of the gang, although he is in charge and control of the gang, and directs the work to be done by them. His superiority in authority does not change his relation to the gang. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334; *Russell, etc., Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Lane Bros. v. Bauserman*, 103 Va. 152, 48 S. E. 857; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692.

The foreman of a gang of hands engaged in moving cars on a siding, who is a member of the gang, doing the same work and receiving the same pay as other members of the gang, is a fellow servant of such other members, although he exercises authority over them, and directs them while engaged in their common work, and it is their duty to obey him. This kind of superiority does not make him a vice principal. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

The failure of the foreman and fellow servant of a gang of hands engaged in moving cars on a siding to give warning of the approach from behind of a car by which a member of the gang is injured, is not negligence for which the master is liable, although it had been customary for the foreman to give such warning under like circumstances. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

Foreman of Log Camp.—A foreman of a lumber camp, whose duty, in the interest of a common employer, requires him to ride on a log train to and from the camp to the mill, is a fellow servant with the employees of the same employer operating the log train, and not a passenger, unless there is an

express or implied contract, requiring him, directly or indirectly, to pay fare for his passage. *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368.

Foreman Directing Employee in Swabbing Out Drill Hole.—An employee of a firm, engaged in the opening of a tunnel for a railroad, was directed by the foreman of the employers to swab out drill holes with a wooden stick. After swabbing out fifty or more holes and finding one which was obstructed, he was required by the foreman to take a steel drill and open the obstructed holes. While doing so, under the direction of one of the foremen who stood by and gave instructions, an explosion occurred in the hole which wholly destroyed one of the employee's eyes and seriously impaired the other. There was no evidence that the firm had failed to perform any of the duties imposed by law upon masters for the protection of their servants, such as providing a safe place to work, suitable tools, machinery and appliances to work with, competent servants and proper rules for conducting the business, nor was the cause of the explosion shown. The court sustained the motion to exclude the evidence after giving the plaintiff an opportunity to take a nonsuit. It was held, that the evidence was insufficient to sustain a verdict and was properly excluded by the court. *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140.

The boss of a gang of hands engaged in quarrying stone was held to be a vice principal while discharging certain duties, and evidence of the refusal of some of the hands to assist in cleaning out a hole that had been loaded but the charge in which had not exploded, was received to show that the boss had knowledge of the condition of the hole when he directed it to be cleaned. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

Mine Boss.—A mine boss so employed is such a fellow servant as, in

case of an injury to other employees through his negligence, the master is not responsible. *Williams v. Thacker Coal, etc., Co.*, 44 W. Va. 599, 30 S. E. 107.

It is the duty of an operator or agent of a coal mine to employ a competent mine boss under and according to the provisions of § 11, p. 995, W. Va. Code, 1891, append, and, having done so, he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss. *Williams v. Thacker Coal, etc., Co.*, 44 W. Va. 599, 30 S. E. 107.

2. Railroad Employees.

Conductors on Different Trains.—In *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692, an injured engineman was denied the right to recover of the railroad company for injuries to him by the negligent misconstruction of a right of way order by the conductor and enginemen on another train, which collided with the train upon which he was running.

Conductor and Brakeman.—A conductor is a fellow servant with the brakeman under him, when he, contrary to the rules of the company, directs the movements of his train on to a track upon which a train from the opposite direction is due, so that the employee will not be liable for the injuries caused to the brakeman by a resulting collision. *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337.

A conductor is a fellow servant with a brakeman and other servants on a train, not a vice principal. *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 287. See ante, "Particular Employees as Vice Principals," IV, A, 8. If, on a trip, the conductor, without

the knowledge or consent of the master, changes the "make up," of a train and, in consequence of that change, while proceeding on his journey, an injury is inflicted on a brakeman of another train travelling on the same track, the master (as the law stood until recent changes were made), is not liable, as the negligence complained of is that of a fellow servant. *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000.

The mere superiority of the conductor in moving his train does not elevate him to the position of principal or vice principal, and hence if a brakeman is injured through the negligence of his conductor in failing to obey the rules of the master for running his train, the master is not liable. *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578.

Enginemen on Same Road.—Locomotive engineers on the same road are fellow servants, and where one is killed in a collision occasioned by the negligence of another in disobeying the train dispatcher's orders, and by his own negligence in running at a speed forbidden by the rules of the company, there can be no recovery. *Norfolk, etc., R. Co. v. Lindamood*, 1 Va. Dec. 748; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692.

Plaintiff's intestate, engineman on defendant's locomotive, was killed, without fault on his part, in collision with another locomotive of defendant. The collision was occasioned wholly by the negligent misconstruction of a right of way order by the engineman in charge of the colliding locomotive. It was held, that the two enginemen, though on different locomotives, were fellow servants, and the defendant was not liable. *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692.

Engineer and Fireman.—An engineer on one train and a fireman on another are fellow servants, and where the latter is injured in a collision due to the

negligence of the former, the master is not liable. *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692.

"They had a common master and a common employer; they were running then, and accustomed daily to run, on their engines upon the same road. They were meeting each other at the time of the accident; that is, going in opposite directions; but the day before they may have followed each other, as their engines were turned back or hurried forward, passing others under orders. They had a common rendezvous in the company's engine yards, or common place for cleaning or inspection, or repairs, and neither had any control or direction, or superintendence whatever over the other. Neither was exercising the duties imposed by law upon the principal to which we have referred; nor were they representing the principal in any way as to each other, but they were fellow servants within the clear and unquestionable limits of the rule as to fellow servants; they were in the same department of the service, although on different trains." *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692.

Engineer and Brakeman.—An engineer and brakeman on the same train are fellow servants. *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. 821.

Engineer and Car Repairer.—An employee engaged as a carpenter in repairing cars for a railroad company should be regarded as a fellow servant with the engineer of a locomotive belonging to the same railroad company, who is engaged in driving cars upon the railroad of said company. *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 300, 12 S. E. 513.

Engineer and Car Numberer.—An engineer and an employee whose duty it is to take and record the number and description of each car in trains coming to the station, whose work is in

the railroad yard at the station, is a fellow servant of the engineer whose duty it is to operate an engine used in switching in the yard, and who had no control, power, or superiority over the car numberer. *Beuhring v. Chesapeake, etc., R. Co.*, 37 W. Va. 502, 16 S. E. 436.

Engineer and Track Repairer.—A track repairer and engineman, though in different departments, are, by the very nature of their employment, brought into frequent contact, and the risk of negligence by the one must therefore be considered to have been in contemplation of the other when service under the common master was accepted. *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342.

Brakemen on Same Train.—Where one brakeman on a freight train is injured by the carelessness and negligence of another upon the same train in the performance of his ordinary duties, they are fellow servants, and the railroad company is not liable for the injury thus occasioned. *Young v. West Virginia, etc., R. Co.*, 42 W. Va. 112, 24 S. E. 615.

The rules of the railroad company require that, if the train should part, the flagman shall immediately apply the brakes and stop the cars, and the engineman shall keep the front part of the train in motion until the detached portion is stopped. A freight train parted between the seventh and eighth cars from the engine in consequence of defective coupling, of which defect the company had notice. After parting, the engine and front cars kept in motion for four or five miles, and then stopped, the engineer supposing the rear portion had been stopped. The train was equipped with brakes sufficient to control it, but no brakes were applied by the flagman, nor by the intestate of the defendant in error, who was a brakeman on the second car from the front of the detached portion, though if they had put one brake down it would have stopped the train, and

in consequence of the failure to stop the detached portion of the train, it followed—a part of the way over an up grade—until it collided with the front portion of the train, and killed the intestate. It was held, that the proximate cause of the injury was the negligence of the intestate, his fellow brakeman, or the engineman, and the defects of the machinery were but the remote or secondary cause of the accident, and there can be no recovery by the defendant in error. *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 24 S. E. 278.

Conductor, Engineer, and Fireman.

—The engineer and fireman of a shifting train are fellow servants with the conductor, who, while attempting to act as brakeman, is injured by their negligence. *Eckles v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545.

Brakeman, Engineer and Fireman.

A brakeman of a shifting crew in a railroad yard, or a conductor of such crew voluntarily acting as brakeman, is a fellow servant of the engineer and fireman of the crew, and can not recover of the company for an injury inflicted through their negligence. *Eckles v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545.

VIII. Constitutional Modification of Fellow-Servant Rule.

Construction of Constitutional Provision.—The rule that statutes in derogation of the common law are to be construed strictly has no application to remedial provisions of a constitution ordained for the purpose of relaxing the stringency of existing precedents in the interest of employees engaged in the dangerous occupation of constructing, maintaining, and operating railroads. Effect is to be given to the policy established by the constitution, and to that end a fair interpretation is to be given to the language used, construing words in their common and ordinary

acceptation, unless it clearly appears that they were intended to be used in some other sense. *Virginia, etc., R. Co. v. Clower*, 102 Va. 867, 47 S. E. 1003.

Liability for Negligence of Telegraph Operator Resulting in Injury to Engineer.—Under the provisions of § 162 of the constitution (1902) of this state, a railroad company is liable for an injury inflicted on an engineer of a moving train, occasioned by the failure of a telegraph operator of the company to deliver to the conductor of such train a message from the train dispatcher. *Virginia, etc., R. Co. v. Clower*, 102 Va. 867, 47 S. E. 1003.

The object of a train dispatcher is to place in the hands of conductors in charge of trains proper and safe orders for their guidance. These orders emanate from the office of the train dispatcher, and their destination is the hand of the conductor of the train whose movements they are intended to direct and control. The order is in transit from the time it leaves the one until it reaches the other, and every agent of the company through whose hands the order passes is necessarily engaged in its transmission until it reaches its ultimate destination. An operator to whom such an order is sent by the dispatcher is an employee "charged with dispatching or transmitting telegraphic or telephonic orders" within the meaning of § 162 of the constitution of 1902. That section includes all agents of the company whose duty it is to transmit telegraphic or telephonic orders for the movement of trains to the conductors of such trains, no matter what instrumentalities may be employed for that purpose. *Virginia, etc., R. Co. v. Clower*, 102 Va. 867, 47 S. E. 1003.

"If 'transmitting orders' for the movement of trains were synonymous with 'dispatching trains,' then there would have been no necessity for the use of both terms in the connection in which they occur. Nor is any authority

adduced in support of the proposition that 'transmitting' an order, is to be construed to mean transmitting it by telegraph only. To subject the provision to that restricted interpretation would not only do violence to the language used, but would also defeat the manifest object of the framers of the constitution. The clause means what the words import, and includes all agents of the company, whose duty it is to transmit telegraphic or telephonic orders for the movement of

trains to the conductors of such trains, no matter what instrumentalities may be employed to accomplish that purpose. It would be a vain thing for the framers of the constitution to protect trainmen against the negligence of a train dispatcher, and leave them exposed to the carelessness of other agents of the company, through whom the train dispatcher's orders must be transmitted before reaching their final destination." *Virginia, etc., R. Co. v. Clower*, 102 Va. 867, 47 S. E. 1003.

Feloniously.

See generally, the title **INDICTMENTS, INFORMATIONS AND PRESENTMENTS**. See also, the titles where the specific offenses are treated, such as **BURGLARY AND HOUSEBREAKING**, vol. 2, p. 660, and others. As to compounding felony, see the title **COMPOUNDING OFFENSES**, vol. 3, p. 36.

Felony.

See the title **CRIMINAL LAW**, vol. 4, p. 9.

FEMALE.—See the title **RAPE**.

In *Com. v. Bennet*, 2 Va. Cas. 237, it is said: "The second error alleged is, that the person on whom the offense is charged to have been committed, is not stated to be a woman child. Those are the terms in the third section of the act aforesaid, upon which the second count was supposed to have been framed. The charge in the indictment is, that the offense was committed upon Nancy Geer, a **female** child, and the court is at a loss to conceive how a distinction can possibly be taken between the two terms."

Feme Covert and Feme Sole.

See the title **HUSBAND AND WIFE**.

FENCES.

CROSS REFERENCES.

As to what constitutes a lawful fence, see Va. Code, ch. 93; W. Va. Code, ch. 60. As to the duty of a railroad to fence and its liability for failure to do so, see the titles **ANIMALS**, vol. 1, p. 379; **RAILROADS**. As to the constitutionality of a fence law which requires a landowner to enclose his land by a lawful fence as a prerequisite to the right to recover for damages done by trespassing animals, see the title **ANIMALS**, vol. 1, p. 374. As to duty between landlord and tenant as to repair of fences, see the title **LANDLORD AND TENANT**. As to liability for constructing a fence across a public road, see the title **STREETS AND HIGHWAYS**. As to the destruction of a fence as constituting a trespass, see the title **TRESPASS**.

Definitions.—A fence is defined to be "an enclosure about a field or other space, or about any object; especially an inclosing structure of wood, iron, or other material, intended to prevent intrusion from without, or straying from within." *Kimball v. Carter*, 95 Va. 77, 87, 27 S. E. 823, quoting Webster's Dictionary.

"A fence is a visible or tangible obstruction, which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property." *Kimball v. Carter*, 95 Va. 77, 84, 27 S. E. 823.

A fence is "a line of obstacle, as a frame of wood, a wall, hedge, or ditch interposed between two portions of land for the purpose of preventing cattle from going astray, or for protecting a field or property from unlawful encroachment." *Kimball v. Carter*, 95 Va. 77, 84, 27 S. E. 823, quoting Worcester's Dictionary.

Necessity for Construction.—There is no law of general operation in West Virginia, requiring any person to fence his land, uninclosed; but the person who leaves his lands uninclosed, takes the risks of intrusions thereon, by the domestic animals of others running at large. *Blaine v. Chesapeake, etc., R. Co.*, 9 W. Va. 253.

Nature.—In *Second Waterman on Trespass (Real Estate)* it is said in respect to property in fences, that fences are a part of the freehold, and the fact that the materials of which they are composed are accidentally or temporarily detached without any intent in the owner to divest them from their use as a part of the fence, works no change in their nature. *Hash v. Com.*, 88 Va. 172, 197, 13 S. E. 398.

Civil Liability for Removing or Injuring.—"In *Second Waterman on Trespass (Real Estate)* it is said in respect to property in fences, if I build a fence on my neighbor's land it is his,

not mine; and the dominion which every man has over his own property gives him a right to remove it whenever he pleases. If it be useful to me as well as to him, and if I build it in consideration of his promise that it shall stand there permanently, and he removes it in violation of that promise, I may recover in an action on the contract, the value of my labor, and perhaps for the consequential injury; but I can not maintain trespass." *Hash v. Com.*, 88 Va. 172, 197, 13 S. E. 398. See the title TRESPASS.

Where A had built a fence upon the line between his land and that of D, and it had been so used for a number of years, and D had notified A not to remove it, the removal thereof would be nothing more than a trespass. But if the fence had been built by the accused on his own land, such removal would not be a tortious act at all. *Hash v. Com.*, 88 Va. 172, 197, 13 S. E. 398.

Criminal Liability for Removal or Destruction.—An indictment which charges that defendant knowingly and willfully removed a fence from the lands of P, and did injure and expose the growing crop of P, then on said land, charges but one offense; and is valid. *Ratcliffe v. Com.*, 5 Gratt. 657.

If the defendant removes the fence under a claim of right, believing it to be his own, and that he has a bona fide right to it, he commits no offense against the statute which makes it a misdemeanor for any person to "knowingly and willfully, without lawful authority" destroy or injure any fence on the land of another. *Ratcliffe v. Com.*, 5 Gratt. 657.

Where a person was charged with the removal of a fence, from the land of another, it was held, that if he removed the fence under a claim of right, believing it to be his own, and that he had a bona fide right to it, he committed no offense by the removal thereof. *Ratcliffe v. Com.*, 5 Gratt. 657.

Feoffment.

See the title DEEDS, vol. 4, p. 372.

Feræ Naturæ.

See the title ANIMALS, vol. 1, p. 375.

FERRIES.

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CROSS REFERENCES.

See the titles BRIDGES, vol. 2, p. 623; CARRIERS, vol. 2, p. 671; CORPORATIONS, vol. 3, p. 510; INJUNCTIONS; MONOPOLIES; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS; TAXATION; WHARVES.

I. Definitions.

A ferry is an incorporeal hereditament acquired from the public, either by special act of the legislature, or by some other competent authority, under the provisions of a general law. It includes the exclusive privilege of transportation, for tolls, across a watercourse, and also the use, for that purpose, of the respective landings and their outlets. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396, 410.

It has been held, that a ferry landing is not a wharf in any legal or proper sense. *Christie v. Malden*, 23 W. Va. 667, 674. See the title WHARVES.

II. Establishment.

A. WHO MAY BE AUTHORIZED TO ESTABLISH.

Section 12, ch. 64, Va. Code, 1873, requires the person desiring to establish a ferry "to own or to have contracted for the use of land at the point at which he wishes to establish the same." This statute, however, is complied with where the lessee of the land, the owner of the equity of redemption therein, and the trustee holding the legal title unite in the application for the establishment of the ferry. *Wimbish v. Breeden*, 77 Va. 324. See also, *Zane v. Zane*, 2 Va. Cas. 63.

Ownership of land on the West Virginia side of the Ohio river is sufficient to enable the owner to sustain an application to establish a ferry over it, without his showing that he owns land on the Ohio side of the river. *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107.

B. JURISDICTION TO ESTABLISH.

Jurisdiction to establish ferries is conferred upon the county courts by ch. 64, Va. Code, 1873. When in a particular case such jurisdiction is acquired, the failure of the court in the

progress of the case to comply with the statute in detail, may be error reviewable on appeal, but is no ground for collateral attack on the judgment. *Wimbish v. Breeden*, 77 Va. 324.

This statute, however, does not authorize the county court to establish a ferry across a stream which forms one of the boundaries of the state. *Zane v. Zane*, 2 Va. Cas. 63.

The state of Ohio has the right to establish ferries on the Ohio side of the Ohio river and to fix their charges for ferriage over that river from Ohio to West Virginia. *State v. Faudre*, 54 W. Va. 122, 46 S. E. 269.

C. PROCEEDINGS TO ESTABLISH.

1. Application.

In General.—Section 12 of the Virginia Code of 1873 provided that "A person desiring to establish a ferry across any watercourse, whether it be a stream bounding the state or not, who owns, or has contracted for the use of, land at the point at which he wishes to establish the same, may, after publishing notice of his intention at the front door of the courthouse, on the first day of each of the two next preceding terms, apply to the court of the county, or one of the counties, in which he desires to establish such ferry, for leave to establish the same." *Wimbish v. Breeden*, 77 Va. 324, 326.

Form and Contents.—In an application to the county court to establish a ferry, the applicant should set forth in his petition that he owns the land either on one or both sides of the stream, and that a public road has been established through the land to the place where the ferry is sought to be established. *Zane v. Zane*, 2 Va. Cas. 63. See also, *Wimbish v. Breeden*, 77 Va. 324.

Description of Proposed Ferry.—"In establishing a ferry, the usual form of its designation is from the lands of an individual on one side, the watercourse to the lands of another on the opposite

side; and the place of departure is always regarded as the seat of the ferry. There is no necessity for requiring a more particular description of the ferry ways on either side, and it would be extremely inconvenient to do so, both as it regards the public and the ferry keeper, for that would render an exact description on both sides by metes and bounds indispensable, and make every departure from them unlawful, however immaterial, and whatever the urgency of the occasion, and though attended with no invasion whatever of the rights of others." *Somerville v. Wimbish*, 7 Gratt. 205, 229; *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107.

An application for a ferry was held to sufficiently describe the proposed ferry where it said that the ferry is to be "across the Ohio river from a point in Lincoln district, in said county of Tyler, on lands belonging to (persons named) to the said (person's) landing on the farm of Talbott Bros. in Monroe county, state of Ohio." *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107.

2. Notice.

Where the notice of an application for a ferry described the proposed ferry, as "across the Ohio river from a point in Lincoln district, in said county of Tyler, on lands belonging to (persons named) to the said (person's) landing on the farm of Talbott Bros. in Monroe county, state of Ohio," it was held, that the description was sufficient. *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107.

3. Who May Contest Proceedings.

In proceedings instituted in the county court to establish a ferry or in other cases before the county court, where there are no formal parties defendant, when the proceedings are instituted, the county court ought not to permit any person to be made a party defendant or contestant, so as to give him a right to obtain a writ of error to the judgment of the court, if such person have no interest in the subject

matter before the court except such interest as he has in common with all other members of the community. *Williamson v. Hays*, 25 W. Va. 609.

The county court should in such cases permit any one to become a contestant and party to the proceeding, so as to give him a right to obtain a writ of error to the judgment, if such person has a peculiar interest in the controversy different from that of all other members of the community, though this interest be not a vested right, which could be infringed by the judgment of the court, and which might entitle him to pecuniary compensation. *Williamson v. Hays*, 25 W. Va. 609.

Upon the application of a party to the county court for the establishment of a new ferry across a stream, where there is a ferry already established in close proximity to the site of the proposed ferry, the county court should permit the proprietor of the old ferry to be made a party contestant; and if this be done, such proprietor is entitled to apply for a writ of error to the judgment of the county court establishing the new ferry. *Williamson v. Hays*, 25 W. Va. 609.

4. Determination as to Necessity of Establishment.

a. In General.

An important inquiry to be made by the county court before establishing a new ferry is, whether the travel and business across the stream is or is not sufficient to support reasonably well two ferries, as the result of such inquiry must have much weight in determining the question, whether the new ferry should or should not be established. *Williamson v. Hays*, 25 W. Va. 609.

Where there are already two ferries within a mile of each other, and the owners of one of them apply for the establishment of a third one between them, and its establishment will injure the revenue of the other existing ferry,

and it does not appear that the travel will well support three ferries, and there is no imperative public need of the third ferry, it should not be established. *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107.

b. View by Commissioners.

Section 13 of the Virginia Code of 1873 provided that "if the place at which the ferry is proposed be a half mile or more in a direct line from any ferry legally established, the application shall be referred to the commissioners of roads for the county, or to three or more viewers, to be appointed by the court, and the said viewers or commissioners shall view the place, and upon oath, report their opinion whether or not public convenience will result from the proposed ferry, with their reasons for such opinion." *Wimbish v. Breeden*, 77 Va. 324, 326.

A report of viewers appointed to report upon an application for the establishment of a ferry, signed by two of three viewers, the order of the county court authorizing two to act, is good. *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107.

c. Finding of Jury.

Who May Act as Jurors.—And a person who signs a memorial to the legislature for the establishment of a ferry is not thereby rendered incompetent to act on the jury. *Somerville v. Wimbish*, 7 Gratt. 205.

Validity of Finding.—Upon the return of the certificate of a jury, that, in their opinion, public convenience would result from the establishment of a proposed ferry, evidence is introduced: 1. Of one of the jurors, who proved, that before he was sworn, he had made up an opinion that the ferry would be a public convenience; that he thought it probable he might have expressed his opinion, though he did not recollect to have done so; that he had, before he was sworn, signed a petition for the said ferry; and that, at the time he was sworn, he was uninfluenced by

the said opinion, and prepared to render an impartial verdict. 2. Of another juror, who proved the like facts with regard to himself, and also that he had expressed his opinion. 3. Of another juror, who proved the same facts with regard to himself, that the second had proved with regard to himself, and also that he had circulated a petition for the ferry. Upon this evidence the county court quashed the finding of the jury, and the circuit court reversed the judgment of the county court. It was held, that the judgment of the circuit court is right. *Muire v. Smith*, 2 Rob. 458.

Effect of Finding.—Under the act in 2 Rev. Va. Code, 1819, p. 261, ch. 238, which provides for the impanelling of a jury to say whether, in their opinion, public convenience will result from the establishment of a proposed ferry, and for the return of this opinion to the county court, who thereupon, as well as upon any other evidence that may be offered, shall have full power to establish such ferry; the finding of the jury in such a case is merely evidence, and the weight of it, under all the circumstances, a matter for the discretion of the court. *Muire v. Smith*, 2 Rob. 458.

d. Proceedings Subsequent to Finding by Jury.

The order of the county court directing the justices to be summoned to consider of the verdict of the jury, in ferry cases, may be executed by leaving a notice in the mode directed in the general law in relation to notices. *Somerville v. Wimbish*, 7 Gratt. 205.

5. Judgment or Order.

When in particular case jurisdiction is acquired by the county court, the failure of the court in the progress of the case to comply with the statute in details, may be error reviewable on appeal, but is no ground to attack the judgment collaterally. *Wimbish v. Breeden*, 77 Va. 324; *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740.

6. Review of Order Ordering or Denying Establishment.

An important question to be determined by the county court before establishing a new ferry is as to whether the travel and business across the stream would support two ferries, and, as this is a question of fact, the appellate court must have all the facts before it that were before the court below before it can properly pass upon the correctness of the judgment complained of, unless the circuit court retains the case, and tries it *de novo*. *Williamson v. Hays*, 35 W. Va. 52, 12 S. E. 1092.

Where an application is made for the establishment of a ferry across a stream, over which a ferry has already been established, the owner may resist the establishment of the new ferry; and if, upon hearing the evidence, the court to which the application is presented refuses to establish a new ferry and the applicant thereupon obtains a writ of error to the circuit court, after moving to set aside the judgment as contrary to the law and evidence, and excepting to the action of the court in overruling said motion, the circuit court can not properly act upon and determine the writ of error, unless the bill of exceptions certifies all of the evidence offered, or all of the facts proved before the county court, or unless all of the facts appear either expressly or by necessary implication in the bill of exceptions. *Williamson v. Hays*, 35 W. Va. 52, 12 S. E. 1092. See the title *APPEAL AND ERROR*, vol. , p. 418.

D. NATURE AND EXTENT OF GRANTEE'S RIGHTS.

Nature of Franchise.—A ferry franchise is private property within the meaning of the constitution, which declares that private property shall not be taken or damaged for public use without just compensation. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Patrick v. Ruffners*, 2 Rob. 209.

A ferry franchise in Virginia is the creature of the statute law; and the rights of the owner of the franchise are to be measured by the statute. *Somerville v. Wimbish*, 7 Gratt. 205.

Ferry franchises in this state have always been granted with a view to subserve the public, and are deemed public trusts, to be regulated and managed by the legislature through its different agents. *Roper v. McWhorter*, 77 Va. 214.

Title Conferred by Franchise.—The establishment of a ferry confers upon the owner no title to any portion of the soil on the other side of the stream, and no easement therein except the incidental delegation of such as has been therefore or may thereafter be acquired by the public as a highway. *Somerville v. Wimbish*, 7 Gratt. 205.

But the establishment of a ferry in a public road entitles the grantee to the use of the road for landings and outlets, as the use of the landings and their outlets is a part of the ferry franchise. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223. See also, *Somerville v. Wimbish*, 7 Gratt. 205.

A ferry proprietor has the right to land his boats at the foot of a town without the consent of the council of said town where the order of the county court granting leave to establish the ferry designates the street as one of the landings of the ferry, and neither the charter of the town nor the statute law prohibits such landing. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

E. PARTNERSHIP IN FRANCHISE.

While there may be partnership in a ferry, yet as a ferry is not ordinarily the subject of partnership and trade, the terms of the contract by which it is made so, should be more clear than in cases in which the subject is one of ordinary trade and partnership. Thus

in a case in which the owner of a public ferry leased it for two years, in consideration of \$1,000 cash, and upon an agreement between the parties that if the net profits of the ferry did not yield the lessee \$2,000 within the two years, he should hold over the term until the profits yielded the \$2,000, and if the profits gave more than the \$2,000 in the two years, the surplus should be equally divided between them, it was held that this contract did not constitute a partnership so as to render the lessor liable for losses occasioned by negligence in operating the ferry during the term of the tenancy. *Bowyer v. Anderson*, 2 Leigh 551. See the title PARTNERSHIP.

L. is admitted to be the owner of a ferry, from a landing in the state of Ohio, across the Ohio river. It is alleged that the ferry was established according to the law of Ohio, but this is denied. B. owned a ferry, from his land in this state, across the river, to L.'s landing. In consequence of the obstruction of a private road down the bank of the river to the water at B.'s ferry, he, for many years, used a landing above. B. seems to have regarded L.'s ferry as valid, and L. to have regarded the upper landing used by B. as that owned by him. They make a contract, under seal, to enter into partnership to run the two ferries, to continue five years; and to build a boat for the purpose. L. with B.'s approbation builds the boat nearly to completion. Neither party does anything else toward putting the partnership in operation. After the contract between L. and B. was made, on D.'s application the board of supervisors granted him leave to establish a ferry at the upper landing mentioned, about two hundred yards above B.'s lawful landing. D. repaired a public road to near the water at this place, built a commodious boat and put and continues his ferry in operation. This renders L.'s and B.'s ferries of little value. About a year after the contract, while

D. was running his ferry, B. sold his land and ferry to D. Under these circumstances a court of equity, will not at the instance of L. coerce B. to commence or continue the partnership business. *Cross v. Hopkins*, 6 W. Va. 323.

F. TRANSFER OF FRANCHISE.

Effect of Sale.—Where the ferry franchise has been conferred upon the corporation by the legislature, the sale of this franchise to another corporation does not render the franchise irrevocable, or deprive the legislature of its power to grant a rival franchise should it be deemed to the public interest so to do. *Wheeling Bridge Co. v. Wheeling, etc., Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009, affirmed in 138 U. S. 287.

Power to Lease Ferry Franchise.

It is a well-settled rule of construction of legislative grants to public or private corporations, that they can exercise only such powers as are conferred expressly or impliedly by the act, and that in all cases of ambiguity, the doubts shall be resolved in favor of the public. Without legislative authority, a grantee of a ferry franchise can not lease or alien any franchise necessary to perform its obligations and duties to the state. *Roper v. McWhorter*, 77 Va. 214.

In September, 1881, the board of supervisors of Norfolk county and the council of the city of Portsmouth leased to R., for twelve years, the Norfolk county ferries at \$13,000 per annum. It was held, that neither under the general or statutory laws of this state did the said board and council, or either of them, possess the authority to lease the said ferries. The *jus disponendi* is not incident to the ownership of property as a public trust. The boards of supervisors, like other corporate bodies, are the creatures of the statute, and have no other powers than those conferred expressly or by necessary implication, and no

powers devolved on those boards as the successors of the county courts. *Roper v. McWhorter*, 77 Va. 214.

It was held, that even had the power existed in the board and council to execute the lease, yet the circumstances attending its execution justified its annulment. *Roper v. McWhorter*, 77 Va. 214, 215.

Injunction against Lease of Franchises.—The right of taxpayers to resort to equity to restrain municipal corporations and their officers, and quasi corporate bodies and their officers from transcending their lawful powers or violating their lawful duties in any way injuriously affecting the taxpayers, such as making unauthorized appropriations of the corporate funds or an illegal disposition of the corporate property, is well established. Hence, injunction will lie to restrain the unauthorized lease of county ferries. *Roper v. McWhorter*, 77 Va. 214.

G. ESTABLISHMENT AND MAINTENANCE AS CONDITION TO RIGHT TO ERECT DAM.

Judgment Allowing Erection of Dam upon Providing a Ferry Presumed to Be Correct on Appeal.—In a case in which the judgment of the court giving leave to erect a dam provided that the applicant should keep a ferry boat at the crossing of a public road over the stream across which the dam was to be erected, it was held that, as such judgment was authorized by statute (2 Rev. Va. Code, 227, § 5), and as the county and circuit courts had held upon the evidence that a ferry boat at that place would sufficiently remedy any impediment to the crossing of the stream, the court of appeals would presume that they acted rightly, in the absence of evidence to the contrary. *Mairs v. Gallahue*, 9 Gratt. 94.

Duties in Regard to Ferry Boat.—Where the right to erect a dam is made conditional upon the applicant's maintaining a ferry across a stream for the

benefit of the public, the duty of keeping up the ferry boat is not merely personal to the grantee of the privilege of erecting the dam, but is a condition incident to the grant, and attaches to it in whosoever hands it passes. The kind of boat to be kept is such an one as the exigencies of the travel and trade on the road shall require. And it is the duty of the party required to keep up the ferry boat to ferry the public over the stream without charge. *Mairs v. Gallahue*, 9 Gratt. 94.

III. Protection Afforded Ferries.

A. AGAINST RIVAL FERRIES OR BRIDGES.

1. In Absence of Statute.

Grant of Franchise Does Not Imply a Monopoly.—A monopoly will not be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits. To give such monopoly, there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival and competing works. Hence, though a ferry has been established across a river, it is competent for the legislature to establish another ferry from the opposite side of the river, to pass along the same line used by the first; and the granting of this second charter is no invasion of the franchise of the owner of the first ferry. *Somerville v. Wimbish*, 7 Gratt. 205; *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42; *Trent v. Cartersville Bridge Co.*, 11 Leigh 521; *Roper v. McWhorter*, 77 Va. 214; *Wheeling, etc., Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009; *James River & K. Co. v. Thompson*, 3 Gratt. 270.

Though a ferry has been established for any length of time across a river, it is competent for the legislature to establish another ferry from the opposite side of the river, to pass along the same line used by the first; and this is

no invasion of the franchise of the owner of the first ferry. *Somerville v. Wimbish*, 7 Gratt. 205.

The statute providing that no ferry could be established over a watercourse within half a mile of another ferry legally established, except over the Ohio river, was repealed by acts, 1882, ch. 159, § 6. But in repealing it the legislature simply declared, that it ought not to be regarded as prejudicial to the public good in every case to establish two ferries over a stream within that distance of each other. It was considered, and very properly, that instead of prohibiting the establishment of a second ferry close to another over the same stream it should be left to the discretion of the county court, subject however to the review of the circuit court, to determine, whether the general public interest would be promoted in the particular case by the establishment of two ferries so close to each other over the same stream. *Williamson v. Hays*, 25 W. Va. 609.

Under the act of 1882, ch. 159, § 6, the county has the authority to establish a ferry within half a mile of another ferry over any of the streams within the state, and without in any manner infringing upon the franchise of such existing ferry, or rendering the proprietor of the new ferry liable for damages on account thereof. *Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. 146.

The owner of a ferry can not recover compensation or damages for injury to his ferry flowing from loss of patronage incident to the establishment of a second ferry, either from the owner of a second ferry or the county. *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107.

2. Under Statute.

a. Privilege Exclusive within Certain Limits.

Formerly it was provided by W. Va. Code, § 6, ch. 44, that the board of supervisors, and after 1872 the county

court, should not establish a ferry over a watercourse within half a mile of another ferry legally established except over the Ohio river. The obvious reason for granting this exclusive privilege to the proprietor of the ferry was that it was considered promotive of the public good, it being considered that there was not sufficient travel and transportation over any stream in that state to justify the establishment of two ferries so close to each other. *Williamson v. Hays*, 25 W. Va. 609; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. 146; *Wheeling Bridge Co. v. Wheeling, etc., Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009.

Under the general law, as it existed in 1879, the proprietor of a ferry across the Shenandoah river, had the exclusive privilege of transporting persons and things across the river within a half mile of his ferry. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

Though the late board of supervisors could not lawfully establish a ferry over any other watercourse within half a mile of another legally established ferry over it, the board might establish a ferry over the Ohio River at any place. *Cross v. Hopkins*, 6 W. Va. 323.

Erection of Bridge within Half Mile of Ferry.—The unauthorized erection of a bridge for transportation across the stream within a half mile of a ferry already established was as much prohibited by the statute as the establishment of another ferry within the same distance. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

The erection of a bridge within a half mile of a ferry, although it would confessedly very materially diminish the profits of the ferry franchise, would not be a taking thereof within the meaning of the constitutional prohibition, but is a damaging thereof within the said prohibition. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

Effect as to Existing Ferries.—Long after the license and establishment of a ferry the legislature, by general law, provided that the county courts should not license a ferry within a half mile, in a direct line, of one already established. It was held, that this general law, so far as it applied to such existing ferry, did not create in it the right to a perpetual monopoly, but was repealable at the will of the legislature. *Wheeling Bridge Co. v. Wheeling, etc.*, Bridge Co., 34 W. Va. 155, 11 S. E. 1009.

The purchase of the ferry under an enabling act authorizing the purchase, could not enlarge nor add to the ferry franchise or privileges, nor convert said monopolistic feature into an irrevocable perpetuity in the hands of the vendee, but left it subject to repeal just as it was held by the vendor; and the legislature having repealed it by general law, the purchaser has no right to complain, and a new bridge may be erected within the restricted territory, without any violation of vested rights. *Wheeling Bridge Co. v. Wheeling, etc.*, Bridge Co., 34 W. Va. 155, 11 S. E. 1009.

Repeal of Statute.—The statute making a ferry franchise exclusive within the limits of a half mile on each side, was repealed by the acts of 1882, ch. 159, § 6; *Williamson v. Hays*, 25 W. Va. 609; *Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. 146; *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107.

b. Remedies of Ferry Owner.

There being as yet no legislation prescribing the manner in which an internal improvement company can acquire the legal right to damage private property for the use of such corporation, and the plaintiff having the right to restrain the defendant from constructing and operating its bridge, and thus damaging his private property, until just compensation should be paid or secured to be paid to him, equity will award an issue quantum damnificatus,

to assess the damage to the plaintiff's ferry franchise by the erection and use for public travel of the toll bridge; and after said damage is so ascertained, the injunction shall continue in force until compensation for the same is paid; but when paid the injunction shall be wholly dissolved. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

An injunction is obtained by a ferry owner to restrain a bridge company from completing and operating a toll bridge near his ferry, until the damages are ascertained and paid for the injury done to the ferry by the operation of the bridge. While the injunction is in force, the parties enter into an agreement, by which the ferry owner binds himself to dismiss or abandon his injunction, and the company in consideration thereof binds itself to pay to him a certain diem from the time the bridge is completed and open for travel, until the said damages are ascertained, and until they are paid. Under this arrangement the bridge is completed and opened for travel, the suit is prosecuted and the damages are afterwards ascertained and fixed by a decree of the court, which directs that the company can either pay said damages and let the injunction be dissolved, or refuse to pay them and not use the bridge. The damages are not paid, but under the aforesaid agreement the bridge is kept open and the per diem paid until after a written notice is given by the ferry owner to the company, informing it of the said decree, and stating that it must elect either to pay said damages or close the bridge. Some time thereafter the company closes the bridge and refuses longer to pay the per diem. The ferry owner then brings an action of debt on said agreement for the per diem, while the bridge was so closed. The defendant enters a plea of set-off, averring that induced by said notice, it closed its bridge and thereby suffered damages to the full amount claimed by the plaintiff. It was held, that the said plea shows no ground to

entitle the defendant to damages or set-off against the plaintiff's claim. The plea sets up no facts which could operate as an estoppel, upon a plaintiff; the plaintiff shows a good cause of action and is entitled to recover. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

What May Be Considered by Jury in Assessing Damages.—Upon the trial of an issue quantum damnificatus to ascertain the damage to a ferry franchise by the construction and operation of a bridge, for the purpose of ascertaining such damage it is proper for the jury to consider the revenues derived from the exercise of the ferry franchise, while the ferry proprietor was landing his boat on the land of another, rather than on his own landings, even though he was a trespasser, while so landing his ferry boats. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

The jury are to regard the franchise as permanent, and in estimating the damage will not take into consideration the fact, that the legislature may repeal the law creating the exclusive privilege of transporting persons and things across the river within half a mile of the ferry. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

Upon the trial of such issue, it was not error to instruct the jury, that if at the time of the trial the jury believed, that the landings of the ferry were not safe and convenient, and that by the expenditure of money they could be made safe and convenient, that they must find for the plaintiff such damages, as they may ascertain his ferry franchise would sustain by reason of the erection and use of the bridge less the amount of the costs of making said landings safe and convenient. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

Evidence as to Ownership.—Upon such an issue it is not error for the court to refuse to instruct the jury, that the plaintiff is bound to show his

ownership of the property damaged at the time of the trial, when upon a former appeal his ownership of the ferry franchise was settled in his favor. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

The right of the ferry proprietor to the ferry seat on the east side of the river on the former appeal having been determined, evidence tending to show, that he did not then legally possess such ferry seat was properly excluded as irrelevant. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

Decree.—The court erred in its decree ordering the money ascertained as damages to the franchise to be paid to the plaintiff, in adding to such decree, "and execution may issue upon this decree," as the bridge company might abandon the bridge, and would not then be compelled to pay the money. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

Dissolution of Injunction.—Where a person is enjoined from operating an illegal ferry at a certain point on a river, and the county court afterwards established a ferry at such point, and licenses such person to maintain and operate it, such injunction is properly dissolved. *Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. 146.

B. AGAINST PRIVATE FERRIES.

The owner of a public ferry can not maintain any action against persons who use their own boats for passage or transportation of themselves, their families and property, and who do not hold themselves out to transport the general public. *Trent v. Cartersville Bridge Co.*, 11 Leigh 521.

A charter is granted to an incorporated company to build a toll bridge across a river, over which there is at the time an ancient ferry near by; but no exclusive privilege is granted to the bridge company for the transportation of persons or property; and other persons, of their own will, establish a ferry at or near the same place, for the

use of themselves only, not for the use of the public generally. It was held, that the bridge company have no just cause of complaint against such persons establishing such ferry for such purpose, though it may reduce the profits of the bridge. *Trent v. Cartersville Bridge Co.*, 11 Leigh 521.

C. ACTIONS FOR DISTURBANCE OF FERRIES.

Right of Action.—An action for disturbing a ferry may be maintained by the owner against persons who, by obstructions in the river, cause injuries mediate or immediate to the landings, thereby diminishing the profits of the ferry, and subjecting the owner to increased labor and expense in the use of his franchise. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740.

In an action by the grantee of a ferry against a wrongdoer who disturbs the enjoyment of his franchise, the grant of the franchise from the public, the use of the ferry with its appurtenant landings and outlets, and the fact of such disturbance, are all that need be established. Nor is it material whether the disturbance is by invading the plaintiff's right to the exclusive transportation and tolls, or by obstructing or impairing his navigation, or by destroying or injuring the landings and outlets. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740.

Declaration or Complaint.—In an action for the disturbance of a ferry, by injuring the landings and their outlets, the complaint need not set forth the means by which the ferry was legally established, or the derivation of the plaintiff's title thereto. Nor is it necessary to allege expressly that the plaintiff was possessed of the landings and outlets, or that he was owner of the soil; for if the complaint shows that they were used as appurtenances to the ferry this is sufficient. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740.

A declaration in case by the owner

of a ferry for the disturbance of his franchise, contains two counts, each of which is demurred to. The first count sets forth, in substance, that the plaintiff was possessed of a legally established ferry; that there were good and convenient roads, ways and landings for the use of the same; and that there was, and of right ought to have been, a free and uninterrupted passage for the water flowing in and down the river, so as not to affect or inquire the landings, ways or roads at the ferry; and it charges that the defendants wrongfully placed obstructions in the river near the ferry and landings, by which the current of the stream was checked and diverted, and thrown from and upon the landings (in modes particularly described) thereby occasioning the plaintiff great labor and expense, destroying or injuring the roads and landings, rendering the embarkation and debarkation difficult, and preventing the transportation of persons and property. The second count is the same, except that, instead of alleging a possession of the ferry by the plaintiff, it avers his right to the reversion thereof, expectant upon the term of his tenant, in whom the possession, use and enjoyment are charged to be and that the grievance complained of is to the prejudice of the plaintiff's reversionary estate. It was held, that both counts are good on general demurrer. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740.

IV. Taxation of Ferries.

Section 63, ch. 29, W. Va. Code, which provides that the assessment of toll bridges and ferries shall be made by the assessor by ascertaining the annual value, and multiplying such annual value by ten, is not unconstitutional, under the provision of § 1, art. 10, of the constitution, which provides that taxation shall be equal and uniform throughout the state, and all property, real and personal, shall be taxed in

proportion to its value, to be ascertained as directed by law. *Charleston, etc., Bridge Co. v. Kanawha County Court*, 41 W. Va. 658, 27 S. E. 1002.

A town incorporated under chapter 47 of the Code of this state can not assess and collect wharfage from the proprietor of a ferry for the use of a ferry landing within its corporate limits; nor can it tax such ferry except as property, at the rate it may tax other property within its corporate limits. *Christie v. Malden*, 23 W. Va. 667.

A lot in city of N., owned and used by county of E. and city of P. as landing for ferry maintained by them, is exempt from taxation under acts 1881-82, p. 382. *Black v. Sherwood*, 84 Va. 906, 6 S. E. 484. See the title TAXATION.

V. Criminal Liability for Charging Excessive Fees for Ferriage.

West Virginia can not punish one who acts under a ferry franchise given by the state of Ohio to operate a ferry from its side of the Ohio river over that river, for charging one coming from Ohio more than is allowed by West Virginia law for ferriage over that river. *State v. Faudre*, 54 W. Va. 122, 46 S. E. 269.

VI. Discontinuance of Ferries.

Discontinuance a Penalty Imposed by Law.—The discontinuance of a ferry is a penalty which the law attaches to the failure of the ferry keeper to ex-

ercise his privilege of keeping up his ferry; it is not an offense, much less an indictable offense. *Carter v. Com.*, 2 Va. Cas. 354; *Trent v. Cartersville Bridge Co.*, 11 Leigh 521.

Jurisdiction to Discontinue.—Under act of December 26, 1792, reducing into one the several acts regulating ferries (Rev. Va. Code, 1802, ch. 116, pp. 221-228), wherein defendants' ferry is described as extending "from the land of William Howard (Albemarle county over the Fluvanna (James River) to Thomas Anderson's landing (Buckingham county), and from said Anderson's to Howard's;" and Code, 1887, § 1380, conferring on the court of the county "from" which any ferry is established the right to discontinue such ferry for failure to comply with the law—either the county court of Buckingham or that of Albemarle had jurisdiction to discontinue defendant's ferry on proper showing, subject to the concurrence of the other court. *Sargeant v. Irving*, 2 Va. Dec. 338.

Discontinuance for Nonuser.—Under §§ 23-24, ch. 237, Rev. Va. Code, 1819, where a public ferry has been disused for more than three years, though the franchise of the ferry owner has not been declared forfeited by quo warranto or other like proceedings, he is not entitled to the aid of a court of equity, to prevent others from invading the franchise, which he has thus abandoned. And, in such case, it seems that he can not maintain an action at law to vindicate his franchise. *Trent v. Cartersville Bridge Co.*, 11 Leigh 521.

FERTILIZERS.

CROSS REFERENCES.

See the title AGRICULTURE, vol. 1, p. 288.

Act of 1871 Not Repealed by That of 1877.—The act of 1871 requires that the manufacturer or manipulator of the fertilizer shall label the bag or package containing it, before he sells the same in this state, and imposes a pen-

alty on him for omitting it, or for false representations in the label as to the quantity or quality of the fertilizer contained in the bag or package. The act of 1877 requires him, before he sells, to furnish the superintendent of

agriculture, under the penalty of a fine from \$100 to \$1,000, with a fair sample of the fertilizer which he has for sale in this state, who is required to analyze it carefully, and to determine whether it is of any practical value or not. And if he determines that it is of no practical value, after the parties interested have been summoned before him, and have had full and sufficient opportunity to contest it, the sale of it is prohibited as a fertilizer for use in this state. These two clauses are not in conflict, and the former is not repealed by the latter, and the act of 1871 is still in force in this state. *Atlantic, etc., Fert. Co. v. Kishpaugh*, 32 Gratt. 578.

Contract without Compliance with Statutory Provisions Not Illegal.—See generally, the title **ILLEGAL CONTRACTS**.

The acts of March 29th, 1871, Va. Code, 1873, ch. 227, and of March 29th, 1877, acts of 1876-77, ch. 249, which require under heavy penalties certain things to be done by persons selling commercial manures, does not avoid the contract for such sale; and a party selling the said manures may recover upon such contracts, in an action at law, though he has not complied with the directions of the statutes. *Niemeyer v. Wright*, 75 Va. 239.

Sufficiency of Label.—The A. & V. F. Co. were the manufacturers of a fertilizer which was labeled on the bags containing it—"Eureka. 200 lbs. Ammoniated bone superphosphate of

lime"—and which was sold by its agents to different parties, some of whom gave their negotiable notes, with K. as endorser, for the same. The notes were not paid, and in an action of debt by the company against K., his sole defense under the plea of nil debet was, that the labels on the bags were not in conformity with the statute (§ 48, ch. 86, Va. Code, 1873), and that consequently the sales made to the makers of the notes for whom he was endorser were illegal and void. Held, the label aforesaid was a sufficient compliance with the terms of the statute, and that company is entitled to recover on said notes given for the price of said fertilizers. *Atlantic, etc., Fert. Co. v. Kishpaugh*, 32 Gratt. 578.

Proof of Breach of Warranty.—See generally, the title **WARRANTY**.

Upon proof of a warranty that a fertilizer is as good as any other article of a like character and price offered upon the same market, a breach of the warranty may be established by proof that when applied in like quantities to the same crop, during the same season, upon the same land, receiving the same cultivation, results were obtained from the warranted fertilizer inferior to those obtained from other fertilizers offered upon the same market at the same price. *Reese v. Bates*, 94 Va. 321, 26 S. E. 865.

Commissioner of Agriculture.—As to powers and rights of commissioners of agriculture, see the title **AGRICULTURE**, vol. 1, p. 288.

Fidelity and Guaranty Insurance.

See the title **SURETY, TRUST AND SAFE DEPOSIT COMPANIES**.

FIDUCIARY CAPACITY.—See the titles **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 483; **GUARDIAN AND WARD**; **TRUSTS AND TRUSTEES**. And see *Jones v. Clark*, 25 Gratt. 642, 680.

FIDUCIARY SETTLEMENTS.—In *Leavell v. Smith*, 99 Va. 374, 378, 38 S. E. 202, it is said: "It must be observed, that this principle applies to **fiduciary settlements** in the legitimate acceptance of that term, to administration and executorial accounts, and the like, such as the commissioner of accounts has authority to deal with, affecting assets, the due administration of which devolve upon the fiduciary by virtue of his office, and which are covered by his oath and bond; but it extends no further." See generally, the titles **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 483; **TRUSTS AND TRUSTEES**.

Field Notes of Surveyor.

See the title **DOCUMENTARY EVIDENCE**, vol. 4, p. 767.

Fieri Facias.

See the title **EXECUTIONS**, vol. 5, p. 416.

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See the titles **AFFRAY**, vol. 1, p. 238; **ASSAULT AND BATTERY**, vol. 1, p. 729; **HOMICIDE**.

FILING PLEADINGS AND PAPERS.

CROSS REFERENCES.

See the titles **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 22; **ANSWERS**, vol. 1, p. 392; **BILL OF PARTICULARS**, vol. 2, p. 376; **BILL OF REVIEW**, vol. 2, p. 394; **CERTIORARI**, vol. 2, p. 734; **CROSS BILLS**, vol. 4, p. 112; **DEBT, THE ACTION OF**, vol. 4, p. 307; **DEMURRERS**, vol. 4, p. 492; **DISCOVERY**, vol. 4, p. 665; **EXCEPTIONS, BILL OF**, vol. 5, p. 357; **EXHIBITS**, vol. 5, p. 769; **INJUNCTIONS**; **MORTGAGES AND DEEDS OF TRUST**; **REJOINDER**; **REPLICATION**.

As to filing amended pleadings, see the title **AMENDMENTS**, vol. 1, p. 337. As to filing notice of intention to appeal, and the petition for appeal, see the title **APPEAL AND ERROR**, vol. 1, p. 502. As to filing suspension and appeal bonds, see the title **APPEAL AND ERROR**, vol. 1, p. 516, et seq. As to the necessity and manner of making papers a part of the record on appeal, see the title **APPEAL AND ERROR**, vol. 1, p. 505. As to filing, and endorsement of depositions, see the title **DEPOSITIONS**, vol. 4, p. 566. As to dismissal for failure to file in proper time, see the title **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 4, pp. 693, 702. As to defaults in pleadings, see the title **PLEADING**. As to filing declaration for writ of prohibition, see the title **PROHIBITION**. As to the necessity, time and manner of filing under recording acts, see the title **RECORDING ACTS**.

General Rule as Filing Pleadings.—Heatherly, 38 W. Va. 409, 18 S. E. 611; *Hayzlett v. McMillan*, 11 W. Va. 464; *Goddin v. Vaughn*, 14 Gratt. 102. See the titles **ANSWERS**, vol. 1, p. 395; **INJUNCTIONS**.
Answers and other pleadings, except in cases of injunction can only be filed at rules or in court. First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792; *Zell Guano Co. v.*

FILL.—See *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521, 325.

Filling Blanks.

See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 312.

FINAL HEARING.—In *Continental Ins. Co. v. Kasey*, 27 Gratt. 216, 221, it is said: "It would seem sufficient to say, that this court has already by its unanimous judgment, construed this act of congress against the pretensions of the appellant in this case. In *Beery v. Irick*, 22 Gratt. 484, 489, this court construing this same act says: 'The question we have to consider is, was the application (for removal of the case), made before the "**final hearing** or trial," within the meaning and intent of the statute? The word **final** in the act applies to and qualifies the word **hearing**, and not the word "trial." In the act of 1866 the language is before "**trial or final hearing.**" The transportation of the words in the act of 1867 so as to read, "**before final hearing** or trial" was probably accidental and not affecting nor designed to affect any change in the meaning. The words **final hearing** are ordinarily applied to cases in equity, while the word "trial" is applied to actions at law. The obvious and unmistakable intention of the statute was to require a party desiring a removal of his case, to make his application before a "trial" in actions at law, and before a **final hearing** in suits in equity.'" See also, *Beery v. Irick*, 22 Gratt. 484, 489, 12 Am. Rep. 539. And see the title REMOVAL OF CAUSES.

Final Judgments and Decrees.

See the titles ANSWERS, vol. 1, p. 392; APPEAL AND ERROR, vol. 1, p. 437; BILL OF REVIEW, vol. 2, p. 388.

Finding Lost Property.

See the title LOST PROPERTY.

Findings of Court.

See generally, the titles JUDGMENTS AND DECREES; OPINIONS OF COURTS; VERDICT.

As to rule of decision where case is tried by court in lieu of jury, see the titles AGREED CASE, vol. 1, p. 283; EXCEPTIONS, BILL OF, vol. 5, p. 357.

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CROSS REFERENCES.

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As to fines by building and loan associations, see the title BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 645.

I. Fines.

A. DEFINITIONS AND GENERAL CONSIDERATIONS.

1. Definitions and Distinctions.

"A Fine."—"A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor." 1 Bouvier's Law Dict. 662." Southern Express Co. v. Walker, 92 Va. 59, 63, 22 S. E. 809.

Fine in Chapter 31, Va. Code.—"By § 745 (Va. Code, 1887; § 745, Va. Code, 1904) it is provided that 'wherever the word "fine" is used in this chapter (ch. 31) it shall be construed to include a pecuniary forfeiture, penalty, and amercement.'" Western Union Tel. Co. v. Tyler, 90 Va. 297, 18 S. E. 280; Southern Express Co. v. Walker, 92 Va. 59, 63, 22 S. E. 809. See also, Ex parte Marx, 86 Va. 40, 9 S. E. 475.

Does Not Comprehend Forfeitures.—"The term 'fines' used in the constitution, literally construed, does not comprehend forfeitures." Southern Express Co. v. Walker, 92 Va. 59, 63, 22 S. E. 809.

The fact that in chapter 31 of the Virginia Code, 1887, the word "fine" includes a pecuniary forfeiture, penalty, and amercement; by virtue of the special enactment (§ 745, Va. Code), can not affect the proper construction of the term "fine" as used in the constitution. Southern Express Co. v. Walker, 92 Va. 59, 63, 22 S. E. 809.

Fines and Forfeitures Distinguished.—The term "fine" as used in the Virginia constitution, literally construed, does not comprehend forfeitures. "A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor." A forfeiture is a pecuniary penalty for an act which the lawmaking power of the state in its wisdom deemed necessary to prevent imposition upon its citizens. A forfeiture is not a penalty for a crime, "an offense committed against the state. It is in no sense criminal. The act for which it is provided is only contrary to law and may be entirely innocent in itself." Southern Express Co. v. Walker, 92 Va. 59,

22 S. E. 809. See also, *Ex parte Marx*, 86 Va. 40, 9 S. E. 475.

"Forfeit" as Used in § 3799, Va. Code.—The word "forfeit" used in § 3799, Va. Code, 1887, same section, Va. Code, 1904, prohibiting violating the Sabbath, is synonymous with "fine." Section 745, Va. Code, 1904. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475.

2. Nature as a Debt.

Debt of Record.—"When the prosecution for a public offense has ended in a judgment imposing a fine, it is no longer an unascertained penalty or liability, but has become fixed in amount, and has become a debt, and that of the highest character—a debt of record, payable instant— and the lawful process of execution may go upon it at common law and under our statute. *Rex v. Woolf*, 1 Chit. 401, 18 E. C. L. 225, 229, 230; *Kane v. People*, 8 Wend. 203; 1 Bish. Cr. Proc. § 1304; Code, c. 36, § 12. The position taken above—that a judgment for a fine is a debt—is not only supported by cases just cited, but our case of *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439, supports it, as it holds the state, under its claim to a fine, to be a creditor, and the demand such a debt as will authorize the state to appeal to a court of equity to avoid a deed to the prejudice of the state as to its fine." *Gill v. State*, 39 W. Va. 479, 20 S. E. 568.

Judgment Debt.—A fine is a personal judgment and binds the defendant's estate, although a married woman. "Mr. Bishop, in 1 Cr. Prac., § 1304, says: 'A fine is treated as a judgment debt, and binds a married woman.'" *Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 570.

Not a Debt by Contract.—"A fine imposed by statute for the violation of a law can not, in any just sense, be designated as a debt contracted. The ordinary meaning of the word 'debt' is a sum of money due to another by contract; and a 'debt contracted' necessarily means that a debtor has come

under a voluntary obligation to a creditor. The relation of debtor and creditor implies, as of course, that the one has given credit to the other in a contract. It would be a solecism and absurd to say that a fine imposed as a punishment for a penal offense was a debt contracted. Contracted how? Contracted with whom? 'A debt contracted' implies the voluntary action of debtor and creditor founded on a valuable consideration. This can not be predicated upon a fine imposed by way of punishment. The very essence of a contract is taken away when the amount is assessed as a penalty for violated law claimed by the state as a punishment for crime." *Sheriff v. Rector*, 29 Gratt. 714. See also, *Clarke v. Tyler*, 30 Gratt. 134, where it is said: "In a certain sense a fine is a debt due the state, yet it might be said with much force, if not conclusively, that the word debt refers to matters of contract, and that, therefore, a fine is not embraced in the meaning of the word debt."

Embraced in Words "Dues and Demands."—The words "dues and demands due the state" embrace fines. "A fine is something 'which the law requires to be paid;' and that is the meaning of the word 'dues.' A fine is a thing 'due or claimed to be due' to the state, a liability which the state has a right to enforce and demand; and that is the meaning of the word 'demand.'" *Clarke v. Tyler*, 30 Gratt. 134.

3. Purpose of Fines.

A pecuniary fine, when exacted, is not by way of compensation to the commonwealth for a loss or injury done by the perpetration of a criminal act. Money will not remunerate the commonwealth for the loss of the life of a citizen, or for an injury to his person or property; but the fine is imposed for the purpose of punishment, and thereby to deter the same party and others from committing similar

violations. *Anglea v. Com.*, 10 Gratt. 696. See post, "Nature and Purpose," II, A.

"The public welfare is best promoted by the enforcement of the laws, and one of the most potent means of their enforcement is by fines imposed for their violation." *Sheriff v. Rector*, 29 Gratt. 714.

4. Imposed by Legislature or Common Law.

The constitution does not impose fines nor provide for their enforcement. To the legislature belongs the duty of imposing them, except where they are imposed by the common law. *Southern Express Co. v. Walker*, 92 Va. 59, 64, 22 S. E. 809. See post, "Discretion of Legislature," I, B, 2.

5. Constitutionality of Laws.

Effect of Constitutional Limitation as to Amount of Fine.—See post, "Excessive Fines," I, B.

Statutes Allowing Judgment for Fines by Default.—See post, "Presence of Defendant at Trial," I, C, 2, b.

Section 717, Va. Code, authorizing commitment for fine imposed by a justice. See post, "Under Justice's Commitment," I, C, 6, b.

Forfeiture imposed on express companies by § 1220, Va. Code, 1887. See post, "Instances Where Fines Adjudged Reasonable," I, B, 7.

Virginia Code, § 3799, Punishing Violations of the Sabbath.—See post, "Jurisdiction and Remedies," I, C, 2, a.

Requiring Oyster Inspector to Collect Fines, etc.—Virginia Code, 1887, § 2134, as amended by acts, 1894, p. 778, requiring oyster inspectors to collect "all fines, taxes and all sums due, or would be due," on oyster ground rented, or used and not rented, and conferring "the same powers to collect the same which a county treasurer has for the collection of taxes," and also giving said inspectors power to remove enough oysters to pay the same, is not unconstitutional, as allowing the inspector to impose fines, as the fine

is imposed by the statute itself. *Thomas v. Rowe*, 2 Va. Dec. 113.

B. EXCESSIVE FINES.

1. Constitutional Limitations.

Virginia Constitution.—"The constitution, provides that 'excessive fines' ought not to be imposed." *Southern Express Co. v. Walker*, 92 Va. 59, 66, 22 S. E. 809; *Doyle v. Com.*, 100 Va. 808, 823, 40 S. E. 925; *Jones v. Com.*, 1 Call 555. See also, *Bullock v. Goodall*, 3 Call 44.

West Virginia Constitution.—"The constitution of West Virginia provides that cruel and unusual punishment shall not be inflicted, and that penalties shall be proportioned to the character and degree of the offense. Ex parte *Garrison*, 36 W. Va. 686, 15 S. E. 417.

Constitution of the United States.—Article 8, of the amendments to the constitution of the United States, providing that "excessive bail shall not be required, nor excessive fines imposed, etc.," has reference solely to the powers exercised by the government of the United States, and does not apply to the powers exercised by the state governments. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809.

2. Discretion of Legislature.

The imposition and regulation of fines is within the discretion of the legislature, and to its discretion and judgments the widest latitude must be conceded. Its discretion will not be questioned by the courts except where the minimum penalty is so excessive as to shock the sense of mankind. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809.

"Fines are to be fixed with reference to the object they are designed to accomplish. The degree of criminality of the offense, or the illegality or impolicy of the act they are intended to punish or prevent, are elements that must enter into their consideration. The peace of society and the welfare of the people occasionally require that the legislature shall create

new offenses, and affix penalties for their violation, or alter the penalties for others already existing. What is to be the legislative guide, in the performance of this duty, but its sound judgment and the wisdom of experience? And how can the courts with reason or propriety question the action of the legislature, or control or restrain its discretion, except where the minimum penalty is so plainly disproportioned to the offense or act, for the violation of which it is affixed, as to shock the sense of mankind." *Southern Express Co. v. Walker*, 92 Va. 59, 66, 22 S. E. 809. See ante, "Imposed by Legislature or Common Law," I, A, 4.

Failure to Fix Maximum Limit.—"It is further contended that the statute is unconstitutional in that it fails to prescribe a maximum limit to the forfeiture and thus places it within the power of a jury, through caprice or prejudice, to mulct a corporation with a fine of so large an amount as practically to destroy it. If a supposition so extreme, and so unlikely ever to be confirmed, were to be verified in consequence of the failure to fix a maximum limit to the forfeiture, still we are unable to see how that would render the statute obnoxious to the bill of rights, or § 11, art. 1, of the constitution. How can the bare possibility that an excessive fine might be imposed by a jury invalidate the statute? If so, a statute otherwise valid might be annulled by a possibility that might never happen. If a jury were to render a verdict so excessive as to contravene the inhibition of the constitution, the wrong or vice would lie in the verdict, and not in the statute." *Southern Express Co. v. Walker*, 92 Va. 59, 67, 22 S. E. 809.

3. When Excessive a Judicial Question.

"The question as to an excessive fine is a judicial one, and does not effect the validity of the statute." *Southern Express Co. v. Walker*, 92 Va. 59, 67, 22 S. E. 809.

4. Amount of Fine.

a. Independent of Statute.

Independent of statutes limiting the amount of the fine which may be imposed, the jury exercises a discretion controlled only by the limitation contained in the bill of rights. In some instances the legislature has seen fit to restrict their power, leaving it undiminished in others. *Doyle v. Com.*, 100 Va. 808, 40 S. E. 925.

There is no limit to the fine which may be imposed upon conviction of a misdemeanor for which the law has not provided some specific penalty, save the constitutional clause that cruel and unusual punishment shall not be inflicted, and penalties shall be proportioned to the character and degree of the offense. *Ex parte Garrison*, 36 W. Va. 686, 15 S. E. 417. See also, *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

b. According to Degree or Offense and Estate of Defendant.

"It is said, that in every information or indictment, the fine or amercement ought to be according to the degree of the fault, and the estate of the defendant." *Jones v. Com.*, 1 Call 555.

"The rule, as old as the written law, is that a fine must have reference to the estate of the defendant. As stated by Mr. Blackstone: 'What is ruin to one man's fortune, may be a matter of indifference to another.'" *Doyle v. Com.*, 100 Va. 808, 40 S. E. 925, dissenting opinion of Cardwell, J.

"A fine that would prove efficacious in the case of an individual, and beyond which it would appear to be excessive to go, would be likely to prove ineffectual in the case of a corporation, with its aggregated wealth and power, and its disposition to act oftentimes, in an arbitrary manner, because of the inability of private persons to contend against its illegal and willful acts." *Southern Express Co. v. Walker*, 92 Va. 59, 66, 22 S. E. 809.

c. Limitation in Felony Cases.

"The legislature has limited the fine

that may be imposed in felony cases to \$500." *Doyle v. Com.*, 100 Va. 808, 40 S. E. 925, dissenting opinion of Cardwell, J.

d. Damages upon Affirmance of Judgment: for Fine.

The statute allowing damages on affirmance (Acts of 1830-31, ch. 11, § 32; Suppl. to R. C. p. 149) does not apply to the affirmance of a judgment imposing an amercement or fine; the amercement or fine not being a debt or damages, within the meaning of that act. But though the judgment of affirmance in such case award damages according to law for retarding the execution, yet as no specific damages are thereby adjudged, and the law gives none, the error is merely formal, and the appellate court will disregard it. *Abrahams v. Com.*, 1 Rob. 675.

5. Remedy Where Verdict Excessive.

Excessive verdicts are under the control of the court. If the jury were to render a verdict imposing a fine so excessive as to contravene the inhibition of the constitution, it is the province of the court, and would be its duty, to set aside the verdict. When if ever any such fine is imposed by a jury, the corrective hand of the court will annul it, in accordance with the letter and spirit of the bill of right. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809.

Where the verdict of a jury in assessing a fine is such as to satisfy the court that the jury was influenced by prejudice or ill will, it will be set aside. *Doyle v. Com.*, 100 Va. 808, 40 S. E. 925.

6. Relief in Equity.

A court of equity will relieve against a fine on the same principals upon which it relieves against forfeitures and penalties. *Goodall v. Bullock, Wythe*, 328. See also, the titles **JUNCTIONS; SHERIFFS AND CONSTABLES.**

7. Instances Where Fines Adjudged Reasonable.

Under the evidence in the case of

Doyle v. Com., 100 Va. 808, 40 S. E. 925, it was held, that a fine of \$1,000 for an indecent assault upon a young lady can not be said to be so excessive as to be prohibited by the constitution, nor to manifest bias or prejudice on the part of the jury. The mere fact that the fine is double the maximum allowed in certain felonies is no evidence of excess in a case like this, where the legislature has interposed no statutory limitation on the amount.

"Of the charge made in the indictment the jury acquitted the accused, but found him guilty of an assault and battery—a purely technical offense—fixing his punishment at one year's imprisonment in jail, and a fine of \$1,000, a fine double the limit fixed by statute (§ 3671, Va. Code), for the crime of shooting, etc., with intent to kill; by § 3672 for the crime of shooting, stabbing, etc., in the commission of or attempt to commit a felony; and by § 3706, for entering a dwelling house, etc., with intent to commit larceny, or any felony other than murder, rape or robbery." *Doyle v. Com.*, 100 Va. 808, 823, 40 S. E. 925.

If the forfeiture of not less than \$100 imposed by § 1220, Va. Code, 1887, on express companies and others for excessive charges were a fine for a criminal offense against state, it would not be excessive within the meaning of the constitutional inhibition as to imposing excessive fines. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809.

C. ENFORCEMENT.

1. Power of Legislature.

"The very power to impose the fine, of necessity implies the power to collect it." *Gill v. State*, 39 W. Va. 479, 20 S. E. 568.

2. Procedure to Recover.

a. Jurisdiction and Remedies.

Statutory Provision as to Remedies.

"Section 712 enacts that 'where any statute imposes a fine, unless it be otherwise expressly provided, or would

be inconsistent with the manifest intention of the general assembly, it shall be to the commonwealth, and recoverable by presentment, indictment, or information. Where a fine without corporal punishment is prescribed, the same may be recovered, if limited to an amount not exceeding twenty dollars, by warrant, and if not so limited, by action of debt, or action on the case, or by motion. The proceeding shall be in the name of the commonwealth." *Ex parte Marx*, 86 Va. 40, 9 S. E. 475; *Western Union Tel. Co. v. Tyler*, 90 Va. 297, 18 S. E. 280; *Com. v. Collins*, 9 Leigh 666. See post, "By Suit in Chancery or Action of Debt," I, C, 5.

Jurisdiction of Justice and Form of Remedy.—"It is also provided by § 2939, which relates to 'warrants for small claims,' that any claim to a fine, not exceeding twenty dollars, which would be recoverable by an action at law, shall be cognizable by a justice, the proceeding to be by civil warrant, as in the case of other small claims enumerated in the same section." *Ex parte Marx*, 86 Va. 40, 9 S. E. 475. See the title JUSTICES OF THE PEACE.

There are in fact two remedies for the recovery of many fines before justices. One is by warrant of arrest or a criminal prosecution; for the rule at common law is that where a statute gives a justice jurisdiction over an offense, it impliedly gives him power to apprehend any person charged with such offense. *Bac. Abr.*, tit. Justices of Peace (E) 5. And the other is by a civil warrant. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475.

Virginia Code, 1887, § 3799, makes punishable as an offense the violation of the Sabbath, and prescribes the penalty. Upon a breach of this statute the question arose as to whether the fine under such section could be imposed by a justice of the peace, under Va. Code, 1887, § 2939, relating to the jurisdiction of justices of the peace. The court held, that such a fine is recov-

erable before a justice of the peace, and by a civil warrant; and that the constitutional right to trial by jury does not extend to such offense. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475. See Va. Code, 1887, § 717.

b. Presence of Defendant at Trial.

Statutes allowing judgments for fines by default are constitutional. *State v. Campbell*, 42 W. Va. 246, 24 S. E. 875; *Shifflet v. Com.*, 90 Va. 386, 18 S. E. 838. See the title CRIMINAL LAW, vol. 4, p. 64.

c. How Assessed.

(1) When by Court.

In indictment for misdemeanors in the courts of the United States, the court and not the jury, should assess the fine. *United States v. Mundel*, 6 Call 245.

"In England, in cases of misdemeanor, the jury merely passed upon the fact of guilt. The amount of the fine against him was fixed by the judgment of the court." *Pifer v. Com.*, 14 Gratt. 710.

The West Virginia Code, § 22, ch. 152, provides that the court shall fix the amount of the fine on conviction of a misdemeanor, unless when otherwise provided. *Ex parte Garrison*, 36 W. Va. 686, 15 S. E. 417.

(2) When by Jury.

See post, "Verdict and Judgment," I, C, 2, d.

In Virginia it is the province of the jury to assess the fine. *House v. Com.*, 8 Leigh 755; *Harvey v. Com.*, 23 Gratt. 941; *State v. Davis*, 31 W. Va. 390, 7 S. E. 324; *Com. v. Frye*, 1 Va. Cas. 19; *Strickler v. Com.*, 2 Va. Cas. 268. See ante, "Remedy Where Verdict Excessive," I, B, 5.

"In Virginia the general assembly, in 1786, authorized the jury to assess a fine in misdemeanor cases." *State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

(3) Upon Joint Prosecution.

See post, "Verdict and Judgment," I, C, 2, d.

If more persons than one are jointly

convicted of a crime and fined, there must be a separate fine against each. "In legal reason, if more persons than one are jointly convicted of a crime, each should receive a several sentence. 1 Bish. Crim. Law, §§ 954-958. Each must render the full penalty, the same as though he had done the criminal act. 1 Bish. Crim. Proc., § 1035; Harris' Case, 7 Gratt. 600; State v. Griggs, 34 W. Va. 78, 11 S. E. 740; State v. Snider, 34 W. Va. 83, 11 S. E. 742; Com. v. Ray, 1 Va. Cas. 262; Com. v. Hamor, 8 Gratt. 698; Jones v. Com., 1 Call 555, distinguished in Ammonett v. Harris, 1 Hen. & M. 490, which holds that the rule does not apply in civil cases.

"In 2 Hawk., ch. 48, § 17, it is laid down, that where there are several defendants, a joint award of one fine against all is erroneous, as it ought to be several against each defendant; for, otherwise, he who hath paid his proportionable part might be continued in prison, until all the others had paid theirs; which would be, in fact, to punish him for the offense of another." Jones v. Com., 1 Call 555.

In an indictment for assault against several, a joint award of one fine against all, is erroneous. Jones v. Com., 1 Call 555. See also, Gill v. State, 39 W. Va. 479, 20 S. E. 568.

If two persons are jointly indicted or proceeded against, by information, for retailing ardent spirits without license, upon their conviction, there should be a separate fine against each. Com. v. Harris, 7 Gratt. 600. See also, Gill v. State, 39 W. Va. 479, 20 S. E. 568.

Husband and Wife.—"In this state we assess separate fines against husband and wife for one act of selling liquor or assault and battery, under a joint indictment. Com. v. Hamor, 8 Gratt. 698; Com. v. Ray, 1 Va. Cas. 262." Gill v. State, 39 W. Va. 479, 20 S. E. 568.

d. Verdict and Judgment.

See ante, "Upon Joint Prosecution," I, C, 2, c, (3).

Jury Find the Verdict, and the Court Renders Judgment Accordingly.

—On an indictment charging that the defendant did aid, abet and assist a certain male slave to escape from his owner, it is a proper procedure for the jury to find the defendant guilty, ascertain the term of his imprisonment, and assess his fine, and then for the court to render judgment according to verdict. House v. Com., 8 Leigh 755. See, in this connection, the case of Harvey v. Com., 23 Gratt. 941, in which the court, p. 948, affirms the above procedure to be correct even in the absence of statute so providing. See ante, "When by Jury," I, C, 2, c, (2).

Addition of Imprisonment to Verdict Laying Fine.

—Where a person is indicted for feloniously and maliciously cutting, striking, wounding, etc., with intent to maim, disfigure, disable and kill, the indictment charging that the accused made the assault feloniously and maliciously, cutting, etc., and the jury find "the prisoner not guilty of the malicious cutting and wounding as charged in the within indictment, but guilty of an assault and battery as charged in the within indictment, and assess his fine at certain figures," it was held, proper for the jury to assess a pecuniary fine upon the prisoner but not proper to add the punishment of imprisonment. But upon such conviction the court may sentence the prisoner to be imprisoned in the county jail, in addition to the pecuniary fine. Canada v. Com., 22 Gratt. 899.

Where upon a trial for murder, the jury finds the prisoner not guilty of the murder, but guilty of involuntary manslaughter, and assesses upon him a fine, and the court thereupon enters a judgment discharging him, and then at the same term of the court sets aside the judgment, and enters a judgment against him for the fine, and a certain term of imprisonment, and directs him to be arrested and committed, it is proper, although the prisoner was not present in court at the time the second

judgment was entered. *Price v. Com.*, 33 Gratt. 819.

But on a prosecution for a misdemeanor, if there is a verdict against the defendant for a fine, and the court enters up a judgment thereon for fine and costs, and directs a *capias ad audiendum* against the defendant, the judgment for the fine and costs is final, and no further judgment can be rendered in the case, and therefore a sentence, at a subsequent term, to imprisonment in the county jail, is erroneous. *Pifer v. Com.*, 14 Gratt. 710; *Price v. Com.*, 33 Gratt. 819; *Barnes' Case*, 92 Va. 794, 23 S. E. 784.

Effect of Failure to Assess Fines.—

Where the penalty is fine and imprisonment, and the jury in a verdict of guilty, fail to assess the fine, which it was their province to have done, judgment for the imprisonment may nevertheless be rendered against the defendant. *Com. v. Frye*, 1 Va. Cas. 19.

Judgment for Fine—Waiver of Imprisonment.—Where an offense is punishable with fine and imprisonment, a superior court may render judgment for the fine only. *Com. v. Crump*, 1 Va. Cas. 171.

Verdict for Fine—Judgment for Fine and Costs.—Verdict on an indictment finds defendant guilty, and assesses his amercement at five dollars; and judgment is rendered for the amercement and costs. Held, there is no error in such proceeding. *M'Clintic v. Com.*, 1 Rob. 727.

Judgment for Fine in Addition to Confinement in Penitentiary.—Where a verdict is rendered on an indictment for an injury done with intent to maim, etc., under W. Va. Code, 1899, ch. 144, § 9, finding the defendant not guilty of doing an act maliciously, but guilty of unlawfully doing an act charged, the court can not, under the statute, sentence the prisoner to confinement in the penitentiary, and also impose a fine. *State v. Mooney*, 27 W. Va. 546.

3. Duty of Prosecuting Attorney.

Section 9 of chapter 36 of the West Virginia Code provides: "It shall be the duty of the prosecuting attorney of every county to institute and prosecute in the circuit court of his county proper proceedings for the recovery of all fines imposed by law, where the cases are cognizable in such court." *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439.

4. By Execution.

a. Fieri Facias.

See also, the title EXECUTIONS vol. 5, p. 416.

The 10th and 11th sections of chapter 36 of the West Virginia Code, provides for a writ of *fieri facias* as a means for collection of fines. *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439. See also, *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864, 890, where it is said: "The fine against the Harper's Ferry Company should be enforced by execution."

Execution can be issued for a fine and costs and be collected. *Pifer v. Com.*, 14 Gratt. 710; *Sheriff v. Rector*, 29 Gratt. 714; *Wilkerson v. Allen*, 23 Gratt. 10; *Ex parte Marx*, 86 Va. 40, 9 S. E. 475. See post, "How Discharged," I, C, 6, g.

Runs against Goods, Chattles and Real Estate.—A writ of *fieri facias* upon a judgment of a circuit court for a fine against a person convicted of a misdemeanor ought to run against goods and chattles and real estate. *Gill v. State*, 39 W. Va. 479, 20 S. E. 568; *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439.

The law allows a state's execution to be levied on land only in default of the defendant's having personalty. He will not be allowed to avoid payment of fine because he has not personalty. *Gill v. State*, 39 W. Va. 479, 20 S. E. 568; *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439; *Com. v. Ford*, 29 Gratt. 683.

May Be Levied on Separate Estate.
—A *fieri facias* upon a judgment of a

circuit court for a fine against a married woman convicted of a misdemeanor may be levied upon her separate estate, real or personal. *Gill v. State*, 39 W. Va. 479, 20 S. E. 568. See also, the title **SEPARATE ESTATE OF MARRIED WOMEN**.

Homestead Exemption.—A homestead exemption can not be claimed against a fine due the commonwealth, imposed for a violation of the criminal laws. *Sheriff v. Rector*, 20 Gratt. 714. See the title **HOMESTEAD EXEMPTIONS**.

Executions Issued by Justices.—Land can not be sold under execution issued by justices for fines recovered before them. Such executions do not operate upon lands. This is so; for § 5 of chapter 36, W. Va. Code, enacts that proceedings before justices for fines shall conform to §§ 219 to 230, inclusive, of chapter 50, W. Va. Code, and one of those sections (227) limits the collection of such justices' executions to personal estate. *Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 570. See post, "Under Justice's Commitment," I, C, 6, b.

"By § 717, Va. Code, 1887, it is enacted, that when any fine is imposed by a justice, he shall not issue any execution for the fine and costs or for the costs where there is no fine. Ex parte Marx, 86 Va. 40, 9 S. E. 475.

In Virginia the act of March 14, 1878 (acts 1877-78, p. 377), which empowered a justice in certain cases to issue an execution of fi. fa. for a fine imposed by him has been repealed. What seems to be an implied authority to issue a fi. fa. upon a judgment for a fine under § 2048, Va. Code, 1887, relating to judgments for small claims, is controlled by the express prohibition contained in § 717, Va. Code, 1887, which applies to all cases in which any fine is imposed by a justice—the term "imposed" applying as well to the rendition of a judgment for a fine in a civil, as in a criminal case. Ex parte Marx, 86 Va. 40, 9 S. E. 475.

Effects of Imprisonment.—The fact that a party has been released from imprisonment, both when he is in execution under a *capias pro fine*, as well as when upon conviction he is ordered by the court to be held in custody until the fine is paid, does not prevent the issue of a *fieri facias*, after such release from jail. *Wilkerson v. Allen*, 23 Gratt. 10. Sections 4074, 4075, Va. Code, 1904.

b. Levari Facias.

By common law, on a judgment for a fine, a writ of *levari facias* to take the goods and the issues of the whole land of the defendant, could be issued just the same as on a judgment for debt. *Gill v. State*, 39 W. Va. 479, 20 S. E. 568; *Com. v. Webster*, 8 Gratt. 702.

c. Capias ad Satisfaciendum.

See post, "*Capias ad Satisfaciendum*," I, C, 6, e.

d. Capias Pro Fine.

See post, "*On Capias Pro Fine*," I, C, 6, d.

5. By Suit in Chancery or Action of Debt.

By Suit in Equity.—Whether a judgment in the name of the state for fine can be enforced in a court of equity like the judgment of one individual against another by subjecting the land of the defendant to the payment thereof, was not decided. The court said: "It is not necessary to inquire here whether the state would be confined to the remedy pointed out by the statute, or whether it could at its opinion institute in every case, whether necessary or not, a chancery suit, like an individual, to subject the real estate of the defendant to the satisfaction of its judgment. Where the title of the real estate appears in the name of the defendant, the most expeditious mode for the state would certainly be to pursue the remedy pointed out by the statute, and sell under a *fieri facias*." *State v. Burkeholder*, 30 W. Va. 593, 1 S. E. 439.

It seems that a chancery suit might

be brought to enforce a judgment for a fine and subject the defendant's land to the payment thereof. Since no one would deny that a judgment for a fine is a lien on land under § 5, ch. 139, and the state has like remedy to enforce as individuals. *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439. *Com. v. Ford*, 29 Gratt. 683." In the opinion in *State v. Burkeholder*, Judge Johnson pointedly expresses the opinion that under § 5, ch. 35, an execution for a fine runs against land, and under it land can be sold. This is said to be an obiter dictum. It was germane to the discussion of the subject before the court, if not in point, and, I think, expresses the correct construction of the statute." *Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 570.

Suit to Set Aside Fraudulent Conveyance.—The state can maintain a suit in equity to set aside a fraudulent conveyance, and subject the land of the defendant to the payment of a judgment for a fine recovered against the defendant. When the legal title is not in the defendant, but in others, charged in the bill to have been transferred in fraud of the claim of the state, the state is remediless unless it can appeal to the courts to set aside the conveyance and subject the property to the payment of its judgment. *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439. See also, the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Action of Debt.—"Fines are recoverable by action of debt." *Clarke v. Tyler*, 30 Gratt. 134. "Penalties for violation of license and other laws may be recovered in action of debt." *State v. Campbell*, 42 W. Va. 246, 24 S. E. 875. See also, the title DEBT, THE ACTION OF, vol. 4, p. 284. See ante, "Jurisdiction and Remedies," I, C, 2, a.

c. By Imprisonment.

a. By Order of Court.

"Section 726 of the Code empowers the court in which any judgment for

a fine is rendered, going in whole or in part to the commonwealth, either of its own motion, or at the instance of the attorney for the commonwealth, to commit the defendant to jail until the fine and costs are paid, or until the costs are paid, where there is no fine." *Shiflett v. Com.*, 90 Va. 386, 389, 18 S. E. 838. See also, *Ex parte Marx*, 86 Va. 40, 9 S. E. 475.

b. Under Justice's Commitment.

"By § 717 (Va. Code, 1887), it is enacted that 'when any fine is imposed by a justice, he may commit the defendant to jail until the fine and costs are paid, or until the costs are paid where there is no fine, but he shall not issue any execution therefor.'" *Ex parte Marx*, 86 Va. 40, 9 S. E. 475. See ante, "Fieri Facias," I, C, 4, a.

Constitutional.—Section 717 of the Virginia Code, authorizing a commitment for a fine imposed by a justice, is constitutional. The commitment is not a part of the punishment annexed to the offense, but is a means provided for carrying the judgment into effect after the trial is over. "The provision of the constitution relied on; namely, that 'in all capital or criminal prosecutions a man hath a right * * * to a speedy trial by an impartial jury,' is not to be construed as extending, any more than restricting, the right of trial by jury as it existed at the time the constitution was adopted. It is the right as known and enjoyed by the people of the state at that time that is preserved and guaranteed by the constitution. And we know that Sabbath breaking, and a great variety of petty offenses of the same class, were not only cognizable by a justice at the time our constitution was adopted, but for centuries before." *Ex parte Marx*, 86 Va. 40, 42, 9 S. E. 475. See the titles CONSTITUTIONAL LAW, vol. 3, p. 190; JURY.

Only Means of Enforcing Judgment.

—The provision found in § 717, Va. Code, 1887, must be construed as giv-

ing the only means to a justice for carrying into effect a judgment rendered by him for a fine in any case, civil or criminal. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475.

Statutory Authority Must Be Strictly Followed.—In the construction of Va. Code, 1887, § 3799, regarding Sabbath violation, the question arose, in *Ex parte Marx*, 86 Va. 40, 9 S. E. 475, as to whether upon a fine being imposed by a justice of the peace, and defendant's refusal to pay same, the justice's committal of the defendant to jail, "for one year unless the fine be sooner paid," was valid. It was held, that the commitment was a departure from the terms of the statute, from which the justice derived his authority, the letter whereof must be strictly followed, and by which no particular term of imprisonment is prescribed, and was therefore defective and invalid. *Jones' Case*, 20 Gratt. 848.

If it be suggested that a commitment for a year, unless the fine be sooner paid, is not less favorable to a defendant than a general commitment until payment be made, and is therefore not to his prejudice, the answer is, that the question is not to be determined with reference to any consideration of that sort, but according to the letter of the statute alone. See *Jones' Case*, 20 Gratt. 848." *Ex parte Marx*, 86 Va. 40, 42, 9 S. E. 475.

c. By Municipalities.

A power conferred on a municipal corporation to adopt ordinances and to enforce its by-laws by prescribed fines, does not confer the power of imprisonment before trial for a violation of the ordinance, nor after trial for failure to pay the fines. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847. See also, the title MUNICIPAL CORPORATIONS.

d. On Capias Pro Fine.

Common-Law Writ Unrepealed.—

The common-law writ of *capias pro fine* is unrepealed, and may be used by

the commonwealth. *Com. v. Webster*, 8 Gratt. 702.

Statutory Provision.—Section 726 of the Virginia Code, 1887, provides that the court, in which judgment for any fine is rendered, going in whole or in part to the commonwealth, or the judge thereof in vocation, may direct the clerk to issue a *capias pro fine*, either before or after the return of the writ of *fi. fa.* *Shifflet v. Com.*, 90 Va. 386, 18 S. E. 838.

The 10th and 11th sections of chapter 36 of the West Virginia Code, provides for a *capias pro fine* as a means for collection of fines. *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439.

Part of the Judicial Sentence.—"In some instances it will be seen in the books that a *capias pro fine* is a part of the judicial sentence pronounced by the court; as in the old precedents of judgments in trespass, or wherever the action was properly commenced by *capias ad respondendum*. In this and in other instances, the judgment, in addition to the damages adjudged to the plaintiff, awarded a *capias pro fine* to the king. In none of the authorities does it seem to be stated that there is any difference whether the award of the writ is expressly a part of the judgment, or is silently a consequence of the judgment—whether it be judicially awarded or ministerially issued." *Com. v. Webster*, 8 Gratt. 702.

Distinguished from Capias ad Satisfaciendum.—In *Com. v. Webster*, 8 Gratt. 702, Judge Lomax, in pointing out the distinction between a *capias ad satisfaciendum* and a *capias pro fine*, said "that the imprisonment under the *capias pro fine* was, in respect of such fine, not as a debt, but as a punishment for the crime, until the fine was paid."

It is true that a *capias pro fine* is an execution to compel the payment of the fine, as the *capias ad satisfaciendum* is to compel the payment of the debt. Notwithstanding that point of resemblance, these two species of process

were never confounded in practice; and were kept signally distinct in the views of the legislature, in many provisions made relating to the operation and the incidents of a *capias ad satisfaciendum*. In the original structure of the two writs the levy of the *ca. sa.* was made a direct satisfaction of the debt, but in the frame of the writ of *capias pro fine* the imprisonment did not purport to be a satisfaction of the fine; it was a part of the punishment; and the fine still remained in full force and could only be redeemed by satisfaction of the fine whenever it might be made. The frame of the writs of *ca. sa.* in its teste and return and the interval between them was also distinguished from the other writ. The levy of the *ca. sa.* was attended with consequences that do not seem ever to have attended the imprisonment under the *capias pro fine*, such as the effect of a voluntary enlargement of the prisoner to discharge the debt, the effect and the liabilities arising out of an escape, the provisions enacted for the maintenance of the prisoner whilst in custody, the privilege of the prisoner to avail himself of the proceedings of insolvency under a *ca. sa.* which he did not have under the *capias pro fine* (Chapman's Case, 1 Va. Cas. 138), and which required an express statute to entitle him to these proceedings (acts, 1803, ch. 21, § 1; 1 Rev. Code, 1819, 541), and the privilege of the prisoner in Virginia to discharge his person from custody under the *ca. sa.* by making a surrender of property, thereby in effect converting the *ca. sa.* into a *fi. fa.* In all of these particulars a distinction is observable between the *capias ad satisfaciendum* and the *capias pro fine*; and which never was wholly obliterated. *Wilkerson v. Allan*, 23 Gratt. 10.

May Issue before Fi. Fa. Is Issued.—When the accused is not in custody the court may direct his arrest and confinement in jail for the nonpayment of a fine before *fi. fa.* has been issued.

Shifflet v. Com., 90 Va. 386, 18 S. E. 838.

May Issue for Fine and Costs.—It was held in *Com. v. Webster*, 8 Gratt. 702, that where there is a judgment in favor of the commonwealth for a fine and costs of prosecution, a *capias pro fine* may issue for the fine and the costs; but where the judgment is for costs without a fine, the writ is not a proper process to enforce the judgment. See also, *Wilkerson v. Allan*, 23 Gratt. 10.

"If originally any question could be raised, whether upon a judgment for fine and costs, the costs could be included in the *capias pro fine*, that question seems to be settled by the provision in the Code, p. 783, which authorizes the clerk to include the costs in the execution which may be issued for the fine." *Com. v. Webster*, 8 Gratt. 702.

For Costs Alone.—A *capias pro fine* can not issue for costs alone where the judgment is for costs without a fine; the writ is not a proper process to enforce the judgment. *Com. v. Webster*, 8 Gratt. 702. See also, *Wilkerson v. Allan*, 23 Gratt. 10.

e. *Capias ad Satisfaciendum*.

By common law, on a judgment for a fine, a writ of *capias ad satisfaciendum*, to take the body, could be issued, just the same as on a judgment for a debt. *Gill v. State*, 39 W. Va. 479, 20 S. E. 568. See also, the title EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 5, p. 474.

A *capias ad satisfaciendum* on behalf of the commonwealth against a person convicted of a misdemeanor, upon a judgment against him for a fine and costs, can not be issued. *Com. v. Webster*, 8 Gratt. 702. See also, *Wilkerson v. Allan*, 23 Gratt. 10. And see the title EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 5, p. 474.

f. *Term of Imprisonment*.

"Section 4071, however, provides that

when a person is sentenced to confinement in jail a certain term, and afterwards until he pay a fine, etc., such additional confinement shall in no case exceed six months from the end of said term; and this provision was observed in the present case." *Shifflet v. Com.*, 90 Va. 386, 18 S. E. 838; *Wilkerson v. Allan*, 23 Gratt. 10; *Com. v. Webster*, 8 Gratt. 702. See post, "How Discharged," I, C, 6, g.

It was held, in *Com. v. Webster*, 8 Gratt. 702, that "where a party is imprisoned upon a *capias pro fine*, for a fine and costs, the term of his imprisonment, under such *capias*, is limited by the provision of the statute, to not more than six months. *Wilkerson v. Allan*, 23 Gratt. 10.

g. How Discharged.

Where a party is imprisoned upon a *capias pro fine* for a fine and costs, he can only obtain his discharge from imprisonment by paying the fine and costs. But the term of his imprisonment under such *capias* is limited by the provision in the Code of 1849, ch. 209, § 177, p. 781; § 4071, Va. Code, 1904. *Com. v. Webster*, 8 Gratt. 702; *Wilkerson v. Allan*, 23 Gratt. 10; *Com. v. Fields*, 33 Gratt. 291. See also, *Quinling v. Com.*, 2 Va. Cas. 494. And see ante, "Term of Imprisonment," I, C, 6, f.

Upon an indictment for assault, F. is fined \$1 and the costs. He pays one dollar to the clerk before execution issued, and directs him to apply it to the fine. The costs are a part of the fine, and F. being taken upon a *capias pro fine* can only be released by paying the costs as well as the one dollar. *Com. v. Fields*, 33 Gratt. 291. See post, "Nature and Purpose," II, A.

Upon Order of Court or Judge.—"The 19th section of chapter 209, Code of 1860, provides that, 'whenever a person is in jail under a *capias pro fine*, issued from any court in this commonwealth, on application to the court from the clerk's office of which such

execution issued, or to the judge of such court, in vacation, as the case may be, if to such court or judge it shall appear proper, may order the person so in jail to be released from imprisonment, without the payment of the money mentioned in such execution; provided, however, that in all such applications, the attorney for the commonwealth, of the court from which the execution issued, shall have ten days' notice of such application.' Section 20 provides that, 'Whenever any court of this commonwealth shall have directed any person convicted of a misdemeanor, to be confined in jail until the fine imposed upon such person, or until the costs of the prosecution shall have been paid, the person so confined may be released in the manner provided for in the preceding section; provided, that nothing in this act shall prevent the issue of a *fieri facias*, after such release from jail.' " *Wilkerson v. Allan*, 23 Gratt. 10. See §§ 739, 4074, 4075, Va. Code, 1904. And see ante, "*Fieri Facias*," I, C, 4, a.

D. PAYMENT AND SATISFACTION.

1. To Treasurer—Fines Collected by Sheriff.

Fines collected by the sheriffs of counties, or the sergeants of cities or towns, are to be paid by him to the treasurer of his county, city, or town, and not to the auditor of accounts of the state. *Tyler v. Taylor*, 29 Gratt. 765; *Clarke v. Tyler*, 30 Gratt. 134, 136.

A *mandamus* will not lie at the suit of a sheriff or sergeant, to compel the auditor to receive coupons which have been paid to him in discharge of a fine. *Tyler v. Taylor*, 29 Gratt. 765; *Clarke v. Tyler*, 30 Gratt. 134, 136. See the title *MANDAMUS*.

2. Remission by Governor.

Formerly §§ 4199-4200, Va. Code, 1887, provided: "The governor shall not remit in whole or in part, any fine or amercement assessed or imposed by

any court of record, court-martial, or other authority having jurisdiction to assess or impose the same, except that whenever a judgment shall have been rendered against any person for a contempt of court, other than a nonperformance of or disobedience to some order, decree, or judgment, the governor shall have power to pardon the offense and remit the punishment, whether corporal or pecuniary, either in whole or in part." *Wilkerson v. Allen*, 23 Gratt. 10; *Anglea v. Com.*, 10 Gratt. 696. These sections have been repealed. See § 738, Va. Code, 1904. See the title PARDON.

3. Under Insolvent Debtor's Acts.

In the absence of express statutory provision a person convicted of a misdemeanor, and committed until he shall pay the fine against him, can not discharge himself therefrom, under an act made and provided for the relief of insolvent debtors. *Com. v. Chapman*, 1 Va. Cas. 138. See also, *Quinling v. Com.*, 2 Va. Cas. 494; *Saunders v. Com.*, 10 Gratt. 494. See also, the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 247.

4. Payment in Overdue Coupons.

Fines imposed for a violation of law are embraced in the act of 1871 (Va. Code, 1887, ch. 22) known as the funding act, and a person, upon whom such a fine is imposed, may discharge it by the overdue coupons taken from the bonds mentioned in said act. *Clarke v. Tyler*, 30 Gratt. 134; *Williamson v. Massey*, 33 Gratt. 237, 250.

5. Not Satisfied by Imprisonment.

It would seem that where a party is in execution under a *capias pro fine*, or where upon conviction he is ordered by the court to be held in custody until the fine and costs is paid, or when he is sentenced to be confined in jail a certain term, and afterwards, until he pay a fine and the costs of the proceedings; that the fine and costs are not satisfied by the imprisonment, which is but a means of enforcing pay-

ment. Sections 4074, 4075, Va. Code, 1904. See *Wilkerson v. Allan*, 23 Gratt. 10; *Com. v. Webster*, 8 Gratt. 702. Where it is said, "there is, under our laws, no means by which a party assessed with a fine as the penalty of a misdemeanor (and who is ordered by the court to be imprisoned until the fine is paid), to discharge his obligation to the commonwealth, except by either paying the fine and costs, by being discharged by serving his term of six months, or being released in the mode prescribed by the 19th and 20th sections of chapter 209, just referred to." *Wilkerson v. Allan*, 23 Gratt. 10.

E. DISPOSITION.

1. Fines for Contempt.

All fines imposed for contempt of court go to the state. *State v. Druin*, 30 W. Va. 404, 4 S. E. 413.

2. Fines Set Apart for Literary Fund.

Section 7 of article 8 of the constitution of 1869 sets apart as permanent and perpetual literary fund; among other resources, "All fines collected for offenses committed against the state." *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809; *Clarke v. Tyler*, 30 Gratt. 134. See also, *Pitman v. Com.*, 2 Rob. 800. And see post, "Power of Legislature to Give Part to Informers," I, E, 3.

What Fines Dedicated.—Fines collected for offenses against the state within the meaning of § 7 of article 8 of the constitution of the state, are fines imposed by law as a punishment for crime. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809. See ante, "Definitions and Distinction," I, A, 1.

3. Power of Legislature to Give Part to Informers.

If the legislature, thought its policy as evidence by the fine or forfeiture imposed, was more likely to be enforced by giving one-half of it for the use of the informer, "it had the right to do so, and only such part as it reserved for the use of the state would

be covered by the constitutional provision. This is not an appropriation or diversion of the fine to an object other than that to which the constitution dedicates it. On the contrary, all of the fine, beyond what the legislature has deemed proper to set apart to stimulate the prosecution and secure the enforcement of the fine, goes to the literary fund, as required by the constitution." *Southern Express Co. v. Walker*, 92 Va. 59, 67, 22 S. E. 809. See ante, "Fines Set Apart for Literary Fund," I, E, 2.

Section 1220 of the Virginia Code, imposing a forfeiture of not less than \$100 on express companies and others for excessive charges, one-half of which is given to the informer, is not in conflict with § 7, art. 8, of the constitution of the state. The fines mentioned in the constitution are the fines imposed by law as a punishment for crime, and do not include forfeitures recoverable in a civil action. But even if such forfeitures are embraced within the constitutional provision, the legislature has power to give one-half to the informer as expense of recovery. The fine dedicated to the literary fund is the state's part of the recovery. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809.

F. OFFENSES PUNISHABLE BY FINE.

1. In General.

A misdemeanor, where no statute fixes the punishment, is punished by fine or imprisonment in jail, or both, at the discretion of the court. *Ex parte Garrison*, 36 W. Va. 686, 15 S. E. 417. See the title SENTENCE AND PUNISHMENT.

Fines constitute in whole or in part the punishment for many of the smaller offenses at common law, and also for many offenses created by statute. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809.

2. Specific Instances.

As to fines which may be imposed

upon conviction of any particular criminal offense against the state, see the specific criminal titles. As, for instance, as to fine upon conviction of assault and battery, see the title ASSAULT AND BATTERY, vol. 1, p. 736. As to fine upon conviction of involuntary manslaughter, see the title HOMICIDE.

II. Costs in Criminal Cases.

A. NATURE AND PURPOSE.

Nature.—"While costs in civil cases are not penal, in criminal cases they partake of the nature of a fine. Code, ch. 161, § 11." *Charleston v. Beller*, 46 W. Va. 44, 30 S. E. 152. See the title COSTS, vol. 3, p. 604.

In Virginia the costs are a part of the fine. *Com. v. Fields*, 33 Gratt. 291; *Com. v. Webster*, 8 Gratt. 702. See also, *Quinling v. Com.*, 2 Va. Cas. 494. See ante, "On Capias Pro Fine," I, C, 6, d.

"The costs are necessary incident to the fine, and are as much a part of the judgment of the court, as the fine." *Com. v. Webster*, 8 Gratt. 702; *Com. v. Fields*, 33 Gratt. 291. But see *Pitman v. Com.*, 2 Rob. 800, where it is said: "Costs and charges of prosecution are never regarded as a part of the penalty or punishment for the offense." And *Anglea v. Com.*, 10 Gratt. 696, holding: Payment of the costs of the prosecution can not be regarded as a "pain, penalty or forfeiture." The term "pain" imports some bodily suffering or corporal infliction; while the terms "penalty" and "forfeiture" are used to signify an involuntary transfer of a sum of money or property, imposed by way of punishment for the commission of an offense. The court said: "The payment of the costs of the prosecution is no part of the punishment prescribed by law for the commission of felony. * * * Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense."

Purpose.—The payment of the costs of the prosecution stands on a different footing from a pecuniary fine that may be imposed. The latter, when exacted is not by way of compensation to the commonwealth for a loss or injury done by the perpetration of a criminal act. But with regard to costs it is different. They are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws. It is money paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth. *Anglea v. Com.*, 10 Gratt. 696.

Incident to Conviction.—The right to enforce payment of costs is a mere incident to the conviction, "and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it. And it can make no substantial difference whether the money is going directly to the witnesses and others who are entitled to be paid for their services in the prosecution, or the commonwealth having paid them, stands by substitution in their place. Indeed where a party having a claim that may be included in the execution, fails to present it for the purpose in due time, it shall be disallowed." *Anglea v. Com.*, 10 Gratt. 696. See also, *Abrahams v. Com.*, 1 Rob. 675; *Com. v. Webster*, 8 Gratt. 702; *Com. v. Fields*, 33 Gratt. 291.

B. INTERPRETATION OF LAWS RELATING TO COSTS.

It is expressly provided by statute, that the laws of costs shall not be interpreted as penal laws. They are to be construed as remedial statutes and liberally and beneficially expounded for

the sake of the remedy which they administer. *Anglea v. Com.*, 10 Gratt. 696; *Va. Code*, 1904, § 3547; *West Va. Code*, 1899, ch. 138, § 10.

C. POWER OF LEGISLATURE AS TO LAW OF COSTS.

"The law of costs may at any time be changed and modified." They may be increased or diminished at the will and pleasure of the legislature, and apply to all prosecutions, whether they be for offenses committed before or after the passage of the act. *Pitman v. Com.*, 3 Rob. 800.

D. RIGHT TO AND LIABILITY FOR COSTS.

1. Liability of State or Municipalities.

See the title COSTS, vol. 3, p. 626.

2. County.

Justice's Fees in Felony Cases.—Under § 20, ch. 137, *W. Va. Code*, justices' fees in felony cases must be audited and paid by the county court or tribunal in lieu thereof, as other claims against the county. *Gillespy v. Board of Com'rs*, 48 *W. Va.* 269, 37 *S. E.* 543.

3. Informer or Prosecutor.

See the title COSTS, vol. 3, p. 626. See also, the title INFORMERS.

A voluntary informer ought to be made a prosecutor, and liable for the costs. *Wortham v. Com.*, 5 *Rand.* 669; *Com. v. Dove*, 2 *Va. Cas.* 29. See also, *Baker v. Com.*, 2 *Va. Cas.* 353; *Gilliam v. Com.*, 4 *Leigh* 688; *Com. v. Hill*, 9 *Leigh* 601; *Com. v. St. Clair*, 1 *Gratt.* 556; *United States v. Mundel*, 6 *Call* 245; *Tennant v. Brookover*, 12 *W. Va.* 337; *State v. Irwin*, 30 *W. Va.* 404, 4 *S. E.* 413; *Swisher v. Maloe*, 31 *W. Va.* 442, 7 *S. E.* 439; *Barbour County Court v. O'Neal*, 42 *W. Va.* 295, 26 *S. E.* 182.

Necessity for Name of Prosecutor at Foot of Indictment.—"The defendant was presented at the superior court of Rockingham, for retailing spirituous liquors, etc., 'on the information of Philip Stultz.' Having failed to show cause, an information was regularly filed against him, describing the of-

fense as in the last case, but committed on the 20th of January. At the foot of the information, are these words: "This information is filed by the order of court, on the presentment of the grand jury. *Briscoe G. Baldwin*, attorney for the commonwealth." An issue being made up, the cause was continued at the costs of the prosecutor, till the next term, and on the motion of the defendant, it was ordered, that this prosecution be dismissed, unless *Philip Stultz*, who is named as a prosecutor, give sufficient security with the clerk of this court, within sixty days from this time, for the payment of all such costs as may be awarded the said defendant. That security was given according to the rule. On the trial, the jury found for the defendant. It was then ruled, that *Philip Stultz*, the alleged prosecutor, show cause at the next term, why a judgment for the costs should not be rendered against him." At the next term, the court adjourned to the general court the following matter of law: "Whether, from the proceedings in this case, *Philip Stultz* is the prosecutor, and liable to pay the costs of the defendant, although he is not named at the foot of the information." It was held, that from the proceedings, he should be deemed the prosecutor, and liable to pay the costs of the defendant, notwithstanding he is not named at the foot of the information, it appearing sufficiently by the presentment, and other proceedings in the cause, that he was the person who instituted the prosecution." *Com. v. Dove*, 2 Va. Cas. 29. But see *United States v. Mundel*, 6 Call 245.

Congress has dictated that: "The informer, if the prosecution fails, shall pay the costs, without prescribing that his name shall be written at the foot of the indictment. Act May, 1792, ch. 36, § 5." *United States v. Mundel*, 6 Call 245.

Parol Evidence That Information Involuntary.—After verdict, the prose-

cutor can not be allowed to show, by parol evidence, that he was called on by the grand jury, and did not voluntarily give the information. *Com. v. Dove*, 2 Va. Cas. 29. See also, the title **PAROL EVIDENCE**.

Effect as to Competency as Witness.

—And the prosecutor in an information for assault and battery, who is liable for the costs, is a competent witness for the commonwealth. *Baker v. Com.*, 2 Va. Cas. 353.

On an indictment for an assault and battery on the voluntary information of the person assaulted, the informer and prosecutor, being the only witness for the prosecution, is a competent witness, though liable for costs in case defendant is acquitted. *Gilliam v. Com.*, 4 Leigh 688. See also, the title **WITNESSES**.

4. Defendant.

In General.—"In all convictions for misdemeanors, with us, judgment is uniformly given that the commonwealth recover her costs; and even in cases of felony, though no formal judgment is given for them, yet the statute provides that the prisoner shall pay them, if his estate is able to do so. Tate's Dig., 2d Ed., p. 269, § 44; 1 Rev. Code, ch. 169, § 31, p. 608." *Abrahams v. Com.*, 1 Rob. 675. See also, *Anglea v. Com.*, 10 Gratt. 696.

When Acquitted of Felony but Convicted of Misdemeanor.—Where defendants are found not guilty of the felony charged in the indictment, although convicted of a misdemeanor, they ought not to be made to pay the costs of the prosecution. *Hardy v. Com.*, 17 Gratt. 592.

Joint Defendant.—See the titles **COMMONWEALTH'S ATTORNEY**, vol. 3, p. 33; **COSTS**, vol. 3, p. 630.

5. In Particular Proceedings.

See the title **COSTS**, vol. 3, pp. 626, 627.

6. Particular Items.

See the title **COSTS**, vol. 3, p. 627.

Fee of Attorney General.—See the

titles ATTORNEY GENERAL, vol. 2, p. 173; COSTS, vol. 3, p. 627.

Fee of Clerk, Attorney or Sheriff.—See the title COSTS, vol. 3, pp. 627, 630. As to fees of commonwealth attorney, see also, the title COMMONWEALTH ATTORNEY, vol. 3, p. 33.

Justices' Fees.

In Felony Cases.—See ante, "County," II, D, 2.

E. SECURITY.

See the title COSTS, vol. 3, p. 628.

F. CORRECTION OF ERROR IN TAXATION.

Erroneous taxation of costs may be corrected on motion. See *Thon v. Com.*, 77 Va. 289.

G. REVIEW.

See the title COSTS, vol. 3, p. 628.

H. EFFECT OF PARDON.

See the title COSTS, vol. 3, p. 628. See also, the title PARDON.

I. REMEDY TO PREVENT ENFORCEMENT.

See the title COSTS, vol. 3, p. 629.

J. COLLECTION, PAYMENT AND DISPOSITION.

See the title COSTS, vol. 3, p. 630. See ante, "Fieri Facias," I, C, 4, a.

Disposition.—By the sixteenth section of chapter 181 of the Virginia Code of 1873, it is provided that in the cases of the commonwealth "what is so taxed for fees of, or allowance to any person, shall be paid to him by the sheriff or officer who may receive such costs, unless such person shall previously have received payment thereof, in which case the same shall be paid into the treasury. *Thon v. Com.*, 77 Va. 289.

K. OFFENSES UPON CONVICTION OF WHICH COSTS AWARDED.

As to costs allowed upon termination of trial for particular criminal offenses, see the particular criminal titles, as for instance, as to costs upon conviction of assault and battery, see the title ASSAULT AND BATTERY, vol. 1, p. 736.

Fines and Penalties.

See the titles FINES AND COSTS IN CRIMINAL CASES, ante, p. 40; PENALTIES AND FORFEITURES.

Firearms.

See the title WEAPONS.

FIRE BOSS.—See *Graham v. Newburg Orrel Coal, etc., Co.*, 38 W. Va. 273, 18 S. E. 584.

Fire Companies.

See the title MUNICIPAL CORPORATIONS.

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See the title MUNICIPAL CORPORATIONS.

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CROSS REFERENCES.

See the titles ACCIDENT INSURANCE, vol. 1, p. 71; AGENCY, vol. 1, p. 245; CONTRACTS, vol. 3, p. 307; CORPORATIONS, vol. 3, p. 510; INSURANCE; LIFE INSURANCE; MARINE INSURANCE; MUTUAL INSURANCE; RESCISSION, CANCELLATION AND REFORMATION; TAXATION; TORNADO INSURANCE; VENUE.

I. Scope of Title.

In this title it is intended to set out so far as possible only those points in the decisions of the Virginia and West Virginia reports relating to matters of fire insurance. For the general principles of insurance law common to all kinds of insurance, such as the incorporation, regulation, rights, duties and liabilities of insurance companies, insurance agents and brokers, the requisites, interpretation and construction of the contract or policy, matters of estoppel, etc., see the title INSURANCE.

II. Definition.

"Fire insurance is a contract whereby the insurer undertakes, for a stipulated consideration, to indemnify the assured against all losses, to an extent not exceeding the amount set forth in the contract, in his houses, buildings, furniture, ships in port, or merchan-

dise, by means of accidental fire happening within a specified period." 3 Min. Inst., pt. 2 (2d. Ed.), 1168.

III. The Contract or Policy.

A. NATURE AND VALIDITY.

A policy of insurance against fire, is a contract of indemnity against loss by fire. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

As to the nature and validity of contracts of insurance generally, see the title INSURANCE.

B. TERMINOLOGY.

The policy is the instrument evidencing the contract. 3 Min. Inst. (2d. Ed.), pt. 2, 1168.

An open or floating policy is one intended to cover to the amount specified in the policy any goods of the character and description specified therein which

from time to time during the continuance of the policy may be contained in a specified place. As, for instance, in a certain warehouse under the control of the manager. *Morotock Ins. Co. v. Cheek*, 93 Va. 8, 24 S. E. 464.

The premium is the consideration paid to the insurer for his contract. 3 Min. Inst. (2d Ed.), pt. 2, 1168. See the title **INSURANCE**.

C. REQUISITES OF VALID CONTRACT.

1. Parties.

Generally, as to the necessity for competent parties, the insurer and the insured, see the titles **CONTRACTS**, vol. 3, p. 307; **INSURANCE**.

As to what persons have such an insurable interest as will entitle them to enter into a contract of insurance, see post, "Persons Held to Have Insurable Interest," III, C, 2, b, (3).

Agents.—Whenever an insurable interest exists in an agent, he may, as a general rule, insure for the entire value and recover the same for the benefit of the owners, over and above his own interest, whenever the assurance was effected for that purpose, though the agent was not responsible to the owners, and they were not aware of any insurance for their benefit. Policies in such cases may be issued "for the benefit of whom it may concern," and then any person, who has an insurable interest therein at the time of the loss, and whose interest was intended to be covered by the policy, may recover thereon. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

2. Insurable Interest.

a. Necessity.

In General.—It is essential that the insured have an insurable interest in the property. *Colby v. Parkersburg Ins. Co.*, 37 W. Va. 789, 17 S. E. 303; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Lucas v. Insurance Co.*, 23 W. Va. 258; *Tyree*

v. Virginia Ins. Co., 55 W. Va. 63, 46 S. E. 706.

Object of Requirement.—The main object of the law in requiring the insured to have what is called an insurable interest in the property insured, is to discourage and prevent parties having no control or management of property, and no sort of interest in its preservation from fire, but mere strangers to the property, obtaining policies on such property against its destruction by fire. Such policies would amount to nothing but wagers, whether the property would be destroyed in a specified time. And public policy, rather than justice to the insurance company, requires that the law should pronounce, as it does, such policies void. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Lucas v. Insurance Co.*, 23 W. Va. 258.

"When there is no interest at all to be protected, a policy will be invalid, as counter to the spirit and purpose of the contract, as well as against public policy." "When the insured has nothing to lose, but everything to gain, by the event insured against, it would be dangerous and demoralizing to subject the insured to so great a temptation to destroy the property or the life upon which the insurance is effected." *May on Ins.*, §§ 74, 75." *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

Must Exist Both When Policy Issued and Loss Occurs.—The interest in the property insured must be existing as a general rule, both when the policy is issued, and when the loss occurred. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

As to declaration of insurable interest, see post, "Requisites and Sufficiency," X, F, 1, c.

b. What Constitutes.

(1) In General.

"Any person who has any interest in the property, legal or equitable, or who stands in such a relation thereto that

its destruction would entail pecuniary loss upon him, has an insurable interest, to the extent of his interest therein, or of the loss to which he is subjected by the casualty." *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

"The assured has in the property insured, an insurable interest, whenever he holds such a relation to it, that its destruction by fire would involve him in pecuniary loss, or would involve others in pecuniary loss, for whom he acts, or whom he represents." *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368, quoted in *Lucas v. Insurance Co.*, 23 W. Va. 258.

It has been said that any interest, however slight, may be insured. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

An insurable interest arises from some liability which is the legal result of obligations assumed. *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777.

(2) Property in Subject Insured Unnecessary.

In General.—In *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368, it is held, that "It would be a great error to assume that by an insurable interest is meant property in the subject insured."

Possession or Care of Property Sufficient.—To give a party an insurable interest in property it is not necessary that he should have any pecuniary interest therein, or that he should be even responsible for its safekeeping. If he has the care or possession of the property, he may insure in his own name for the benefit of others, the owners, and the insurance will inure to their benefit upon their subsequent assent to the insurance, even when this assent is after the loss has occurred. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

(3) Persons Held to Have Insurable Interest.

An administrator of an insolvent es-

tate has an insurable interest in the property of the estate. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

"If the personal estate of a decedent be insufficient to pay his debts, the administrator of such decedent has an insurable interest in the buildings, which belonged to his decedent, for our statute in such case authorizes him as administrator to bring a suit in chancery to have such buildings sold to pay the debts of the decedent." *Lucas v. Insurance Co.*, 23 W. Va. 258, quoting *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

The charterer of a ship has an insurable interest in such ship. *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777.

A common carrier has an insurable interest in goods carried by him, which he may insure to their full value without regard to his liability to the owner of the goods. *Lucas v. Insurance Co.*, 23 W. Va. 258; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

A commission merchant, in the habit of making advances on consignment, has an insurable interest in the consigned property to the extent of his advances. *Fire, etc., Ins. Co. of Wheeling v. Morrison*, 11 Leigh 354, 36 Am. Dec. 385.

The grantee in a deed of trust has an insurable interest in the property covered by the deed. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

Interest of Husband in Wife's Property.—A husband living with his wife in a house which is on her separate estate land has no insurable interest therein. *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

"The question whether the husband has insurable interest in the wife's property must depend, in great measure, upon the statutes of the several states by which the rights of a husband in the wife's property are governed. If the loss of the property will deprive

him of its possession, enjoyment or profits, or any certain benefits growing out of it, or of a security or lien therein, it would seem that he has an insurable interest in such property. But, on the other side, if the wife's management of her property is not limited; if she may control absolutely its income; if she may lease it without his consent, and her lessee may expel him from possession; if during her lifetime he has no interest, no inchoate rights therein, nor even a right of occupancy, and after her decease his only rights would be acquired by descent, and not inchoate which would be perfected thereby, he would, on general principles, seem to have no such pecuniary interest in the preservation of her property as would constitute an insurable interest.' *Joyce on Ins.*, § 1049." *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

"The able jurist, Judge Cooley, said that if the husband could insure in his own name his wife's property, 'it is manifest that any person may obtain insurance upon property without any right in it whatever; he has but to disclose the facts, and the policy, though only a wager policy, will be as legal as any other. But such a doctrine is at war with the fundamental principles of insurance, which require that a person shall have an insurable interest before he can insure; a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge. The policy of the law does not admit of such insurance, however willing the parties may be to enter into it. The doctrine of waiver has obviously nothing to do with such a case. The agent can not do for the company by waiver what it is powerless by express contract to do for itself; he can not by waiver invest the insured with an interest he does not own.'" *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

A landlord has an insurable interest

in the furniture of his tenant on the leased premises where there is rent due and unpaid by the tenant. *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209.

Merchant with Whom Property Left.

—Where property is left with a merchant for any purpose connected with his business, the mere possession of the property by him, and its being in his charge would give him an insurable interest in such property. *Lucas v. Insurance Co.*, 23 W. Va. 258.

Mortgagor.—A mortgagor may insure for the benefit of the mortgagee. Where it is provided in the covenants of the mortgage that the mortgagor shall insure for the benefit of the mortgagee, and the mortgagor takes out a policy in accordance with such agreement, the mortgagee is entitled to the proceeds in case of loss. *Colby v. Parkersburg Ins. Co.*, 37 W. Va. 789, 17 S. E. 303.

An occupant in lawful possession of property, with some duty to perform regarding it, or in some measure responsible for its safety, has an insurable interest therein. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777.

Remaindermen or Reversioners.—A remainderman has an insurable interest in the property to which he is entitled in remainder. *Haxall v. Shippen*, 10 Leigh 536, 34 Am. Dec. 745.

It seems that a reversioner has such interest also. *Brough v. Higgins*, 2 Gratt. 408.

Tenants for Life.—A tenant for life may insure the premises in his own name and for his own benefit. *Brough v. Higgins*, 2 Gratt. 408, 410.

The tenant for life and the remainderman or reversioner may take out insurance jointly, and, in case of loss, the insurance money will belong to them in proportion to their interest. *Haxall v. Shippen*, 10 Leigh 536, 561, 34 Am. Dec. 745. See also, *Brough v. Higgins*, 2 Gratt. 408, 410.

Vendee.—A vendee of property, even where the parties have agreed to rescind the contract of sale, has an insurable interest, if he is still in possession and the agreement is not consummated. *McCutcheon v. Ingraham*, 32 W. Va. 378, 9 S. E. 260.

Where the vendor retains legal title to property until the conditions of the sale are performed, he has an insurable interest although he has given up possession to the vendee. *Fire, etc., Ins. Co. of Wheeling v. Morrison*, 11 Leigh 354, 36 Am. Dec. 385.

The vendor in a conditional sale is not divested of his insurable interest in the premises until the conditions are performed and the sale becomes absolute. *McCutcheon v. Ingraham*, 32 W. Va. 378, 9 S. E. 260.

Where the vendee fails to perform the conditions, the interest of the owner remains unchanged. *Fire, etc., Ins. Co. of Wheeling v. Morrison*, 11 Leigh 354, 36 Am. Dec. 385.

A house is insured against fire, by a policy containing a provision that it is to have no effect if assigned, unless the assignment be allowed by the insurance company. The owner and assured makes a written contract, by which he agrees to sell to A. the house with the lot on which it stands, and A. agrees to procure and assign to the vendor the bond of a third person for the purchase money, and to execute a mortgage on the property for securing the payment; the contract to be fulfilled on A.'s part within the month. A. fails to perform his contract within the month; and five days afterwards, and while it is still unperformed, the house is consumed by fire. The contract is subsequently carried into effect by the parties. In an action by the vendor against the insurance company to recover the value of the house, the parties to the suit, in addition to the foregoing facts, agree, that both before and after the execution of the written contract for the sale of the premises, it was agreed by parol between the

vendor and vendee, that the former should assign the policy of assurance to the latter; reserving, however, the question of law, whether the said parol agreement can be admitted, either as a distinct contract, or for the purpose of affecting the terms of the written contract of sale. Held, the plaintiff is entitled to recover, notwithstanding the contract of sale, and the subsequent performance of it: 1. Because the purchaser, if sued in equity for specific execution, might have set up the parol agreement to assign the policy, and, thereby entitle himself to an abatement for the loss of the house; 2. Because, by the stipulation for a mortgage, the plaintiff retained an insurable interest in the premises, which gave him an immediate right of action against the insurance company upon the happening of the loss. *Fire, etc., Ins. Co. of Wheeling v. Morrison*, 11 Leigh 354, 36 Am. Dec. 385.

One Advancing Money and to Be Paid from Proceeds of Property Purchased.—Where A advances money to B^o in any venture, and by agreement is to be paid out of the proceeds of the property purchased, he has an insurable interest in such property to the extent of his advances. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 813, 11 S. E. 120.

The managing partner of a dissolved partnership has authority to insure the firm property if done in good faith, and having such authority he may charge the firm assets to refund premiums paid for such insurance by a third party at his request. The premiums so paid are part of the expenses incurred in managing the property and as such entitled to be paid as preferred claims against the firm assets, and are not affected by the statute of limitations until a settlement of the partnership accounts has been made. *Conrad v. Buck*, 21 W. Va. 396.

Warehousemen, Wharfingers, etc.—A warehouseman has an insurable interest in the goods in his keeping,

though he is liable only for his own negligence to the owner. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Lucas v. Insurance Co.*, 23 W. Va. 258; *Boyd v. McKee*, 99 Va. 72, 37 S. E. 810.

c. Effect of Extinguishment of Interest.

See post, "Change in Title or Interest—Alienation," III, H, 2, b, (3).

3. Agreement.

As to the necessity for agreement as in the case of other contracts, see the titles **CONTRACTS**, vol. 3, p. 307; **INSURANCE**.

4. Form of Contract.

Generally, as to the form of contracts of insurance, the validity of parol contracts, etc., see the title **INSURANCE**.

A contract of fire insurance need not be in writing; an oral contract is valid. *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854.

5. Consideration.

As to the necessity for consideration in contracts of insurance generally, see the title **INSURANCE**.

6. Delivery of Policy and Payment of Premium.

a. Necessity.

Generally, as to the necessity for payment of premium and delivery of the policy, see the title **INSURANCE**.

Prepayment as Requisite of Liability.—Policies of fire insurance may and often do contain a provision to the effect that the company will not be liable by virtue of such policy until the premium therefor be actually paid, and such provision is binding unless waived by the act of the company. See *Eagan v. Ætna, etc., Ins. Co.*, 10 W. Va. 583; *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

As to waiver of provision avoiding policy for nonpayment of premium,

see post, "Delivery of Policy without Prepayment of Premium," III, H, 8, c, (2), (b).

Sufficiency of Payment When Policy Ready for Delivery.—In *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, it was held, that unless in the executory agreement between the agent and the insured, prepayment is made a condition precedent, the premium need not be paid until the policy agreed upon is ready to be delivered.

Power of Agent to Give Credit.—An agent of a fire insurance company authorized to negotiate risks, may give credit in the executory agreement between himself and the insured, for the premium. *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854; *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277, 18 S. E. 195.

"Insurance can be sold on credit as well as anything else. The agent can give credit. *Eagan v. Ætna, etc., Ins. Co.*, 10 W. Va. 583, 588 * * * Prepayment is not necessary to the conclusion of an oral contract. *Wood, Ins., §§ 22A, 43B.*" *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854.

b. What Constitutes Payment.

Offset of Agent's Indebtedness to Applicant.—The terms of the insurance company having been agreed upon between the applicant for insurance and the agent of the insurance company, the applicant tenders to the agent the money for the premium; but the agent living in the house, and being indebted to the applicant for rent, tells him he has in his hands money belonging to him for rent, and will credit him for that amount. This was a valid payment of the premium. *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732.

Where a company charges premiums personally to the agent, who gives credit to the insured, it amounts to payment. *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277, 18 S. E. 195.

c. Possession of Policy as Evidence of Payment.

The possession of a policy is sufficient evidence of the payment of the premium, on a demurrer to the evidence by the insurance company. *Fidelity, etc., Co. v. Chambers*, 93 Va. 138, 24 S. E. 896.

d. Enforcement of Issuance of Policy on Payment of Premium.

When the premium has been paid, a court of equity has jurisdiction to enforce specific performance and compel the insurer to issue the policy. Such remedy is as appropriate after as before the loss. *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732. See post, "Jurisdiction and Venue," X, A.

D. EVIDENCE OF CONTRACT.

See post, "Evidence," X, G, and cross references there found.

E. CONSTRUCTION AND INTERPRETATION.

1. General Rule.

The principles of interpretation applicable to contracts of fire insurance are the same as those which obtain in the case of other contracts. The same rule of construction which applies to other instruments applies also to these. They are to be construed according to the sense and meaning of the terms used, and if these are clear and unambiguous, parol evidence will not be permitted to contradict, vary or explain them. *Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209. See the titles CONTRACTS, vol. 3, p. 316; INSURANCE; INTERPRETATION AND CONSTRUCTION; PAROL EVIDENCE.

As to construction of provisions as to avoidance and forfeiture, see post, "Application of General Rules of Construction," III, H, 1, a, (1).

2. Application as Part of Contract.

The application to an insurance company for insurance upon a building,

which is granted and a policy issued based upon the application, is a part of the policy. *Southern Mut. Ins. Co. v. Yates*, 28 Gratt. 585.

Where a policy of insurance is issued without any written application on the part of the assured so far as the facts appear, the assured, in offering in evidence the policy, is not required to read with it, as part thereof, a written application produced by the insurer, without proof that it was signed by the assured or his agent. *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998.

3. Property Included.

Policy Covering Property "Held in Trust."—A policy taken out by a merchant against loss by fire describes the property insured as "his stock of pianos, organs and other musical instruments, sheet music and such other goods as are usually kept for sale in a music store, his own, or held by him in trust or on commission or sold but not delivered, contained in a certain storeroom described," will cover a piano left at the storeroom in charge of the insured for any purpose connected with his business, as, to have it forwarded to a northern city to be repaired. The entire value of such a piano, if destroyed by fire while at such store, if it does not exceed the sum insured, may be recovered by the assured; and the merchant after satisfying his own charges for the keeping and other services in relation to such piano must hold the remainder as trustee for the owner of the piano. The words in such a policy "held in trust" mean "property intrusted to the insured as a merchant for its keeping;" they do not mean property held by the insured as a trustee in the technical sense of that word. Such piano so left with the merchant for any purpose connected with his business would be covered by such a policy, though the merchant had received it merely for accommodation and did not intend to

make charge for keeping it or for any labor or service in connection with it. The mere possession of the property by the merchant and its being in his charge would give him an insurable interest in such piano; and the policy might be sued on by him, if such piano was destroyed by fire, though when recovered he might hold the full amount of the recovery only as trustee for the owner of the piano. A provision in such a policy that "goods held on storage must be separately and specifically insured" would not prevent the recovery on such policy of the value of such piano so "held in trust" by the assured though such piano was not separately or specifically mentioned in such policy. *Lucas v. Insurance Co.*, 23 W. Va. 258.

Policy on Property "Contained in" a Certain Building.—Where the policy was on vehicles and harness, plaintiff's own or sold, until removed, "contained in" a building occupied as livery and sale stables, and those destroyed were, at the time of fire, at a repair shop several hundred yards off, it was held, that the words "contained in" designate the usual place of deposit of the vehicles when not in use, or being repaired, and cover the destroyed property. *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962, 9 S. E. 694. See also, "Contain," 7 Am. & Eng. Ency. Law (2d Ed.), 23.

Open or Floating Policy.—A policy of insurance against fire, issued to the manager of a warehouse, for account of whom it may concern, on 150 barrels of flour while contained in said warehouse, is an open or floating policy, and covers, to the amount named in the policy, any goods of the character and description specified therein, which, from time to time during the continuance of the policy, may be in such warehouse under the control of the manager. In such case the policy enures to the benefit of the owner of the property at the time of

the loss, although he had no interest in it when the policy was issued; and extrinsic evidence is admissible to show who was in fact concerned. *Morotock Ins. Co. v. Cheek*, 93 Va. 8, 24 S. E. 464.

F. ASSIGNMENT OR TRANSFER OF POLICY.

Assignability.—Generally, as to the assignment or transfer of policies of insurance, see the titles ASSIGNMENTS, vol. 1, p. 752; INSURANCE.

Manner of Assignment.—As in the case of other choses in action, no formal words are necessary to make an assignment of a policy of fire insurance; anything showing an intent to assign on the one side, and an intent to receive on the other will operate as an assignment. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

No formal words are necessary to constitute an assignment after loss. An oral assignment is sufficient. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584. See the titles ASSIGNMENTS, vol. 1, p. 759; INSURANCE.

As to the effect of assignment or transfer of policies of fire insurance in violation of stipulations in the policy, as avoiding the policy, see post, "Avoidance of Policy for Assignment Thereof," III, H, 4.

G. CANCELLATION, RESCISSION OR REFORMATION.

1. In General.

Generally, as to cancellation, rescission or reformation of insurance policies, see the titles INSURANCE; RESCISSION, CANCELLATION AND REFORMATION.

2. Cancellation by Insurer.

Power to Cancel on Notice.—Policies of fire insurance like other insurance policies may and frequently do contain a provision reserving to the insurer the right to cancel on giving a prescribed

notice as, for instance, five days. *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277, 18 S. E. 195; *Miller v. Fireman's Ins. Co.*, 54 W. Va. 344, 46 S. E. 181.

A policy may, however, be canceled by consent without notice. *Miller v. Fireman's Ins. Co.*, 54 W. Va. 344, 46 S. E. 181.

To Whom Notice of Cancellation Is Given.—Where a provision in the policy of fire insurance required notice of cancellation by the company to be given to insured, notice of such cancellation given to the broker who obtained the policy is insufficient to discharge the liability of the insurer, and this notwithstanding the provision in the policy that the broker who had obtained the policy should be considered agent of the insured and not the company. The broker is agent of the insured only in procuring the policy and not to receive notice of cancellation. *Mutual Assurance Society v. Scottish Union, etc., Ins. Co.*, 84 Va. 116, 4 S. E. 178.

No custom as to giving notice of cancellation to the broker who obtained the policy, can avail to override an express stipulation in the policy that notice should be given to the insured. *Mutual Assurance Society v. Scottish Union, etc., Ins. Co.*, 84 Va. 116, 4 S. E. 178.

Cancellation for Nonpayment of Premium.—In *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277, 18 S. E. 195, it was held, that the policy having been delivered as a valid executed contract, the only way the company could terminate its liability thereon for nonpayment of the premium if the premium was not paid, was by exercising the reserved right to cancel it after "giving five days' notice of such cancellation."

Cancellation for Failure to Refund Premium Advanced by Agent.—Insurance agents wrote a number of policies for assured in various companies, paid the premiums to the companies, and charged them up to the assured. The

latter was constantly in default, but made payments from time to time simply on insurance account without special application to any particular policies. Being in default over \$100, the agents made repeated and urgent applications to him to pay, but he took no notice of their requests. Finally, they threatened to cancel the policies if the amount was not paid to them by a given day. The threat was ignored, and some time thereafter the agents notified the assured of the cancellation of seven of his policies, and that they had applied part of the money paid by him to premiums to date on four of the policies on which he had paid nothing, and the \$6.80 of unearned premiums was due him upon surrender of the policies, which he was requested to surrender at once and get his money. He received the notice of cancellation, and reinsured some of the property in other companies, but did not surrender his policies, or demur to the cancellation, or take any further notice of the cancellation. Six months afterwards the building covered by one of the policies was burned, and this action was brought on the policy to recover for the loss. Held, notwithstanding agents had advanced the premiums for the assured, they had the right to apply the amount paid by him as they did, and to have the policies canceled for failure to pay the premiums thereon, and even if it was necessary that the \$6.80 should have been paid to the assured in money before the cancellation could be effective, the whole of this was consumed by the currency of the policy in suit long before the date of the fire, and the assured is not entitled to recover. *Hamburg-Bremen Fire Ins. Co. v. Browning*, 102 Va. 890, 48 S. E. 2.

Conditional Surrender to Agent as Cancellation.—An insurance agent directed by his company to take up for cancellation a policy of insurance has no power to take it up with a condition that he would get for the assured

a policy in another company, and the surrender of the policy to such agent for such cancellation on such condition is an absolute cancellation. *Miller v. Fireman's Ins. Co.*, 54 W. Va. 344, 46 S. E. 181.

A fire insurance policy gives right to the company to cancel it on five days' notice. The company instructs its local agent to take up the policy for cancellation, and the agent informs the assured that the company elected to cancel the policy, and stated to him that he would procure him a policy in another company for which he was agent. The assured with this understanding delivered up the policy to the agent for cancellation, and the agent delivered it to the company, and it was canceled by it. Held, that the policy was thereby canceled. *Miller v. Fireman's Ins. Co.*, 54 W. Va. 344, 46 S. E. 181.

3. Reformation.

"While a court of equity has jurisdiction to reform and enforce contracts of insurance on the ground of fraud or mistake, relief will not be granted in any case except where there is a plain mistake, clearly made out by satisfactory and unquestionable proof, or the fraud relied on is established by the same degree of proof." *Warner Moore, etc., Co. v. Western Assurance Co.*, 103 Va. 391, 49 S. E. 499.

A contract in writing is presumed to be the embodiment of an antecedent verbal agreement, and, upon clear and full proof, that the person who undertook the preparation of it has, by mistake or fraud, written the contract different from what it was as made by the parties, it may be reformed in equity, and where such departure occurs in a policy of insurance prepared by an agent of the company, it raises an equitable estoppel against the company which may be effectually asserted by the insured in a court of law, unless he had notice of want of authority in the agent to waive the conditions at all or except in a specific manner. *Med-*

ley v. German, etc., Ins. Co., 55 W. Va. 342, 47 S. E. 101.

A court of equity will reform and enforce a contract of insurance, after loss, in case of a plain mistake, clearly made out by satisfactory and unquestionable proof. In the case in judgment, a mutual mistake was plainly made in describing the location of the property insured, and it is established by the requisite proof. *Moore v. Western Assur. Co.*, 103 Va. 391, 49 S. E. 499.

Assured asked company's agent to permit removal of insured property. Agent said there were so many endorsements on old policy it would be best to cancel it and take a new one for the return premium at pro rata rates. Company issued a new policy expiring at an earlier day, but it was not delivered to assured. The property was burned after expiration of the new, but before that of the old policy. Suit was brought in the circuit court to compel the company to issue to the complainant a policy of insurance pursuant to the contract theretofore made by the company with him, and to pay the loss thereon. The court below dismissed the bill with costs against the complainant. On appeal, it was held, that the dismissal was erroneous, and decree was entered for the appellant according to the prayer of his bill. *Hardin v. Alexandria Ins. Co.*, 90 Va. 413, 18 S. E. 911.

Failure to read a policy of insurance within a short time after its delivery is not such neglect or laches as will preclude the insured from having a reformation of it or deprive him of the benefit of a waiver by the company through its agent, unless some fact was known to him sufficient to put him on inquiry as to whether it had been correctly written or contained a limitation upon the powers of the agent. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101. See the title RE-SCISSION, CANCELLATION AND REFORMATION.

H. AVOIDANCE OR FORFEITURE FOR MISREPRESENTATION, FRAUD OF BREACH OF WARRANTY OF CONDITION.

1. General Rules.

a. Construction and Operation of Provisions as to Avoidance and Forfeiture.

(1) Application of General Rules of Construction.

Generally, as to the construction of provisions in contracts, see the titles CONTRACTS, vol. 3, pp. 316, 395; INSURANCE; INTERPRETATION AND CONSTRUCTION.

Construed against One for Whose Benefit Inserted.—The exceptions or provisos in a contract of fire insurance must be construed most strongly against those for whose benefit they are inserted. *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876.

In all cases of doubt, courts lean to that interpretation of representations which shuns a forfeiture of the policy of fire insurance. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575. See also, *Virginia Fire, etc., Ins. Co. v. Vaughn*, 88 Va. 832, 14 S. E. 754; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605; *Virginia Fire, etc., Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. 454; *Miller v. Insurance Co.*, 12 W. Va. 116; *Tucker v. Colonial Fire Ins. Co.*, (W. Va.), 51 S. E. 86.

In the interpretation of a policy of fire insurance in all cases it must be liberally construed in favor of the insured, so as not to defeat without necessity his claim to the indemnity, which, in making the insurance, it was his object to secure; and, when the words are without evidence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted. *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998.

"The rule that words are to be taken most strongly against the party using them, is more applicable to the conditions and provisos of policies of insurance than to almost any other instru-

ments." *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998, quoting *Chandler v. Ins. Co.*, 21 Min. 85.

"The instrument is wholly the work of the underwriter and is usually filled with a multitude and variety of stipulations seldom read by the assured when he accepts the policy, and if read, rarely if ever fully understood. Abounding in forfeitures and in provisions, generally harsh and difficult of performance, it should be strictly construed against the insurer and liberally in favor of the insured." *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

(2) As to Whom Operative.

"The authorities * * * hold that no matter to whom the loss may be made payable it can not be recovered by any one if, by the terms explicitly set forth in the policy, no right of action can accrue at all upon the violation of some specific condition, whose observance by the insured is made necessary to fix the insurers' liability." *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

b. Misrepresentation, Concealment, Fraud and Breach of Warranty.

(1) Necessity for Good Faith.

Generally, as to the necessity for good faith in contracts of insurance, see the title INSURANCE, and cross references there found.

"Nothing is better settled than that the assured must observe in dealing with the insurer the utmost good faith without which there can be no recovery." *Virginia Fire, etc., Ins. Co. v. Vaughn*, 88 Va. 832, 14 S. E. 754, citing *Moore v. Virginia Fire Ins. Co.*, 28 Gratt. 508.

"Good faith and fair dealing is of the very essence of the contract of insurance." *Home Ins. Co. v. Cohen*, 20 Gratt. 312.

(2) Definition and Nature of Representations and Warranties.

A representation in insurance law may be defined as "A collateral state-

ment, either by writing not inserted in the policy or by parol, of such facts or circumstances relative to the proposed adventure, as are necessary to be communicated to the underwriters to enable them to form a just estimate of the risks." Black L. Dict., Tit. Representation, citing 1 Marsh. Ins. 450.

"A representation is a statement incidental to the contract." *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

A **warranty** is a stipulation inserted in a writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. By a warranty the assured stipulates for the absolute truth of the statement made, which is in the nature of a condition precedent. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

"By a warranty, the insured stipulate for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled." *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

A warranty is an agreement in the nature of a condition precedent, and like that must be strictly complied with whether material or not. *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

Warranties are of two kinds, viz.:

(1) Affirmative, or warranties in præ-senti, as they are sometimes called, which affirm the existence of certain facts pertaining to the risk at the time of the insurance; and (2) continuing or promissory. *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

Affirmative warranties consist of representations in the policy of facts; promissory are those that require that something shall be, or shall not be, done after the policy takes effect.

Maupin v. Scottish Union Ins. Co., 53 W. Va. 557, 45 S. E. 1003; *Rosenthal v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

"Warranties, says Mr. May, are distinguished into two kinds: Affirmative, or those which allege the existence at the time of a particular fact, and avoid the contract if the allegation be untrue; and promissory, or those which require that something shall be done or omitted after the insurance takes effect, and during its continuance, and avoid the contract if thing to be done or omitted be not done or omitted according to the terms of the warranty. May on Insurance, § 157." *Virginia Fire, etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973.

"An express warranty," says May, "is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends." May Ins., § 156, quoted in *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

Rules as to Construing Warranty.—

The rule is that the court never construes a warranty as promissory and continuing, if any other reasonable construction can be given. And where the question was: "How long have you been merchandising, and who sleeps in the store?" and the answer was: "Four years; watchman on premises at night;" held, answer amounted to warranty that a watchman was on the premises at time of application; and not that he would be kept there in the future. *Virginia Fire, etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973. See also, *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

Whether a statement is a warranty or not depends upon the intention of the parties as does the nature and effect of the warranty, when there is one which is to be gathered from the language used and the subject matter to which it relates. *Virginia Fire, etc.,*

Ins. Co. v. Morgan, 90 Va. 290, 18 S. E. 191.

Parties are not held to have entered into warranties unless they clearly so intended. *Morotock Ins. Co. v. Fostoria*, etc., Co., 94 Va. 361, 26 S. E. 850; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

Statutory Provision as to Warranty.

—In Virginia, by act of assembly approved February 26th, 1900, it has been provided, that no answer to any interrogatories made by an applicant for a policy of insurance shall bar the right to recover upon any policy issued upon such application, by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was willfully false or fraudulently made or that it was material. Va. Code, 1904, § 3344a. *Prudential Fire Ins. Co. v. Alley (Va.)*, 51 S. E. 812. See the title INSURANCE.

(3) Representation or Warranty Must Be Act of Insured or His Agent.

Where a party makes application for a policy of insurance to the agent of the company, designating in said application the company from which he desires the policy, describing therein the property, and answering the usual questions as to ownership, liens, etc., and in his absence, and without his consent or knowledge, said application is so changed as to make it an application to another and different company, which issues the policy, varying in several respects from the application, which latter is sent by mail to the assured, although such party accepts the policy, he is not bound by the representations and answers contained in said application, and said policy will not be avoided if such representations and answers are not true. *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998. See also, *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

When an insurance agent, entrusted

with blank policies and authorized to fill up, countersign and deliver them, is correctly informed, by the person whose property he undertakes to insure, as to the state of the title and other facts material to and affecting the inception of the contract, so far as inquiry is made respecting them, and takes no written application for the insurance, and then issues a policy embodying, as warranties therein, facts different from those which were given to him by the insured, the company is estopped from defending a claim for loss under the policy on the ground of such false recitals, unless it is shown that the insured has prior or contemporaneous notice of want of authority in the agent to waive conditions. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

Generally, as to waiver by acceptance of risk without application, etc., see post, "Issuance of Policy without Application or Representations," III, H, 8, c, (2), (a).

(4) Effect of Misrepresentations.

General Rule.—A misrepresentation which is positive and of a fact actually material will avoid the policy. *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706; *Continental Ins. Co. v. Kasey*, 25 Gratt. 268; *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

"A representation may be made by express stipulation material, in the sense that inquiry into its materiality is thereby precluded, and the insured will be bound in such case, even though the fact be actually immaterial. The truth of the statements being generally made in such case the basis of the contract, it is sufficient to show they are actually untrue.' *Joyce on Ins.*, § 1912. In the same section we find it said: 'If a fire insurance policy is conditioned to be void "in case of any misrepresentation whatever," any misrepresentation, whether material or

not, will avoid.'" *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

Intention Immaterial.—In a case of insurance upon property, when the insurer is induced to enter into the contract through a misapprehension as to a material matter occasioned by the conduct or declarations of the assured, he is entitled to be released, whether the misrepresentation be produced by fraud or innocent mistakes. *Continental Ins. Co. v. Kasey*, 25 Gratt. 268. See also, *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

"If false and material to the risk, the policy is avoided, whether the misrepresentation be willful or made in good faith through a mistake." *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

"In cases where the misrepresentation is positive and of a fact actually material, it is not necessary to prove that the representation was fraudulently made; the materiality of the misrepresentation, and its falsity does away with the necessity of showing actual fraud." *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706, quoting *Joyce, etc., Ins.*, §§ 1858, 1897, 1894.

"The rule upon this subject is thus laid down in *Flanders on Insurance*, page 327. Any material misrepresentation therefore, or any failure to comply with the conditions of the insurance on the part of the assured, will avoid the policy, such as misrepresentation of the construction, nature, character, value and situation of the premises or goods to be insured, or any other misrepresentation that induces the insurer to take the risk which he otherwise might have rejected, or to take it at a less premium. In *Carpenter v. American Insurance Company*, 1 Story's R. 57, the applicant had represented that certain additions had been made to the property, and upon the faith of these representations the policy was issued. Mr. Justice Story in commenting upon this point said:

"1. It turns out that this representation is utterly untrue, whether by design or mistake is not material. No one can doubt the materiality of this representation, for it was the very point upon which the policy was undertaken. This makes an end of the case; for a false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance undertaken on the faith thereof, whether the false representation was by mistake or design. See 1 Phillips on Insurance, § 337. Authorities to the same effect might be multiplied almost without number. They all affirm the proposition, that when the insurer is induced to enter into the contract through a misapprehension as to a material matter occasioned by the conduct or declarations of the opposite party, he is entitled to be relieved, whether the misapprehension be produced by fraud or innocent mistake; the result is the same in either case. On the other hand, if the misrepresentation was in no wise material to the risk, and could have had no effect to induce the insurer more readily to assume the risk, or to diminish the premium, then it is clear the policy will not be avoided upon the ground of such misrepresentation. Whether, indeed, the misrepresentation has affected the premium, or induced a policy, which otherwise would have been declined, are questions to be determined by the jury. *Columbia Ins. Comp. v. Lawrence*, 2 Peters R. 25." *Continental Ins. Co. v. Kasey*, 25 Gratt. 268.

Technical and Immaterial Misrepresentation.—Any material misrepresentation will avoid a policy, but a misrepresentation simply technical, unintentional and immaterial will not have such effect. *Haden v. Farmers', etc., Fire Association*, 80 Va. 683.

Verbal statements of the insured, not false, fraudulent, and material to the risk, do not vitiate the policy. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77.

(5) Effect of Falsity or Breach of Warranty.

In General.—A warranty in a policy of fire insurance must be strictly complied with whether material or not. *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

"One of the very objects of the warranty, is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction, no latitude, no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed." *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191, quoting *May on Ins.*, § 156.

If an affirmative warranty in an insurance policy is false, it avoids the contract of insurance, and if a promissory warranty therein contained is not complied with, it avoids the policy. *Maupin v. Scottish Union Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003; *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101; *Southern Mut. Ins. Co. v. Kloeber*, 31 Gratt. 739; *Rosenthal v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

As to what will constitute such falsity or breach of warranty as will avoid the policy, see post, "Application of Rules to Particular Matters Relating to Property Insured," III, H, 2.

(6) Effect of Fraud or False Swearing.

When, by the provisions of a policy, it shall be void in case of fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, false swearing, in order to defeat recovery, must be intentional and done for the purpose of defrauding the insurer. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

Fraud on the part of the insured in making the contract of insurance will render it void without any express pro-

vision to that effect in the policy, and even though there may be such a provision therein relating only to fraud or false swearing in connection with the preliminary proof. *Moore v. Virginia Fire, etc., Ins. Co.*, 28 Gratt. 508.

Fraud or false swearing as to one part of the subject insured by the policy is held to be forfeiture of the whole policy, and the insured can not recover for any part of his loss. *Moore v. Virginia Fire, etc., Ins. Co.*, 28 Gratt. 508; *Moore v. Fireman's Fund Ins. Co.*, 28 Gratt. 524. A material and fraudulent alteration of the invoices avoids the policy. *Virginia Fire, etc., Ins. Co. v. Vaughn*, 88 Va. 832, 14 S. E. 754.

As to fraud or false swearing in the proofs of loss, see post, "Effect of False Swearing or Fraud," VIII, G.

2. Application of Rules to Particular Matters Relating to Property Insured.**a. Description of Property.****Effect of Description as Warranty.**—

The expression in a policy, viz.: "A two story frame building standing on leased ground 20x50 feet, also one story frame, 12x16 feet, occupied as a hardware store and dwelling, situated in the town of Antwerp, Clarion County, Pa.," is merely a description of the subject insured, and not a description of the use it should be put to, and is no warranty, within itself that it should be so occupied during the risk. *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.

Effect of Misdescription of Property Based Both upon Examination by Agent and Representation of Assured.

—When an insurance company not relying upon the statements of the insured, sends its own agent to examine the property, and thereupon issues the policy upon the faith of his representations, the insured is not responsible for a misdescription of the property, however material, though inserted in the policy and constituting a warranty;

unless there was a withholding of information by the insured incompatible with good faith and fair dealing. *Continental Ins. Co. v. Kasey*, 25 Gratt. 26°.

When the agent of an insurance company makes an examination of property to be insured on behalf of the company, and inserts in the policy a misdescription, based as well upon that examination as upon the representations of the assured, then if the misdescription by the insured was not bona fide, or if its effect is to induce the company to issue a policy which it would otherwise have rejected, the company will not be responsible for the loss. But if the misdescription was bona fide and immaterial, the insured may recover; though, according to the policy, the description constitutes a warranty. *Continental Ins. Co. v. Kasey*, 25 Gratt. 268.

b. Title, Ownership or Possession of Property.

(1) Title or Interest of Insured—Incumbrances.

(a) In General.

Validity of Conditions as to Ownership.—A condition that if the insured is not the sole and unconditional owner of the property insured, the policy shall be void, is reasonable and valid, and a violation of it will prevent recovery. *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706; *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876.

"If the insured states the nature or extent of his interest, he must state it truly. If the nature of the insured's interest is such that it would influence the underwriter to charge a higher premium or not insure at all, it must be disclosed, for it is material to the risk.' 'In cases where the misrepresentation is positive, and of a fact actually material, it is not necessary to prove that the representation was fraudulently made; the materiality of the misrepresentation and its falsity does away with the necessity of show-

ing actual fraud.' *Joyce on Ins.*, §§ 1858, 1897, 1894." *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 703.

A false statement by an applicant for insurance to the agent that such applicant is sole and absolute owner of the house, the agent not knowing the contrary, avoids the policy. *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

"A false representation as to the interest of the assured in the property is regarded as material, and such as, if substantially false, avoids the policy.' *Wood on Ins.*, § 179. Chief Justice Marshall said: 'Insurances against fire are made in confidence that the assured will use all precautions to avoid the calamity insured against which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk and estimating the premium. So far as it may influence him in this respect, it ought to be communicated to him.' *Columbian Ins. Co. v. Lawrence*, 2 Peters 48." *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

Conditions as to Incumbrances.—Conditions in a policy of fire insurance against incumbrances are valid and in the absence of consent by the insurer, a violation of such condition will avoid the policy. *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876.

A provision avoiding the policy if the property be or become encumbered without consent of the company is valid, and such encumbrance, unknown to the company, avoids the policy. *Sulphur Mines Co. v. Phenix Ins. Co.*, 94 Va. 355, 26 S. E. 856.

If there be a warranty, or a representation, which amounts to warranty, that there are no incumbrances on the property insured, whether such warranty or representation be given in answer to a question or not, if it be untrue, the policy is void, even though the insured was not guilty of actual

fraud. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

Where the policy contains no such provision against encumbrances existing or future, neither an encumbrance at the time of the policy and undisclosed, where no inquiries were made as to encumbrances on the application, nor subsequent encumbrance without consent will affect the insurance. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

Insurer Not Charged with Knowledge of Land Records.—"As the insurer is entitled to rely on the statements of the applicant, the insurer will not be charged with knowledge of the land records where title might have been investigated. 1 Biddle on Ins., § 671." *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

(b) Interpretation and Construction of Conditions.

In General.—It has been held, that a condition in a fire insurance policy which avoids it if the interest of the insured in the property be other than "unconditional and sole ownership," does not refer to the legal title, but to the interest of the insured and is not a warranty against incumbrances. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998; *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024.

Life Estate with Undivided Interest in Remainder as Ownership in Fee.—A statement by the insured that he is owner of the fee simple is substantially complied with where he has a life estate in the property and also an undivided two-thirds interest in the remainder. *Haden v. Farmers', etc., Fire Association*, 80 Va. 683.

Effect of Lien for Purchase Money.—A condition of the policy is that any interest in property insured not absolute, or that is less than a perfect title, must be represented to the company

and expressed in the policy. The insured has the fee simple estate in the building, conveyed by deed reserving a lien for the purchase money, about \$350; the house worth \$1,700. The condition has reference to the quantity of the interest or estate, which is measured by its duration. Or, if not, the words used can not have been intended to guard against mere incumbrances. *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362.

"The first part of this condition, 'any interest in property insured, not absolute,' has been judicially construed in other cases as referring to the character of quality of the estate. The term 'absolute,' in such a condition, has been held to be synonymous with vested, and used in contradistinction to contingent of conditional. *Hough v. City Fire Ins. Co.*, 29 Conn. R. 10. And so, as it seems to me, the words, 'or (interest) less than a perfect title,' in the connection in which they are used, should be construed as referring to the quantity of the interest or estate, which is measured by its duration." *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362, 378.

Effect of Mortgage or Deed of Trust.

—The fact that the insured had given a deed of trust on the property to secure a debt without informing the insurer that he had done so, constitutes no breach of the clause avoiding the policy if the ownership be any other than the sole and unconditional ownership. *Manhattan Fire Ins. Co. v. Weil*, 28 Gratt. 389, 26 Am. Rep. 364; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024.

"In the case of *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846, this court, in construing the effect of the existence of an incumbrance, in a policy containing identically the same conditions, and upon essentially the same facts, as exist in this case, said: 'It was next claimed that the existence of the mort-

gage violated the condition of the policy that the interest of the insured in the property shall be "unconditional and sole ownership." This condition did not have reference to the legal title, but to the interest of the insured in the property, and was not a warrant against liens and incumbrances. The interest of the insured in the property was, and continued to be, unconditional and sole ownership, notwithstanding the mortgage they had given upon it.' *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732; *Clay F. & M. Ins. Co. v. Beck*, 43 Md. 358; *Carson v. Jersey City Fire Ins. Co.*, 14 Vr. 300, 39 Am. Rep. 584; *Quarrier v. Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582." *Union Assurance Society of London v. Nalls*, 101 Va. 613, 44 S. E. 896.

A deed of trust on personal property is not an estate in or title to property within the meaning of a provision in an insurance policy that if the interest of the assured be other than an unconditional or sole ownership the policy shall be void. The deed of trust is a mere lien which may be discharged at any time by payment of the amount secured. The interest of the assured continued to be "unconditional and sole ownership," notwithstanding the deed of trust. *Union Assurance Society of London v. Nalls*, 101 Va. 613, 44 S. E. 896.

Contingent Right of Dower in Wife of Insured.—The contingent right of dower in the wife of the insured, if she was his wife at the date of the deed, is not such an interest as shows that the assured had less than a perfect title in the property insured. *Virginia Fire, etc., Ins. Co. v. Kloeber*, 31 Gratt. 749.

Nor is it such an incumbrance as was contemplated by the parties to the contract of insurance should be disclosed by the assured on the pain of forfeiting his contract for failing to make the disclosure. *Virginia Fire, etc., Ins. Co. v. Kloeber*, 31 Gratt. 749.

Contingent Right of Dower of Wife of Former Owner.—If the application

for a policy is made a part of the policy, and is a warranty and covers the applicant's interest in and title to the property, and his answer to the question "What is your title to or interest in the property to be insured?" is "fee simple"—Held: The fact that the wife of a former owner of the property who is still alive, has a contingent right of dower in it, does not affect the applicant's interest in or title to the property. Nor is it such an incumbrance as, not being mentioned in his answer, will be a breach of the warranty. *Southern Mut. Ins. Co. v. Kloeber*, 31 Gratt. 749.

Judgment in Invitum against Insured.

—The condition against encumbrances is held to apply only to encumbrances created by or with the consent of the insured and does not apply to a judgment recovered in invitum. *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. 691.

"In the case of *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. 691, this court held, that: 'A policy of fire insurance has a clause which provides that, unless otherwise provided by agreement indorsed thereon or added thereto, it shall be void if the subject of the insurance, whether real or personal property, or any part thereof, be or become incumbered by mortgage, trust deed, judgment, or otherwise, that judgments recovered in invitum against the insured during the life of the policy and before loss are not incumbrances within the meaning of the policy.'"
Cleavenger v. Franklin Fire Ins. Co., 47 W. Va. 595, 35 S. E. 998.

Interest of Partners.—In an action of assumpsit, based on a policy of insurance against fire, the insurance was on the stock of wool of the assured in a certain building, and there was in the policy a clause, that "if the interest of the assured in the property be any other than the entire unconditional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company and

so expressed in the written part of the policy; otherwise, the policy should be void." This stock of wool insured was not so represented to the company nor was it so expressed in the written part of the policy, but was represented as the property of the assured and so expressed in the written part of the policy. It was proven by the plaintiff, that this stock of wool, which had been destroyed by fire, was purchased by a third person according to terms set forth in a letter from him to the assured. His letter was thus worded: "I propose this: You furnish the money; I will buy the wool, handle, store, bear one-half of the expense of insurance, interest, etc., for one-half the profit or one-half the loss. You hold the wool as your own to secure you for the investment." At the trial, he asked this instruction of the court: "If the jury believe from the evidence, that the arrangement between the assured and this third person, under which the wool in controversy was bought and held, was that expressed in this letter, then there was a partnership between the assured and this third person in the profits or the losses of the transaction; still the interest of the assured in the wool itself was the entire, sole and unconditional ownership within the meaning of this policy." It was held, that the court should have given this instruction. *Welch v. Insurance Co.*, 23 W. Va. 288.

Title under Quitclaim from Second Mortgages.—"When the condition requires the applicant to have the entire, unconditional and sole ownership, a policy issued to one who described the property as his frame dwelling house, when his title was only a quitclaim deed from a second mortgage, avoids the policy under the sole ownership clause." *Tyree v. Virginia Ins. Co.*, 55 W. Va. 63, 46 S. E. 706, quoting *May on Ins.*, § 287B.

(c) Necessity for Voluntary Statement by Insured.

The insured is bound to disclose only

such matters as may be inquired about, and not particulars of his title not inquired about, unless such disclosure is required by a condition of the policy. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

If a policy of insurance does not require that the insured shall give in the liens or incumbrances on the property insured, or state what is his title to it, and no questions are asked of the insured by the insurer, the policy is not avoided by the failure of the insured, without any fraudulent intent, to mention a lien upon it. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

"There is nothing in the policy which requires a disclosure by the insured of the liens upon the insured property. There was no question propounded by the insurers to the insured in regard to the existence of such liens. The insurers might have examined the records for such liens, and made inquiries about them, either of the insured or others. But they failed to do so. Can they now avoid the obligation of the policy, on the ground that the insured, without being inquired of, and without any fraud, omitted to give notice of the lien at the time of obtaining the policy? I think they can not. In *Flanders on Fire Insurance*, p. 277, that writer says: 'In general the insured is only required to disclose the matters inquired about, and not the particulars of his title, unless interrogated in respect thereto, or unless it is made imperative upon him by a condition of the policy.' 'But an untrue answer in an application for an insurance, in reply to a question respecting incumbrances, or the interest of the insured, renders the policy void; and this, whether the company has a lien on the property or not. By asking the question, it would be manifest that the company deemed the information

material, and it would be material that the applicant should answer it truly.' Many authorities are cited in support of what is here said and fully sustain it. Without repeating the citations here, they can readily be found by referring to the notes to that work. In one of them, *Tyler v. Ætna Ins. Co.*, 12 Wend. R. 507, Nelson, J., in stating the reason why a disclosure of title is not essential, says: 'The rights of insurer are sufficiently guarded by having it in his power to exact by inquiry, a description of the interest of the applicant, and by the recovery being limited, in case of loss, to the value of the interest proved on the trial.' Again, on p. 338, the same writer says: 'A policy can not be avoided for encumbrances, unless upon the applicant's false and fraudulent answers to interrogatories,'" etc. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

As to waiver by issuance of policy without application or representations, see post, "Insurance of Policy without Application or Representations," III, H, 8, c, (2), (a).

(d) Burden of Proof as to Incumbrances.

Where the policy contains a clause avoiding it if there be a chattel mortgage on the personal property insured, the existence of such chattel mortgage is a matter of defense which it is incumbent upon the company to prove. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

(2) Ownership of Land on Which Insured Property Built.

A provision in a policy of fire insurance, that, in the absence of consent by the insurer indorsed thereon, the policy shall be void if any building intended to be insured stand on ground not owned in fee simple by the assured, etc., is valid and a violation thereof will prevent recovery. *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876.

(3) Change in Title or Interest—Alienation.

(a) Validity and Purpose of Provisions.

In General.—Policies of fire insurance may and usually do contain a provision to the effect that the policy will be invalidated by any change other than by the death of the insured, in the title interest or possession of the insured in or to the property insured, without the consent of the insurer. *Virginia Fire, etc., Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364; *McCutcheon v. Ingraham*, 32 W. Va. 378, 9 S. E. 260; *Fire, etc., Ins. Co. of Wheeling v. Morrison*, 11 Leigh 354, 36 Am. Dec. 385; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Virginia Fire, etc., Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. 454; *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

The object of such a provision is to protect the insurers against the risk of the introduction of a stranger to the contract, perhaps not in any way known to them, or, if known, not deemed worthy of their confidence. *Virginia Fire, etc., Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754.

(b) Interpretation and Construction.

aa. General Principles Governing.

Construed to Mean Transfer to Third Person.—In *Virginia Fire, etc., Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754, it was held, that when parties contract that "any change in title or interest of assured," in the goods, without the consent of the insurers shall avoid the policy, they mean a transfer by the assured to third persons. See also, *Virginia Fire, etc., Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. 454.

Provision Held to Relate to Future Changes.—A provision in a policy of fire insurance against any change in the interest, title or possession of the

subject of insurance, relates to future changes, and not to any encumbrance subsisting at the date of the policy. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 393.

Voluntary Alienation Intended.—In *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, it was held, that “by the change of title provided against in the condition must have been intended a voluntary disposition or alienation of the property. It could not have been intended to embrace all kinds of transfer of title, for, in condition three, change of title by ‘foreclosure of mortgage or levy of execution,’ is specially provided against.”

Inapplicable to Descent of Property on Death of Assured.—One of the conditions of the policy is, that it shall be void “if the title of the property is transferred or changed. This does not apply to the descent of the property on the death of the assured to his heirs.” *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

bb. Application in Particular Instances.

Conveyance by Deed.—Where an insurance policy stipulates that the entire policy, unless otherwise provided by agreement, endorsed thereon, or added thereto, shall be void, if any change, other than by the death of the insured, shall take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process, judgment, or voluntary act of the insured, or otherwise, and the insured, after the policy is issued and delivered to him by the company, without any agreement, or consent of the company endorsed on said policy, or added thereto, and without the consent of the company in any other way obtained by him, voluntarily conveys by deed, the insured property to another, such conveyance and change of title of the insured property, forfeits the policy, with the right to recover thereon for loss or damage to the property. *Ritchie County Bank v.*

Fireman's Ins. Co., 55 W. Va. 261, 47 S. E. 94.

Effect of Deed Invalid for Incompetency of Grantor.—A deed of conveyance made by the insured during the policy, and before the loss, but invalid by reason of the grantor's mental incompetency to make such deed, is not such a change or transfer of title as will forfeit the policy. *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. 691.

A conditional transfer of property will not avoid a policy of fire insurance. *McCutcheon v. Ingraham*, 32 W. Va. 378, 385, 9 S. E. 260, 263.

“A mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon the performance of certain conditions, does not affect the validity of the policy; and if a loss occurs before the conditions are performed, a recovery may be had by the insured, even though the conditions are subsequently performed; and, if it was agreed that the policy should be assigned to the purchaser, the judgment will inure to his benefit.” *McCutcheon v. Ingraham*, 32 W. Va. 378, 385, 9 S. E. 260, 263, quoting *Wood on Fire Ins.*, p. 558, § 330, and citing *Fire, etc., Ins. Co. of Wheeling v. Morrison*, 11 Leigh 354, 36 Am. Dec. 385.

An executory contract of sale, where there has been no conveyance or delivery of the property, is not a change in the title so as to avoid the policy. *Fire, etc., Ins. Co. of Wheeling v. Morrison*, 11 Leigh 354, 36 Am. Dec. 385.

Where, during the life of the policy, a decree is obtained in invitum for the sale of the property insured, but sale under said decree is not made until after the loss by fire, and then the property is bought in by the assured, and there is no change of possession, the policy will not be avoided by a clause therein providing that the policy shall become void if any change takes place in the title, interest, location, or possession of the property, or any part

thereof, whether by sale, gift, or other voluntary act of the assured, or by legal process or judgment, or otherwise. *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998.

Transfer between Partners.—A transfer by one partner of a firm of his interest in the insured property to the other partner is not such a change in the title or interest of insured as to avoid the policy. *Virginia Fire, etc., Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754; *Virginia Fire, etc., Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. 454.

Nor is a change of receivers a breach of this condition, where the insurance is obtained by a receiver as such. *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476.

Nor is a deed of trust given as security for a debt a breach of conditions against change of title or interest. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

(4) Foreclosure Proceedings.

Validity and Purpose of Provision.—

A provision to the effect that the policy shall be void in case of foreclosure proceedings is frequently found in policies of fire insurance, and will be enforced. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101. See also, *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

"This clause is inserted by insurance companies for their protection, because it is said that when foreclosure proceedings are commenced with the knowledge of the insured, the risk is thereby increased as under such conditions the temptation to burn the property and thereby procure money to discharge the lien may be very great according to the exigencies of the situation." *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

Notice of sale of the insured property under a deed of trust, served upon the insured before the occurrence of the loss, precludes recovery when the policy contains a stipulation that, un-

less otherwise provided by agreement endorsed thereon or added thereto, it shall be void, "If, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed," together with a clause inhibiting the agent from waiving such condition otherwise than by an agreement so endorsed or added, and no agreement waiving the condition as to commencement of foreclosure proceedings and notice of sale is so endorsed or added, unless the forfeiture is waived by the company or the agent under authority therefor conferred by the company. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

Such Change Deemed an Alienation.

—In *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, change of title by foreclosure of mortgage, or levy of execution was specially provided against and it was declared that such a change shall be "deemed an alienation."

Sale under Decree of Court Afterwards Set Aside.—

A condition in a policy that the entry of a foreclosure of a mortgage shall be deemed an alienation of the property, and avoid the policy, does not involve a sale under the decree of the court in a creditor's bill against the heirs, etc., which sale is set aside by the court. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

c. Value of Property.

It is well settled that a mere misrepresentation of the value of the property insured does not vitiate the policy, unless the over valuation be gross and clear, such as is, or must be presumed to be known to be such by the insured, and not known to the insurer, and therefore false and fraudulent. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

"A bona fide overestimate of the value of property upon which insurance is sought to be effected is mere matter of opinion, and will not be treated as a warranty, as was decided in

Lynchburg Fire Ins. Co. *v.* West, 76 Va. 575." *Virginia Fire, etc., Ins. Co. v. Saunders*, 84 Va. 210, 4 S. E. 584.

d. Vacancy of Property.

A provision in a policy of fire insurance that in the absence of consent by the company, if any building therein insured should be or become vacant, or unoccupied (usually for a specified period), is reasonable, and a violation thereof will avoid the policy. *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876.

In *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, a condition of the policy was, that the policy should be vitiated if the premises insured became vacated by the removal of the owner or occupant for a period of more than twenty days without immediate notice to the company and written consent.

Not within Prohibition of Change in Condition.—In *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, it was held, that the mere vacation of a house by the assured or its occupants was not within a condition in the policy avoiding the same for any change within the control of the assured, material to the risk.

Construction of Provision Where Several Houses Insured in One Policy.

—Where eight double tenement houses were insured under a policy containing a clause forbidding the premises to be left unoccupied, the policy was forfeited as to each house vacant at the time of the fire. *Connecticut Fire Ins. Co. v. Tilley*, 88 Va. 1024, 14 S. E. 851. See also, *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876.

Effect of Partial Vacancy.—Where the policy covered a two story building, the vacancy of the second story did not avoid the policy. *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.

"It may be true that the vacation of a part of the premises increased the risk. If so the onus probandi rests upon the company." *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.

e. Inventory and Keeping Books—Iron Safe Clause.

A clause in a fire insurance policy called the "Iron Safe Clause," that the insured make an inventory of his stock of goods and keep books correctly detailing purchases and cash and credit sales and keep them in an iron safe, or away from the store building when closed for business, is reasonable and valid. It is a promissory warranty. *Maupin v. Scottish Union Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003. See also, *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580; *Tucker v. Colonial Fire Ins. Co. (W. Va.)*, 51 S. E. 86; *Prudential Fire Ins. Co. v. Alley (Va.)*, 51 S. E. 812.

In such "Iron Safe Clause" is a provision that noncompliance with it by the insured shall forfeit the policy, and that "agents of this company have no authority to waive these conditions;" no oral evidence is admissible of an oral waiver of such clause by a soliciting agent of the company before or at the time of the issuance of the policy. *Maupin v. Scottish Union Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003.

Where in the application for a policy, the insured answered in the affirmative to the question whether he kept his account books in an iron safe, this was held to constitute a warranty. *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

"The clause under consideration is now generally introduced into policies of insurance of merchandise kept for sale against loss by fire, and has frequently been considered by the courts, and most usually has not been subjected to any narrow or close construction. Legal effect has been given it for the purpose of guarding the insurer against fraud or imposition on the part of the insured; but it has received a fair and reasonable interpretation, so that it might not work forfeitures or defeat the claim of the innocent to the indemnity promised by

the policy. If the books are kept in such a manner that, with the assistance of those who kept them or understood the system, the amount of purchase and sales can be ascertained, and cash transactions distinguished from credit, it will be sufficient." *Prudential Fire Ins. Co. v. Alley (Va.)*, 51 S. E. 812, 814.

As to the effect of provisions binding the insured to furnish, for examination, books of account, bills, invoices, and other vouchers as part of preliminary proofs, see post, "Form and Sufficiency," VIII, F.

f. Matters Increasing Risk.

(1) Change Material to Risk.

Condition Prohibiting Construed.—

Where a policy contains a condition that any change, within the control of the assured material to the risk, shall avoid the policy, the change referred to is a change in the condition of the property wrought by the agency of the assured. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

Effect of Provision against Manufacturing.—A policy insuring a tin shop, although it contains a provision against manufacturing, allows making tin cans and such other work usually done in such shops. *Virginia Fire, etc., Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. 451.

Increase of Risk a Question for Jury.

—Whether or not the erection of a building near the premises of insured was an additional risk is for the jury to say, upon all the facts and circumstances in proof, and is not a question to determine which expert knowledge is either necessary or proper. *Prudential Fire Ins. Co. v. Alley (Va.)*, 51 S. E. 812.

(2) Omission to Disclose Material Facts—Keeping Inflammable Material.

In *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425, the policy insuring a "barrel factory manufactured barrels and materials for same contained

therein," provided among other conditions that the omission to make known any fact material to the risk should render absolutely void the policy insured upon the description by the assured and also provided that the company should not be liable for damages occasioned by the use of "camphene, burning fluid, coal oil, petroleum or any of their products, by whatever names designated, unless otherwise specially provided for." Under such policy it was held, that the word "materials" means such as are necessarily or usually or commonly employed in the manufacture of barrels; and benzine, being prohibited by the policy was not intended as an article insured or covered by the above language, in the absence of proof; nor could an insurance company have presumptive knowledge that benzine was an article necessarily or commonly used in the manufacture of barrels.

g. Other Insurance.

Validity of Condition.—A condition in a policy of fire insurance providing that the same shall be void if the insured has or subsequently procures without consent of the insurer, other insurance on the property therein insured, is valid and must be conformed to. *Sutherland v. Old Dominion Ins. Co.*, 31 Gratt. 176; *Woolpert v. Franklin Ins. Co.*, 42 W. Va. 647, 26 S. E. 521; *Fire Ass'n v. Hogwood*, 82 Va. 342, 4 S. E. 617.

Other insurance may be defined to be "additional and valid insurance, prior or subsequent, upon the same subject, risk and interest effected by the same insured, or for his benefit, and with his knowledge and consent." *Lacy, J., in Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209.

Other Insurance Must Be Valid.—

In order to avoid a policy on account of subsequent insurance against an express condition therein, it must appear that such other insurance is valid and can be enforced. If it can not be en-

forced, it is no breach of the condition of the prior policy. *Sutherland v. Old Dominion Ins. Co.*, 31 Gratt. 176; *Woolpert v. Franklin Ins. Co.*, 42 W. Va. 647, 658, 26 S. E. 521; *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024.

Consent of Agent to Additional Insurance.—Under a policy having a slip attached thereto by the agent, saying among other things, "\$———". Other Concurrent Insurance permitted," additional insurance on the property will not prevent recovery for loss on the policy. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

Waiver of Prohibition by Adjustment.—See post, "Adjustment as Waiver of Conditions," IX, E.

3. Forfeiture of Policy for Nonpayment of Premium Notes.

See post, "Premiums and Premium Notes," IV.

4. Avoidance of Policy for Assignment Thereof.

Stipulations avoiding the policy on the ground of an assignment before loss without the consent of the insured are valid. *Stolle v. Aetna Fire, etc., Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593. See also, *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

Validity of Assignment after Loss.—Although the policy provides that it shall be void if assigned without the consent of the insurer, such assignment is valid if made after the loss. *Nease v. Aetna Insurance Co.*, 32 W. Va. 283, 9 S. E. 233; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *Stolle v. Aetna Fire, etc., Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593.

Where a policy of fire insurance provides that it shall be void if assigned without the insurer's consent, the clause applies to assignment before loss of the claim for damages in case

of loss. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

Application of Rule Limited to Absolute Assignment.—The rule that a policy is not assignable without consent of the insurer applies to absolute assignments. A parol agreement to assign will not avoid the policy. *Fire, etc., Ins. Co. of Wheeling v. Morrison*, 11 Leigh 354.

5. Conditions as to Time for Bringing Action.

See post, "Limitations in Policy," X, C, 2.

6. Conditions as to Furnishing Proofs of Loss.

See post, "In General," VIII, A, 1.

7. Burden of Proof as to Compliance with Conditions.

See post, "Effect as Putting Plaintiff on Proof," X, F, 6, b, (2), (b).

8. Waiver or Estoppel.

a. In General.

Power to Waive.—Conditions in a fire insurance policy which are inserted for the benefit of the insurer, the breach of which may operate a forfeiture, may be waived by the insurer or his legal agent. *Virginia Fire, etc., Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. 463. See also, the following cases: *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389; *McLean v. Piedmont, etc., Ins. Co.*, 29 Gratt. 361, 372; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277, 18 S. E. 195; *Easley v. Valley Mut. Life Ass'n*, 91 Va. 161, 169, 21 S. E. 235; *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209; *Farmers', etc., Fire Ins. Ass'n v. Williams*, 95 Va. 248, 28 S. E. 214; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366; *Farmers', etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338; *Union Assurance Society*

of *London v. Nalls*, 101 Va. 613, 44 S. E. 896; *Stolle v. Ætna Fire, etc., Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593; *Eagan v. Ætna, etc., Ins. Co.*, 10 W. Va. 583; *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

Generally, as to the doctrine of waiver, see the title **WAIVER**.

A provision that the policy shall be forfeited or avoided for failure to pay the premium within a specified time, being for the benefit of the insurer, may be waived by him. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Easley v. Valley Mut. Life Ass'n*, 91 Va. 161, 21 S. E. 235.

Stipulations avoiding the policy on the ground of assignment before loss may be waived by the insurer. *Stolle v. Ætna Fire, etc., Ins. Co.*, 10 W. Va. 546, 27 Am. Rep. 593.

"A condition in a policy of fire insurance, that if the risk be increased by a change of occupation or other means within the control of the assured, without the written consent of the insurers, 'the policy shall be void,' being inserted for the benefit of the insurers, they may dispense with a compliance therewith, or waive a forfeiture of the policy incurred by a breach thereof, and thereby become estopped from setting up such condition as a breach in an action for a loss subsequently occurring." *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, 109.

Effect of Waiver.—By such waiver the insurer will be estopped from setting up such condition as a breach in an action for a loss subsequently occurring. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Farmers', etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338.

Right Once Waived Is Extinguished.—Where the right to rely upon a forfeiture has been once waived it is extinguished, and can not be revived. *Farmers', etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338.

b. Waiver by Agent.

(1) In General.

Power to Waive in Absence of Limitation of Authority.—Conditions in a policy of fire insurance may be waived either by the insurer or his lawful agent in the absence of limitations on his authority known to the insured. *Virginia Fire, etc., Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. 463; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88. See the title **INSURANCE**.

If at the time of issuing a policy, I. had been authorized by the insurance company to receive and accept proposals for risks, subject to their approval and ratification, to issue and deliver policies and renew the same, and receive premiums therefor, and had been supplied with blanks signed by the president, to be filled and countersigned by him, this constituted I. the general agent of the company, and the company is bound by all his acts as such within the scope of his authority, so long as it existed, notwithstanding any private instructions which he may have received limiting that authority, of which the assured had no notice. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. 732. See also, *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 23 S. E. 744, 53 Am. Rep. 817.

"A local agent of a foreign insurance company, clothed with authority to effect contracts of insurance, to fix rates of premium, to give consent to the increase of risks and change of occupation of buildings insured, to cancel policies issued at his agency, has power to dispense with conditions and waive forfeitures arising from a breach thereof in the absence of any limitation upon his authority known to the assured." *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, 110.

"The foregoing powers are necessary incidents of the general authority

of the agent to effect contracts of insurance, conduct the business at his agency, and do all things necessary and proper in the prosecution thereof." *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, 110.

(2) Necessity for Actual Knowledge of Limitations on Agent's Powers.

An agent may waive conditions in an insurance policy notwithstanding inhibitions contained in the policy, unless the assured has actual notice of the limitations placed upon the agent's powers, either by having his attention called to the inhibitions contained in the policy or otherwise. The mere fact that the policy contains the restrictive provision is not of itself sufficient to affect the assured with notice. *Virginia Fire, etc., Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. 463.

(3) Effect of Restrictions in Policy.

As to Conditions Relating to Inception of Contract.—Restrictions inserted in a policy of insurance upon the power of the agent to waive any conditions except in a particular manner, as by endorsing the waiver on the policy, do not apply to those conditions which relate to the inception of the contract. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

As to promissory warranties, conditions for the violation of which the policy is rendered noneffective after it has become effective and operative, such limitation clause is not only notice to the insured of want of authority in the agent to waive them, but also a stipulation between the parties that the agent has not, and shall not have, any such power. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

c. What Constitutes Waiver.

(1) General Rule.

Forfeitures are not favored, and courts are alert to take advantage of

any circumstance that indicates an election to waive a forfeiture, or any agreement to do so upon which a party has relied and acted. *Farmers', etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338.

Any acts, declarations, or course of dealing by the insurers, with knowledge of the facts constituting a breach of a condition in the policy, recognizing and treating the policy as still in force, and leading the assured to regard himself as still protected thereby, will amount to a waiver of the forfeiture by reason of such a breach, and estop the company from setting up the same as a defense when sued for a subsequent loss." *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, 109; *Farmers', etc., Fire Ins. Co. v. Kinsey*, 101 Va. 236, 43 S. E. 338.

(2) Applications of Rule.

(a) Issuance of Policy without Application or Representations.

If an insurance company elects to issue its policy of insurance against fire without any application, or without any representation in regard to the title to the property to be insured, it can not complain after a loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing incumbrance was not disclosed. *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393; *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024; *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

"This is consistent with, and logically results from, other principles of insurance law several times announced by this court, one of which is that the agent of an insurance company, in preparing, or directing the preparation of, an application for insurance, acts for his company, and not for the applicant. He is the agent of the company and not the agent of the applicant, and, in what he does, binds the company and

not the applicant, if he acts improperly." *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

If an insurance company elects to issue its policy without an application, or without any representation as to the title of the property insured, it can not complain, after a loss has ensued, that an existing encumbrance was not disclosed, although the policy provides that if the subject of insurance be personal property and "be or become encumbered by a chattel mortgage" the policy shall be void. The company can not visit upon the assured the consequences of silence induced by its failure to make inquiry upon subjects upon which it desired information. *Union Assurance Society of London v. Nalls*, 101 Va. 613, 44 S. E. 896, citing *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854; *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389, 398, 26 Am. Rep. 364; *Wood on Fire Insurance*, §§ 151, *Gilmore's Notes on Smith's Mer. Law*, 293.

"In *Wood on Fire Insurance*, § 162, the doctrine is stated thus: 'When a policy is issued on a verbal application, without any representation in reference thereto, all information relative to the risk, except such as is unusual and extraordinary, is waived, and the policy is valid, even though it contains a clause or stipulation that "the insured covenants that the representations given in the application for insurance contain a just, full, and true exposition of all facts and circumstances in respect to the condition, situation, value, and risks of the property insured; and, although the policy professes to be issued upon the faith of representations made by the insured, yet it is valid, even though no representations whatever were made in reference to the risk, and the lack thereof is not a matter of defense. The insurer can not charge the assured with laches induced by its own conduct."'" *Union Assurance Society of London v. Nalls*, 101 Va. 613, 44 S. E. 896.

(b) Delivery of Policy without Prepayment of Premium.

A provision in a policy of insurance against fire declaring the policy void unless the premium is actually paid, is waived by the delivery of the policy without requiring the prepayment of the policy. *Eagan v. Ætna, etc., Ins. Co.*, 10 W. Va. 583.

(c) Effect of Knowledge or Notice to Insurer or Agent.

General Rule as to Imputation of Agent's Knowledge.—"The courts, with few, if any, exceptions, say that, in the absence of any collusion between the agent and the insured, where the latter has no knowledge of a limitation upon the authority of the former, the company is bound by the knowledge of the agent; and that if the applicant for insurance has truthfully answered the questions propounded to him and put the agent in possession of all the material facts necessary to the preparation of a valid contract of insurance, and the agent, in writing up the contract, incorrectly states the facts, or, in other words, writes the contract as if the facts were different from those given to him, or, having knowledge of the facts himself, without any representation from the applicant, writes a policy containing false recitals of the facts, whether the departure be due to an innocent mistake or to actual and willful fraud on his part, not participated in by the applicant, the company is estopped from making defense to an action on the policy on the ground of such departure or misrecital. Some of these cases decided by this court and the court of appeals of Virginia, already cited, go further than this and hold that, if the agent, without any representation whatever from the applicant, writes up the policy, stating the facts upon his own responsibility, the company is likewise bound by his act and estopped from disputing the truth of the recitals in the policy." *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

"It is a general principle, well settled by the authorities, that agents of an insurance company, authorized to procure applications for insurance, and to forward them to the company for acceptance, must be deemed the agents of the company in all they do in preparing the application, or in any representation they may make as to the character or effect of the statements therein contained; and when, either by his instruction or direct act, such agent makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicants, the error is chargeable to the company. This rule is not affected or changed by a stipulation inserted in the policy subsequently issued that the acts of such agent in making out the application, shall be deemed the acts of the insured, unless written in the application, or expressed in the policy. Such stipulation does not convert the acts done for the insurer into the acts of the insured. *Kausal v. Association*, 31 Minn. 17, 16 N. W. 430; *Poughkeepsie v. Insurance Co.*, 30 Hun, 473; *Rowley v. Insurance Co.*, 36 N. Y. 550; *Woodbury v. Insurance Co.*, 31 Conn. 517; *Wood, Ins.*, §§ 400, 401; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622; *Travis v. Peabody Insurance Co.*, 28 W. Va. 583, 598." *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616.

Must Be Acting as Agent of Insurer.

—When policy stipulates that broker effecting the insurance, shall be deemed agent of assured, and that if latter had other insurances at time the policy was issued, or afterwards procured, without consent in writing of company endorsed on policy, then the policy shall be void; and there was evidence tending to show that there was other valid insurance on the property, and that the company's agent had notice of such insurance; then an instruction to the effect that if the party that effected the insurance was an insurance broker, he must be regarded as the

assured's agent, and that if notice of the other valid insurance was given him, such notice was not notice to the defendant company, was proper, and should have been given. *Fire Ass'n v. Hogwood*, 82 Va. 342, 4 S. E. 617.

Delivery by Agent with Knowledge of Facts Material to Risk.—Knowledge of facts material to the risk, communicated to the agent of an insurance company who fills out the application for the policy, which is subsequently delivered, is imputed to the company, whether communicated to it by its agent, or not, unless it is shown that special limitations on the powers of the agent were known to the assured. *Farmers', etc., Fire Ass'n Ins. v. Williams*, 95 Va. 248, 28 S. E. 214.

Facts relating to the risk, communicated to a general agent of an insurance company before or at the time of issuing the policy, bind the company, whether communicated to it by such agent or not. *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209; *Virginia Fire, etc., Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. 370.

Receiving Premiums with Knowledge of Condition of Property.—A

condition of the policy is, that the policy shall be vitiated if the premises insured become vacated by the removal of the owner or occupant for a period of more than twenty days without immediate notice to the company and written consent—Held: It was competent for the insurer or his lawful agent to waive this condition; and if at the time the agent of the company received the premium of insurance and delivered the policy he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it can not be relied on by the company to defeat the recovery upon the policy. *Georgia Home Ins. Co. v. Kinnier*, 23 Gratt. 88; *Virginia Fire, etc., Ins. Co.*

v. Richmond Mica Co., 102 Va. 429, 46 S. E. 463.

Where the agent is acquainted with the location of the property before taking the risk, no misstatement in the assured's application can be set up by the insurer. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77.

Knowledge That Building Is on Leased Premises.—Where the agent knew at the time of issuing the policy that the building was on leased premises, such knowledge is imputed to the company, and they, having received the premiums on the policy, are estopped to deny its validity. *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364.

Where an incumbrance on the property was mentioned to the agent of an insurance company at the time of the application, and he informed the insured that it was too small to note in the application, the company is estopped to set up such encumbrance as a defense to an action on the policy. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

Disclosure to a subagent of incumbrances or other insurance, will prevent the company from avoiding a policy on the ground of violation of such condition. *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 23 S. E. 744, 53 Am. St. Rep. 817.

A general agent may consent to contemporary insurance on the property taken through him at the time in another company. *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. 732.

Agent's Concurrence in Estimate of Cost of Property.—Where the company's agent inspected the property, was as well informed as to its cost as the insured, and concurred in her estimate and inserted it in the application, the company is estopped to set up that the insured exaggerated the cost of the property. *Virginia Fire, etc., Ins. Co. v. Saunders*, 86 Va. 969, 1 S. E. 794.

Breach of "Iron Safe Clause."—

Where an insurance policy provides that the books of account of the assured shall be securely locked in an iron safe in his store during the hours that said store is closed, and, with the consent of the agent of the insurance company and the knowledge of the company, who do not object, the books are kept at night in the merchant's dwelling house, the company is estopped from setting up such failure to observe such condition as working a forfeiture of all claims under the policy. *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580.

Forfeiture for breach of a promissory warranty is not waived by retention of the premium after notice thereof. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101.

Where Insured Property Conveyed without Consent of Insurer.—An insurance policy issued to S. D. W. stipulated that the entire policy, unless otherwise provided by agreement, endorsed thereon, or added thereto, shall be void, if any change, other than by the death of the insured, shall take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process, judgment, of voluntary act of the insured, or otherwise, and the insured, after the policy is issued and delivered to him by the company, without any agreement, or consent of the company endorsed on said policy, or added thereto, and without the consent of the company in any other way obtained by him, voluntarily conveys by deed, the insured property to another, such conveyance and change of title of the insured property, forfeits the policy, with the right to recover thereon for loss or damage to the property. *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

S. D. W., after he had received the policy sued on, conveyed the insured

property by deed to E. D. W., and E. D. W., after such conveyance to him, made and delivered his notes, payable to C. (who, as the agent of the company, issued the policy to S. D. W.), in payment of the premium expressed in the policy, and afterwards E. D. W. paid the said notes to C., but without the knowledge, consent or ratification of the company. Held, that the acts of C., in receiving said notes and collecting the same in payment of the said premium, did not constitute a waiver by the company of the forfeiture of said policy as aforesaid. (p. 273.) *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

Notice to Agent of Contract to Sell Property.—Where the general agent of an insurance company to write and deliver policies applies to a policy holder to renew his policy which he has been carrying for several years, and is informed by the policy holder that he has contracted to sell the property, and has put the purchaser in possession and received a part of the purchase money, stating how much is still due, and giving full particulars as to the condition of his title and ownership, and the agent, without any written application, thereupon writes and delivers a policy on the buildings, which he declares is sufficient to meet the situation disclosed, the company is estopped to assert a forfeiture of the policy by reason of provisions contained therein rendering it void if the interest of the assured be other than the unconditional and sole ownership, unless otherwise provided by agreement endorsed on the policy, and providing that no officer or agent of the company can waive any condition of the policy except by agreement in writing endorsed on or annexed to the policy. The conduct of the agent estops the company from asserting the forfeiture. *Virginia Fire, etc., Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. 463.

(d) Effect of Failure to Furnish Forms for Proofs.

See post, "Effect of Failure to Furnish," VIII, A, 2.

d. Necessity for New Consideration.

"A waiver of conditions, or forfeiture arising from a breach thereof, need not be founded on any new consideration." *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, 109.

In *Muhleman v. National Ins. Co.*, 6 W. Va. 508, the court in holding that the evidence did not establish a waiver or estoppel as to the condition in the policy that failure to pay the premium should terminate the risk, quoted Bigelow on Estoppel, p. 524, to the effect that "a waiver to be operative must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract, or forfeiture of the condition." See the title ESTOPPEL.

e. Need Not Be in Writing.

A waiver of the forfeiture arising from the breach of the condition of a fire insurance policy need not be in writing, but may be by parol, at least in a case where the policy is not attested by the corporate seal of the company, and is hence not a specialty. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, 109.

f. Extent of Waiver.

A waiver of a forfeiture, resulting from a breach occasioned by a change in the occupancy of the building, increasing the risk, extends not only to breaches occasioned by the occupancy before such waiver, but to those resulting from a continuation of such occupancy. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

g. Evidence.

It is always open to the insured to show a waiver of forfeiture, or just and reasonable grounds to believe that a forfeiture would not be exacted. Far-

mers', etc., *Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338.

"If a forfeiture of an insurance policy for nonpayment of assessments is relied on, the fact that subsequent assessments are made and received by the company, without making any reference to the nonpayment of the prior assessment, is evidence tending to show a waiver of the forfeiture, and, for that purpose, should be submitted to the jury under proper instructions. Where a right to rely upon a forfeiture has been once waived, it is extinguished, and can not be revived." *Monger v. Rockingham Home Mut.*, etc., *Ins. Co.*, 96 Va. 442, 31 S. E. 609. *Farmers'*, etc., *Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338.

In *Farmers'*, etc., *Fire Ins. Ass'n v. Williams*, 95 Va. 248, 28 S. E. 214, parol evidence was admitted to show the circumstances under which a written application for insurance was made, and as to what should be deemed a compliance with a requirement as to keeping a watchman.

IV. Premiums and Premium Notes.

In General.—Generally, as to the necessity for the payment of premiums, evidence thereof, the effect of giving note for premiums, etc., see the title *INSURANCE*. And see ante, "Delivery of Policy and Payment of Premium," III, C, 6.

Forfeiture for Nonpayment of Premium Note.—Where a policy provides that if a note given for the premium be not paid at maturity, such nonpayment shall terminate the insurance and the note shall be considered the premium for the risk thus terminated, the policy is forfeited for nonpayment of the note when due. *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

Duty to Refund Premiums.—As to the statutory provision in Virginia as to the duty of fire insurance companies to refund a proportion of the pre-

miums paid in certain cases, see Va. Code, 1904, § 1277c.

V. Risk and Cause of Loss.

A. IN GENERAL.

Generally, as to the rules as to risks and cause of loss, exception from risks, etc., see the title *INSURANCE*.

By the "Proximate cause of loss" in determining liability in case of fire insurance is meant "the direct, efficient, controlling, productive cause" of the loss of the insured property. *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 613.

"Although the application of the maxim referred to is difficult and embarrassing, yet in determining in each particular case whether the alleged cause of a catastrophe is proximate or too remote in a legal view, it is said that one of the most valuable criteria furnished by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered too remote." *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 613. For other definitions of "proximate cause," see the title *NEGLIGENCE* and cross references there found.

B. EXCEPTIONS OF RISKS IN POLICY.

See generally, the title *INSURANCE*.

Fires Occasioned by Military or Usurped Power.—In *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 613, the policies of insurance upon certain buildings contained a proviso that the company should not be liable to make good any loss by fire which might "happen or take place by means of any invasion, insurrection, riot, or civil commotion or of any military or usurped power." The United States forces, before the ordinance of secession, anticipating an attack by the Confederate troops, set

fire to the navy yard at Portsmouth. This fire was communicated to the insured buildings. Held, that, as the ordinance of secession was not then in force, the burning caused by firing the United States buildings did not bring the loss within the operation of the proviso as to military or usurped power.

Exception from Liability for Fire Occasioned by Explosion.—In *Smiley v. Citizen's Fire, etc., Ins. Co.*, 14 W. Va. 33, the policy contained an exception to the risk as follows: "That this corporation shall not be liable to make good any loss, or damages by fire which may happen or take place, occasioned by explosions of any kind by means of invasion, insurrection, riot or civil commotion, or any military, or usurped power." It was held, that the company intended not only to guard against all loss or damages, by fire occasioned by means of invasion, insurrection, riot, or civil commotion, or of any military or usurped power, but also intended to guard against all loss or damages, by fire which might happen or take place, occasioned by explosions of any kind.

VI. Measure of Insurer's Liability.

A. UNDER VALUED POLICY ACT.

1. Statutory Provisions as to Computation.

By the West Virginia Code, 1899, ch. 34, § 18a, it is provided that "All fire insurance companies doing business in this state shall be liable, in case of total loss by fire or otherwise, as stated in the policy on any real estate insured, for the whole amount of insurance stated in the policy of insurance upon same real estate, and in case of partial loss by fire or otherwise, as aforesaid, of the real estate insured, the basis upon which said loss shall be computed, shall be the amount stated in the policy of insurance effected upon said real estate, and the insurer shall have the right to enforce his claim for said loss in any court having jurisdic-

tion." *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

2. Provision Construed.

"The language of the act is broad and unambiguous. Under it, the insurance company shall be liable in case of total loss by fire or otherwise, as stated in the policy, on any real estate insured, for the whole amount of insurance upon said real estate, any provisions in the policy to the contrary notwithstanding. All provisions in a policy in conflict with a valued policy statute are void, and hence a provision for the appointment of arbitrators in case of loss is ineffective where the property is wholly destroyed. *Elliott on Ins.*, § 318." *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

"It is perfectly evident that the legislature intended to remedy the evil of overvaluation in insurance, and in doing so followed the example of many other states of the union by making the insurer responsible for overvaluation, and to do this the remedy was and is to compel the insurer to pay the full amount (in case of total loss) for which it writes the policy, and on which the premium is calculated and collected, subject only to be diminished by any deterioration in value between the dates of the policy and the loss, and providing, further, for relief for fraud on the part of the insured, where the insurer is deceived thereby. In other words, the law says to insurance companies 'If you want to pay only a fair price for property that may be destroyed, you must adjust that matter before the policy is issued, and, if you fail to do so, you will be the loser, as the law fixes the amount you are to pay by the amount you collect premium on, subject to deterioration in value after the date of the policy.'" *Ritchie County Bank v. Firemen's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94, quoting and approving as explaining the intention of the West Virginia legislature in enacting

the valued policy law, the case of *Caledonian Ins. Co. v. Cooke*, 101 Ky. 412, 41 S. W. 279.

B. WHAT CONSTITUTES TOTAL LOSS.

There is no total loss of a building, requiring payment in full amount of the policy of insurance, if the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury. *Providence, etc., Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679.

Whether it is so adapted depends upon the question whether a reasonable prudent owner, uninsured, desiring such a structure as the one in question was before the injury, would, in proceeding to restore the building to its original condition, utilize such basis. *Providence, etc., Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679.

C. EFFECT OF WAIVER BY INSURER OF RIGHT TO REPAIR OR REBUILD.

In case of loss by fire under a policy containing a provision allowing the insurer to repair, rebuild, or replace the injured building, and containing also a provision that the loss or damage should in no event exceed what it would then cost the insurer to repair or replace the same with material of like kind and quality, if the insurer should waive the right to repair or rebuild, and agree to pay the amount of loss and damages in cash, that fact would not change the basis of estimation of the loss and damages, and the same should be ascertained precisely in the same manner as if it were the purpose to repair, rebuild, or replace the structure. *Providence, etc., Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679.

VII. Persons Having Interest in Insurance or Entitled to Proceeds.

As between Administrator and Heirs.
—A house is insured against fire, as

being leasehold property, held for a term of 99 years renewable forever; it was, in fact, held by the assured in fee simple; after the death of the assured, it is destroyed by fire. Held, the money due for the loss belonged to the heirs of the assured, and his administrator having received it, the sureties of the administrator are not responsible for it. *Harrison v. Harrison*, 4 Leigh 371.

"As to the insurance money, the house, it is true, was insured by mistake, as leasehold property. The title of the assured was in fact a fee simple. The policy was, therefore, a covenant for the protection of real estate, though it was by mistake described as a term of years renewable forever. The covenant followed the title to the property, and on the death of Harrison, the assured, devolved to his heirs, for they are expressly named in the policy. The Mutual Assurance Society covenanted to Harrison, his heirs, etc., and he bound himself, his heirs, etc., to the society. This covenant being broken after Harrison's death, the right to the insurance money was in his heirs. The administrator Christian having received what belonged to the heirs, he is debtor for the amount to them, not to his intestate's estate. Therefore, the sureties bound in his administration bond are nowise responsible for it." *Harrison v. Harrison*, 4 Leigh 371.

Mortgagee and Mortgagor.—"In § 449, second May on Insurance, it is said: 'Where a mortgagee insures his own interest without any agreement between him and the mortgagor, the latter has no claim to have any portion of the loss recovered applied to the discharge of his debt.' Citing *McIntire v. Plaisted*, 68 Me. 363. In last-named case, at page 365 in the opinion, it is said: 'It is well settled that a mortgagor can not require a mortgagee to account to him for money received for insurance where there is no contract between them to that effect and the insurance was procured by the mortgagee for his own benefit, and the

premium was paid out of his own money.' Citing *Cushing v. Thomas*, 34 Me. 496; *White v. Brown*, 2 Cush. 412; *King v. Insurance Company*, 7 Cush. 1. Also, in *Insurance Company v. Woodberry*, 45 Me., it is held: 'If a mortgagee insures his own interest without any agreement between him and the mortgagor therefor and a loss occurs, the mortgagor is not entitled to any part of the sum paid upon such loss to be applied to the discharge or reduction of his mortgage debt.'" *Dunbrack v. Neall*, 55 W. Va. 565, 47 S. E. 303.

Where a creditor secured by trust deed procures insurance on the trust property for his own benefit and the premium was paid out of his own money, the trust debtor can not require the creditor to account to him for money received on account of such insurance. *Dunbrack v. Neall*, 55 W. Va. 565, 47 S. E. 303.

By verbal agreement N. sold to D. certain real estate on March 28, 1896, for \$2,500, but the contract was not completed by the payment of \$625, cash payment and execution and delivery of the deed from N. to D. and deed of trust by D. to J. S. N., trustee, to secure the deferred payments aggregating \$1,875 until June 29, 1896, the deeds bearing the first-named date. On the 4th day of June, 1896, N. took an insurance policy on the buildings in her own name for \$2,000, and paid the premium thereon. After the completion of the contract, N. offered to assign to D. the insurance policy upon repayment to her by D. of the premium, which D. refused to do; N. then assigned the same with the assent of the insuring company to D. and the said company endorsed on the policy: "This policy is hereby transferred and assigned to A. C. Dunbrack with loss, if any, payable to J. S. Neall, trustee for Mary A. Neall, as his interest may appear," which policy was held by J. S. N., trustee. Held, said insurance was for the sole benefit of N., and D.

had no interest in said policy. *Dunbrack v. Neall*, 55 W. Va. 565, 47 S. E. 303.

Where a mortgagor insures for the benefit of the mortgagee in accordance with the covenants of the mortgage, the mortgagee is entitled to the proceeds in case of loss. *Colby v. Parkersburg, Ins. Co.*, 31 W. Va. 789, 17 S. E. 303.

Life Tenants and Reversioners or Remaindermen.—A building insured, in which one person is entitled to a life estate, and another to the reversion, sustains a partial injury from fire, for which indemnity is due from the insurers. Held, 1. The tenant for life is entitled to have the amount due from the insurance office applied to the repair of the building. 2. The owner of the reversion is also entitled to have the insurance money applied to the repair of the building. *Brough v. Higgins*, 2 Gratt. 408.

"The fact that on the revaluation of the building, Higgins took out a policy in his own name, may, I think, be at once dismissed from the case, as that fact ought not, in any manner, to affect the interest of the tenant for life, in the then existing insurance. Stripped of that fact, the case for decision is that of a building insured, in which one is entitled to the life estate and another to the reversion, sustaining a partial injury from fire, for which indemnity is due from the insurers; and the injury repaired by the tenant for life, at a cost exceeding the amount of the indemnity. And the question is, what are the rights of the tenant for life and the reversioner, respectively, in this indemnity? In the case of *Haxall v. Shippen*, 10 Leigh 536, 34 Am. Dec. 745, the court decided, and that decision is, in my opinion, a governing authority, that where the title in an insured building is in a tenant for life and a reversioner, and the building is entirely destroyed, the property is in effect converted to personalty, and the parties have the like interest in the insurance money that they had in the

building; that is, the tenant for life is entitled to the use of it for life, and the reversioner to the principal at the death of the tenant for life. And that the tenant for life can not, by applying the money to the rebuilding of the house, defeat the reversioner's title to have the money on the termination of the life estate; nor has the reversioner a right to require the tenant for life to apply the money to the rebuilding of the house. This decision has been applied by the court below to the case now in judgment; and if the cases be not distinguishable, the decree of the court below must be affirmed. To my perception, the distinction between the cases is not only visible, but broad and well defined." *Brough v. Higgins*, 2 Gratt. 408.

Testator, having insured his dwelling house against loss by fire, by a covenant of assurance to himself, his heirs and assigns, devises the same tenement and the farm on which he lived, to his wife for life, remainder to his two daughters in fee; the house is burnt down during the life of the wife; she receives the insurance money, and, without the concurrence of the devisees in remainder, expends it in the building of a new house on the premises; and then dies, leaving the new house standing, which devolves with the farm to the devisees in remainder, who are then both *femes covert*, and they and their husbands both survive the tenant for life. Held, that neither the covenant of insurance, though to the assured, his heirs and assigns, nor the testator's will, worked any special destination of the insurance money to the purpose of reinstating the premises. That the tenant for life had a right to receive the insurance money; but when received, it was mere personal estate, of which she had a right to the use for life, and her daughters to the remainder; and upon the marriage of the daughters, the marital rights of their husband attached to it, as to any other personalty to which their

wives were entitled in remainder. That the tenant for life had no right to convert the insurance money into real estate, by applying it to the building of a new house without the consent of the remaindermen. That, therefore, at the death of the tenant for life, the husbands of the devisees in remainder had a right to call for the whole insurance money, without any deduction for the value of the new house put on the premises by the tenant for life and left standing at her death. *Haxall v. Shippen*, 10 Leigh 536, 34 Am. Dec. 745.

Persons in Charge of Property and Owners Thereof.—If a warehouseman, or other person having goods of others in his possession for storage or sale on commission, insure his own property along with that of others held in trust by him, he may, upon the happening of a loss, recover the full amount of the insurer; but, after paying his own charges and the cost of insurance, including attorney's fees, he holds the residue in trust for the benefit of the owners of all the property covered by the policy, to be divided among them rateably. He has no right to deduct the full value of his property covered by the policy before making the apportionment. Parties who have advanced their share of the insurance premium are entitled to have the same so advanced repaid them first, and are then to share rateably with the others in the residue of the insurance money. *Boyd v. McKee*, 99 Va. 72, 37 S. E. 810; *Lucas v. Insurance Co.*, 23 W. Va. 258.

"An insurance policy, such as *Barrick* held when the elevator operated by him was burned, is in common use with wharfingers, warehouseman, commission merchants and others having goods in their possession on deposit, storage or for sale on commission. Such a policy applies for the benefit of the person who might own the property insured at the time of the loss, and the assured has the right to institute

his suit to recover the value of the goods destroyed, and out of the recovery to pay himself to the extent of his interest, and the balance to pay over to the owner. *Morotock Ins. Co. v. Cheek*, 99 Va. 8, 13, 24 S. E. 464; *Home Ins. Co. v. Balto. Warehouse Co.*, 93 U. S. 527, and authorities cited; *Wood on Fire Ins.*, § 280, et seq.; *May on Ins.*, § 424. The latter author states the rule thus: 'A person having goods in his possession as consignee, or on commission, may insure them in his own name, and in the event of the loss recover the full amount of the insurance, and, after paying his own claims, hold the balance as trustee for the owners. In *Home Ins. Co. v. Balto. Warehouse Co.*, supra, Mr. Justice Strong laid down substantially the same rule as follows: 'It is undoubtedly the law that wharfingers, warehousemen, and commission merchants having goods in their possession may insure them in their own name, and in case of loss may recover the full amount of insurance for the satisfaction of their own claims first, and hold the residue for the owners.'" *Boyd v. McKee*, 99 Va. 72, 37 S. E. 810.

VIII. Notice and Proof of Loss.

A. NECESSITY.

1. In General.

A Condition Precedent to Action on Policy.—If the furnishing of proof of loss is made by an insurance policy a condition precedent to action upon it, performance or waiver of it must be shown before recovery can be had. Such is the case where the policy provides that no action shall be brought until its conditions are complied with and it requires such proof of loss. *Munson v. German Ins. Co.*, 55 W. Va. 423, 47 S. E. 160; *Rosenthal v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021; *Home Ins. Co. v. Cohen*, 20 Gratt. 312; *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194.

Loss of a policy of fire insurance will not excuse compliance with the impera-

tive requirements of the policy as to notice and proof of loss. *Munson v. German Ins. Co.*, 55 W. Va. 423, 47 S. E. 160.

Additional Proof Not Required after Award on Amount of Loss.—A fire insurance policy provides for notice of loss, and proof of loss and arbitration, and contains the independent provision that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraiser, when appraisal has been required." A preliminary proof of loss having been furnished, this clause does not require another after an award upon the amount of loss. *Billmyer v. Hamburg-Bremen Fire Ins. Co. (W. Va.)*, 49 S. E. 901.

By Whom Notice Given.—Where no other party is interested, the assured is the proper person to give notice; but notice from the real party in interest would be sufficient. *Peninsular Land, etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237.

2. Effect of Failure to Furnish.

In General.—"All the cases are consistent with two propositions: One, that where proof is required by the policy within a fixed time, but no forfeiture is declared, mere failure to furnish proof within the time does not destroy all right of recovery; the other, that such proof must precede action." *Munson v. German Ins. Co.*, 55 W. Va. 423, 47 S. E. 160.

Effect as Delaying Right of Action.—If a fire insurance policy provide that proof of loss shall be furnished within a given time, and that no action shall be brought upon it until such proof is furnished, and provide for its forfeiture for certain causes, but not for failure to furnish such proof of loss, failure to furnish such proof of loss within the given time does not wholly destroy all right of recovery, but only delays right of action; but action upon it can not be

brought until such proof is furnished. *Munson v. German Ins. Co.*, 55 W. Va. 423, 47 S. E. 180. See also, *Peninsular Land, etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237.

"If no forfeiture is provided for in case of failure to furnish the proofs, forfeitures being stipulated in case of breach of other requirements, or furnishing the proofs in the specified time is not made a condition precedent to recovery, the great majority of recent decisions hold the effect of failure to furnish them is merely a postponement of the time of payment to the specified time after they are furnished." 13 Am. & Eng. Ency. L. (2d Ed.) 329; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670. Elliott on Ins., § 307, says: 'Where no forfeiture is provided by the contract, and the service of the proof of loss is not made a condition precedent to the liability of the company, the effect of such failure is simply to postpone the day of payment. No liability attaches to the company, however, until such proofs are furnished; but, unless otherwise provided, expressly or by fair implication, it is not important that proofs be not in fact served within the time stated in the policy.' It is there stated that it is only when the policy forfeits the right that the liability ends. *Kerr on Ins.*, 450, lays down the same law. But without regard to absolute forfeiture of the policy, it still can be said under all the authorities that where a policy calls for proof of loss before suit no suit can be maintained upon it without such proof. This is shown by authorities above given and by our own cases. *Peninsular Land, etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237; *Flanagan v. Phenix Ins. Co.*, 42 W. Va. 426, 26 S. E. 513; *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 284, 32 S. E. 194." *Munson v. German Ins. Co.*, 55 W. Va. 423, 47 S. E. 180.

B. NATURE, PURPOSE AND CONCLUSIVENESS.

Proofs of loss are no part of a con-

tract of fire insurance, nor do they create the liability to pay a loss; they serve to fix the time when it becomes payable, and when an action may be commenced to enforce a liability. *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670.

Proof of loss under a policy of fire insurance is not evidence of the amount of loss, but is admissible in evidence for the sole purpose of showing that proof of loss has been made as required by the policy. *Tucker v. Colonial Fire Ins. Co. (W. Va.)*, 51 S. E. 86.

Effect as Limiting Recovery.—In an action on a policy of fire insurance, the plaintiff is not limited in recovery by the amount of loss specified in the proof of loss in the absence of fraud. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

Plaintiff Not Bound by Erroneous Statement of Cause of Fire.—The plaintiff is not bound by the erroneous statement of the cause of the fire, made in the preliminary proofs, but may fix the defendant's liability by proof of the true cause of the loss without regard to the statement in the preliminary proofs; there being no fraud. *Smiley v. Citizens' Fire, etc., Ins. Co.*, 14 W. Va. 33.

"The principle as now settled is 'that the assured may, without filing an amended statement, show upon the trial, that his proofs of loss are erroneous when the error is in fact a mistake and not an attempt upon the part of the assumed to defraud or mislead the assurer.' The justice of this rule is not doubtful. It often occurs that the assured is compelled, in order to comply with the considerations of the policy as to the time in which proofs are to be made to make them up from mere recollection, without any data to guide him, and without time or opportunity to verify the absolute truth of his statements. Under such circumstances it would be an exceedingly harsh and unjust rule, that held the

assured up to the strict truth of his statement and denied him the privilege of showing that he had made an innocent mistake. Insurers have no right, under such circumstances, to exact absolute certainty, but only approximate according to the means at hand and the honest judgment, knowledge and understanding of the assured." *Smiley v. Citizens' Fire, etc., Ins. Co.*, 14 W. Va. 33, quoting *Wood on Fire Ins.*, § 427.

C. DUTY OF INSURER TO FURNISH FORMS FOR PRELIMINARY PROOF.

By section 1277a of the Virginia Code, 1904, when notice of loss or damages by reason of any peril insured against has been given to such insurer or agent thereof, and upon written application, it is made the duty of the insurer to deliver within ten days after application, to the insurer or the person to whom the insurance money is payable under the policy, forms for such preliminary proof of such loss or damages as may be properly required under the policy, and unless such forms shall be so delivered it shall not be necessary for the insured to furnish the insurer with any preliminary proofs.

D. TIME OF GIVING NOTICE AND FURNISHING PROOFS.

In *Home Ins. Co. v. Cohen*, 20 Gratt. 312, the circuit court instructed the jury that it was the duty of the plaintiff, within a reasonable time to give to the defendant notice of his loss and damages, and as soon thereafter as possible to deliver to the defendant a particular account of such loss or damage, etc. On appeal, it was held, that there was no error in the instruction.

When the policy provides that "in case of loss the assured shall give immediate notice thereof," due diligence under all the circumstances is all that is required. *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732.

Where no policy has been issued, the

provisions of the policies usually written by the insurer with regard to notices and proofs of loss need not be complied with. Due diligence in giving notice of the loss of the building under all the circumstances is all that can be required. *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732.

Waiver of Objection as to Time.—

Provisions in a policy of insurance, prescribing a limit of time within which notice of loss is to be given, will not be construed as causes of forfeiture, where not so expressly stipulated in the policy; and where it is provided that no suit or action against the company for the recovery of any claim by virtue of the policy shall be sustainable until after full compliance by the assured with all the foregoing requirements, nor unless suit or action be commenced within six months after the date of the fire, proofs of loss may be furnished in a reasonable limit after the fire, and, if accepted and retained by the insurer without objection, all objection to the form of the proofs and the time in which they are presented will be considered as waived. *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670.

E. EFFECT OF NOTICE BY MAIL.

In General.—Notice of loss may be given to an insurance company through the mail at the risk of the insured. Deposit of it in the mail is *prima facie*, but not conclusive, evidence of its reception by such company. *Munson v. German Ins. Co.*, 55 W. Va. 423, 47 S. E. 160.

"The bill says that after writing to the local agent *Munson* wrote to the company of the fire at once. *Prima facie* this was sufficient notice, as a letter deposited in the mail properly addressed is presumed to reach the person addressed. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969; 1 *Joyce on Ins.*, §§ 62, 3300. Thus so far as concerns notice of loss, the

bill is sufficient." *Munson v. German Ins. Co.*, 55 W. Va. 423, 47 S. E. 160.

Necessity for Registry of Letter.—By § 1277a of the Virginia Code, 1904, if proofs of loss are made by mail, the letter must be registered.

F. FORM AND SUFFICIENCY.

Reasonable Compliance with Conditions Sufficient.—In an action on a policy of insurance against fire, all that can be required of the plaintiff is a reasonable and substantial compliance with the conditions of the policy. *Home Ins. Co. v. Cohen*, 20 Gratt. 312; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605, 610; *Tucker v. Colonial Fire Ins. Co.* (W. Va.), 51 S. E. 86.

A substantial compliance with the requirements of the policy is all that is required in a proof of loss. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

Declarations as to Other Insurance, Value, Interest in Property, Origin of Fire, etc.—In *Home Ins. Co. v. Cohen*, 20 Gratt. 312, it was held, that the court below correctly instructed that it was the duty of the plaintiff to comply with the condition of the policy by declaring on oath "whether any and what other insurance had been made on the same property, what was the whole value of the subject insured, what was his interest therein, in what general manner (as to trade, manufactory, merchandise or otherwise) the buildings containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of said building, and when and how the fire originated as far as the plaintiff knew or believed, and unless the jury is satisfied from the evidence that the plaintiff has complied substantially with these requirements of the policy they must find for the defendant."

Signature and Verification.—In *Home Ins. Co. v. Cohen*, 20 Gratt. 312, the supreme court approved an instruction by the circuit court to the effect that

it was the duty of the plaintiff to give the defendant notice of his loss and damage; and as soon thereafter as possible to deliver to the defendant a particular account of such loss or damage, signed with his own hand and verified by his oath or affirmation.

Certificate of Nearest Magistrate, Notary, etc.—"Where there is no good reason to suspect fraud or false swearing on the part of the insured, in making out his preliminary proof of loss, the insurer generally requires no further evidence to sustain the claim of the insured than his own oath and account, unless it be 'the certificate under seal of a magistrate, notary public, or commissioner of deeds, nearest the place of the fire, and not concerned in the loss, or related to the assured, stating that he had examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to such an amount as the said official shall certify.' Such a certificate is generally provided for in a policy of insurance." *Moore v. Virginia Fire, etc., Ins. Co.*, 28 Gratt. 508.

Production for Examination of Books of Account, etc.—A clause in a fire insurance policy binding the insured when required by the defendant to furnish for examination books of account, bills, invoices and other vouchers is a promissory warranty and compliance with it, in case of loss, is a condition precedent to recovery, unless waived or compliance with it is impossible. *Rosenthal v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021; *Home Ins. Co. v. Cohen*, 20 Gratt. 312.

"For want of these papers there was not such preliminary proof of loss or proof of loss on the trial, as the policy demanded, as justice demanded, because the burden of proof of compliance with this necessary requirement of the policy was on the plaintiff. It was a promissory warranty, compliance was

a condition precedent to recovery and the burden of showing it was on the plaintiff. *Flanagan v. Phenix Ins. Co.*, 42 W. Va. 426, 26 S. E. 513; *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 354, 32 S. E. 194; *Joyce on Ins.*, § 3790." *Rosenthal v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

The clause requiring the insured to produce for examination all books of account, etc., as often as required, at such reasonable place as may be designated by the company or its representative, means a reasonable place in the locality where the insured property was situated, in the absence of conditions rendering such place unreasonable. *Tucker v. Colonial Fire Ins. Co. (W. Va.)*, 51 S. E. 86.

Where a clause in a policy of fire insurance provides that the insured, "as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if original be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made," and another clause in effect provides that no suit or action on the policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with the foregoing requirements, such clause requiring the insured to produce for examination all books of account, etc., is a promissory warranty on his part, and a condition precedent to his right of recovery on the policy. *Tucker v. Colonial Fire Ins. Co. (W. Va.)*, 51 S. E. 86.

G. EFFECT OF FALSE SWEARING OR FRAUD.

False answer as to any fact material to the inquiry into amount of loss willfully made to deceive insurer, is fraudulent and within clause providing that policy shall be invalid for any false swearing, fraud, or attempt at fraud, by insured in support of his claim for

loss or in the proofs of loss. *Virginia Fire, etc., M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754. In this case the insurer, having proved that the invoices had been materially and fraudulently altered, it was held, that no recovery could be had by insured.

It is the duty of an assured to use the utmost good faith in dealing with the insurer, and where a policy contains a provision which forfeits it for any false swearing or fraud, or attempt at fraud on part of the assured, before or after loss, or in proof of loss, and after loss the assured furnishes and swears to duplicate invoices for goods alleged to have been destroyed, which invoices have been so changed as to make it appear that they were a part of the goods destroyed, when the evidence clearly shows that they were not, in the absence of evidence to remove the suspicion excited by such changes, there can be no recovery, even upon demurrer to the evidence by the insurer, and although the goods actually destroyed may have exceeded in value the amount of the policy. *Vaughan v. Virginia Fire, etc., Ins. Co.*, 102 Va. 541, 46 S. E. 692.

"Under these circumstances, as was said by this court upon the former writ of error, 'it was undoubtedly incumbent upon the plaintiff to entitle him to recover, to remove the suspicion which the facts proved in connection with the invoices in question justly excite; for nothing is better settled than that the assured must observe, in dealing with the insurer, the utmost good faith, without which there can be no recovery. *Moore v. Virginia Fire, etc., Ins. Co.*, 28 Gratt. 508, 523, 26 Am. Rep. 373. Because there was no such explanation offered on the first trial touching the false statements made under oath in furnishing the preliminary proofs of loss, the verdict of the jury was set aside and a new trial ordered." *Vaughan v. Virginia Fire, etc., Ins. Co.*, 102 Va. 541, 46 S. E. 692.

Effect after Suit Instituted.—No false

swearing by the plaintiff, no matter what his intent, perpetrated after the writ was issued, can change the rights of the parties or affect the verdict, although the policy contain a claim of forfeiture, in case the assured make any false affidavit with intent to defraud the company. *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 11 S. E. 50.

H. WAIVER OF PROOFS OR DEFECTS THEREIN.

1. Waiver of Proof.

a. In General.

If the evidence shows that the preliminary proofs, required by a policy of insurance, have been waived by the company, the insured is entitled to recover, though no such proofs were in fact taken. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 29 S. E. 670; *Peninsular Land, etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237.

A condition in a policy requiring immediate notice of loss and that proofs thereof be furnished within a limited time may be waived by the insurer. Many acts and circumstances may constitute such waiver. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

b. Matters Constituting a Waiver.

In General.—Everything said or done by the insurer or his proper agents upon which the insured may reasonably rely, which might fairly induce him to conclude that such proofs of loss have in his case been dispensed with or excused, and he is thereby influenced to act in good faith in accordance with such conduct, may amount to a waiver of such formal stipulation. *Peninsular Land, etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 W. Va. 237.

Acts of Insurer or Agent Preventing or Delaying Making of Proofs.—When the company by its acts, or through its agent, induces failure or delay in making or perfecting the proofs, it is held to have waived such defect. *Georgia*

Home Ins. Co. v. Kinnier, 28 Gratt. 88; *Peninsular Land, etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237.

A condition of the policy required immediate notice of loss, and that within thirty days the insured render a particular account thereof with an affidavit, etc. Held, if the insurers, from any reliable source, knew that the building insured had been destroyed by fire, and by any act or declaration of theirs, or of their lawful agent, prevented the assured from preparing the schedule with the affidavit thereto required by the policy within the thirty days, whether verbally or in writing, it was a waiver of the performance within the thirty days of that condition; and the omission to do so is no bar to the action on the policy, provided it was done within a reasonable time thereafter. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

Denial of Liability on Other Grounds.—Denial by an insurance company of its liability on other grounds within the time allowed for furnishing preliminary proofs of loss, is in law a waiver of the conditions of the policy requiring such proofs. *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101; *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998; *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 544, 11 S. E. 50; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Peninsular Land, etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237.

A denial of liability by the insurance company on the ground that the policy was not in force at the time of loss, or that it had been forfeited, is a waiver not only of defects of proof, but of any proofs whatever. *Virginia Fire, etc., Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. 370; *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 613; *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 11 S. E. 50; *Gerl-*

ing *v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. 691.

2. Waiver of Defects.

Acting on Notice.—Where the notice is acted on by the insurer, all defects in its form or contents are waived. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

Where, when an insurance company is informed of a fire by the insured, and the company not saying anything about the preliminary proofs, proceed to inquire whether the insurance is valid upon a specific ground independent of these proofs, and decide that upon this specific ground the insurance is not valid; this is a waiver of all objection to the insufficiency of these proofs. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

S. & Co. have a policy of insurance against fire on buildings in a company of which R. is president. The buildings are burned; and two days after the fire S. writes to R. describing the fire, and stating the loss, and then referring to what will be necessary to be done by the company, and expressing himself as wishing to comply strictly with the rules and regulations of the company. Upon the receipt of this letter by R., the company proceed to act upon it. The letter having been intended by S. as the notice required by the policy, and the company having acted upon it as such, the fact that it was not signed by S. & Co., or addressed to R. as president of the company, or to the company, as required by its rules, will be considered as waived, and the letter is competent evidence of notice. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

Failure to Object in Reasonable Time.—When there is any valid objection to a proof of loss, it should be communicated to the insured within a reasonable time, or the objection will be deemed to have been waived. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

When the requirements of the policy make it the duty of the insured to submit with the proof of the loss, a certificate of the nearest magistrate and a certificate is furnished, to which no objection is made within a reasonable time, the insurer will be estopped from making objections on the ground that it is not by the nearest magistrate. *Nease v. Ætna Insurance Co.*, 32 W. Va. 283, 9 S. E. 233.

Failure to Specify Defects in Proofs.—Where the insured, in sending proofs, inquires whether further statements are required and the company does not specify the defects or informalities in the proofs of loss, it is held, to have waived them. *Home Ins. Co. v. Cohen*, 20 Gratt. 312; *Mason v. Citizens', Fire, etc., Ins. Co.*, 10 W. Va. 572.

When the insurance company does not point out and object to defects or informalities in the proofs of loss, such failure constitutes a waiver of the defects. *Morotock Ins. Co. v. Cheek*, 93 Va. 8, 24 S. E. 464; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670.

One of the conditions of the policy is, among other things, that the insured shall forthwith give notice of his loss, and as soon as possible deliver in a particular account of such loss, signed with his own hand, and verified by his oath or affirmation; and also, if required, shall produce their books of account, etc., and exhibit the same for examination by any person named by the company; and until such proofs are furnished the loss shall not be deemed payable. The account having been furnished, first under the oath of an agent, and when so objected to, under the oath of the principal, and the company having been called upon to state what other proofs they required, and not stating what; held, that the company will be held to have waived any demand for further preliminary proof. *Home Ins. Co. v. Cohen*, 20 Gratt. 312.

"Good faith and fair dealing is of the very essence of the contract of insur-

ance; and where the company puts its refusal to pay upon the ground of a defect in the preliminary proofs, they ought to point out what the defect is—what is necessary to be supplied so as to give the insured the opportunity to supply what is required. Failure to do this, or their silence when called upon, will be held to be a waiver of such defect in the preliminary proofs. *Angel on Insurance*, § 245; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. R. 385; *Burnstead v. The Dividend Mutual Ins. Co.*, 2 Kern. R. 81; *Turner v. North Amer. Fire Ins. Co.*, 25 Wend. R. 374; *Id.* 379. And so as in the case before us, where the company has the right, by the express terms of the policy, to call for the production of copies of bills, invoices, etc., where the originals have been lost, before a person to be named by them, and they fail to name such person, the company will be held to have waived their right to require their production as a part of their preliminary proof." *Home Ins. Co. v. Cohen*, 20 Gratt. 312.

Specific Objection as Waiver of Others on Trial.—Where specific objections to proofs of loss have been made, and the insured has expended time and money in removing them, the insurer will be deemed to have waived all other objections, and will not be allowed to assert them on the trial. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

IX. Adjustment and Settlement of Loss.

A. PROVISIONS IN POLICY AS TO ARBITRATION AND AWARD.

In General.—Policies of fire insurance may and often do contain provisions that in the event of disagreement between the parties thereto touching any loss or damage, after proof has been received, the matter shall be submitted to impartial arbitrators, and that no suit shall be sustainable until after

an award has been obtained. See *Providence, etc., Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679; *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120; *Billmyer v. Hamburg-Bremen Fire Ins. Co. (W. Va.)*, 49 S. E. 901.

In Valued Policy Where Loss Total.—All provisions in conflict with a valued policy statute are void, and hence a provision for the appointment of arbitrators in case of loss is ineffective, where the property is wholly destroyed. *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

For the provisions of this statute, see ante, "Statutory Provisions as to Computation," VI, A, 1.

Waiver of Award.—Where action on a fire insurance policy was brought just before the year ended within which the policy required it to be brought, and the declaration alleged the loss exceeded the insurance, and no demand for an award by defendant was alleged, it was held, in *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120, that the provision for an award was waived.

"If there was any intention on the part of the insured to insist upon this provision where it was useless, the said insurer should have done so promptly. To have so long delayed to do this was a waiver of that provision." *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

B. QUALIFICATIONS OF ARBITRATORS AND UMPIRES.

"The arbitrators and umpire selected to ascertain the loss sustained by any claimant upon any policy of insurance on any property in the state of Virginia, shall be citizens and actual residents of the state of Virginia. Said arbitrators and umpire, before acting as such, shall take an oath to faithfully discharge their duties, and that they are not in any manner in the em-

ployment of any insurance company." Va. Code, 1904, § 1277b.

C. POWERS OF ARBITRATORS AND UMPIRES.

Powers of Umpire.—In *Providence, etc., Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679, the agreement named two arbitrators who, "shall appraise and estimate the loss upon the property damaged and destroyed by the fire * * * Provided that in case of disagreement the said appraisers shall select a third who shall act with them in matters of difference only. The award of said appraisers, or any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement." And the persons so chosen took the following oath: "I, the undersigned, hereby accept the appointment of third appraiser, as provided in the foregoing agreement, and solemnly swear that I will act with strict impartiality in all matters of difference that shall be submitted to me in connection with this appointment, and I will make a true, just and conscientious award, according to the best of my knowledge, skill and judgment." It was held, that such third man is an umpire and can only act in such matters of difference in valuations between the other two as may be referred to him by them and an award made up wholly by one of the original arbitrators and such umpire, the other arbitrator taking no part in the estimate of the value or losses upon which such award is based could not be enforced.

Effect of Excess of Authority by Umpire or Arbitrator.—When an umpire or arbitrator to whom the question of loss or damage by fire has been submitted, exceeds his authority, the effect of his act is the same whether it was done consciously or by mistake, as in either case his award is void. *Providence, etc., Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679. See the title **ARBITRATION AND AWARD**, vol. 1, p. 687.

D. CONCLUSIVENESS OF AWARD.

In General.—An insurance policy provides in case of disagreement as to amount of loss to goods by fire, for arbitration as to such amount, as a condition precedent to suit on it, and provides that the award shall "determine the amount of such loss." A valid award under it is final and conclusive as to the amount of loss. *Billmyer v. Hamburg-Bremen Fire Ins. Co. (W. Va.)*, 49 S. E. 901.

Effect of Award upon Right of Action in Policy.—An award under an insurance policy—the submission limited to the amount of loss by fire—does not prevent action on the policy. *Billmyer v. Hamburg-Bremen Fire Ins. Co. (W. Va.)*, 49 S. E. 901.

E. ADJUSTMENT AS WAIVER OF CONDITIONS.

An adjustment with the assured, after a loss by fire, with a full knowledge of all the facts, is a waiver of a right on the part of the company to insist on the benefit of a provision in the policy that the obtaining of other insurances on the property, without their consent, should render the policy void, and also of a provision requiring the assured to furnish the company, before it should be liable, with the certificate of a notary public of certain facts. *Levy v. Peabody Insurance Company*, 10 W. Va. 560.

The courts will enforce the provision in a policy of insurance against fire, that if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the policy, otherwise the policy should be void, but the benefit of such provision is waived by an adjustment of the loss made by the company with a full knowledge of all the facts. And, therefore, to an action of assumpsit based on the adjustment, a plea of the breach of such condition ought not to be received. *Eagan v. Ætna, etc., Ins. Co.*, 10 W. Va. 583.

An adjustment by a fire insurance company of the loss resulting from the burning of insured property, or the acceptance of the premium after the loss, with full knowledge of all the facts, or even the mere delivery of the policy before the payment of the premium, is a waiver of a right to insist on a provision in the policy that the company shall not be liable until the premium therefor be actually paid. A letter from the secretary of such a company to the assured after proof of loss has been furnished the company, in which he proposes for the company to pay one-fifth of the loss proved, saying that for the other four-fifths the company was not responsible, as the company had but one-fifth of the entire insurance on the property when they issued their policy, is a waiver of any right to claim the benefit of a provision requiring the assured before he could have a right to enforce the policy, to furnish proof in a certain manner to the company of the amount of the loss, and also a certificate of a notary public of certain facts in connection with the loss arising from the fire. *Mason v. Citizen's Fire, etc., Ins. Co.*, 10 W. Va. 572.

X. Actions on Policies.

A. JURISDICTION AND VENUE.

Equity Jurisdiction.—Equity will enforce performance of a contract of insurance, made with an agent having authority to issue policies or to bind the company, in favor of one who has paid the premium. *Haden v. Farmers', etc., Fire Ins. Co.*, 80 Va. 683; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

But the bill must on its face distinctly state that such contract was made, and show when, where, how and by whom it was made, and that the

person making it had authority to bind the company. *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Haden v. Farmers', etc Fire Association*, 80 Va. 683.

"When a contract for insurance has been made, but no policy to evidence it has been issued, the remedy of the insured after loss may be by bill in equity, on the principle of specific performance; and the court does not simply decree the specific performance of the agreement by the actual execution of a policy of insurance, and then compel the insured to bring an action on that policy, but, to avoid multiplicity of actions and delay, having the parties before it properly for specific performance, will at once decree the payment of the amount which would be recoverable under the policy if issued, agreeably to that principle of equity practiced that as all the necessary parties are before the court for one purpose, it will give full and complete relief, and not send them to another court. *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732; *May on Insurance*, § 565; *Wood on Insurance*, §§ 11, 12; *Insurance Co. v. Colt*, 20 Wall. 560. Or he may sue at law, by same authorities." *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

Where a contract for the insurance of a building has been made with the agent of an insurance company having authority to issue policies, and the premium has been paid, but before the policy is issued the building is consumed by fire, a court of equity has jurisdiction to enforce the payment of the policy at the suit of the assured against the insurance company. *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732.

Venue.—By the Virginia Code, an action or suit to recover a loss under a policy of insurance upon property, may be brought in the county or corporation where the property was situated at the date of the policy. Va.

Code, 1904, § 3214. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77; *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487.

A motion may be maintained under Va. Code, 1904, § 3211, against a fire insurance company in the county in which the property insured, and which was destroyed by fire, was situated. An action might be maintained in such county, under § 3214 of the Virginia Code, and it is not "otherwise specially provided," by § 3251. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487.

In West Virginia a suit to recover a loss under any policy of insurance upon property, may be brought in any county wherein the property insured was situated. W. Va. Code, 1899, ch. 123, § 1, cl. 5. *Carson v. Phoenix Ins. Co.*, 41 W. Va. 136, 23 S. E. 552; *Brabham v. Phoenix Ins. Co.*, 41 W. Va. 139, 23 S. E. 553.

Under the provisions of ch. 123 of the West Virginia Code, the action may be brought in any county where a nonresident company does business, or in which it has property or debts due it, or in which the cause of action or part thereof arose. *Carson v. Phoenix Ins. Co.*, 41 W. Va. 136, 23 S. E. 552; *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580.

B. FORM OF ACTION.

Assumpsit.—An action of assumpsit will lie on a policy of fire insurance. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582. See the title ASSUMPSIT, vol. 2, p. 1, 31. And see post, "Pleading," X, F.

Covenant.—Chapter 125 of the West Virginia Code, § 64, makes provisions for pleas in actions on insurance policies "whether the action be covenant debt, or assumpsit," etc. See generally, the title COVENANT, ACTION OF, vol. 3, p. 731.

Debt.—As to actions of debt against insurance companies, see the title

DEBT, THE ACTION OF, vol. 4, p. 269, 279. And see post, "Pleading," X, F.

Remedy by Motion after Notice, under Va. Code, § 3211.—Under Va. Code, 1887, § 3211, a motion may be maintained for a judgment for money on an insurance policy, and the notice takes the place of both the writ and declaration. *Grubbs v. National, etc., Ins. Co.*, 94 Va. 589, 27 S. E. 464; *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

On such motion the defendant, where he has appeared and pleaded, can not move to dismiss. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487.

C. LIMITATIONS.

1. In General.

Generally, as to the limitations of actions, see the title LIMITATION OF ACTIONS.

2. Limitations in Policy.

Validity.—A condition in a policy that suit shall not be brought except within a period less than that fixed by the statute of limitations is valid. *Virginia Fire, etc., Ins. Co. v. Aiken*, 82 Va. 424; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

A provision in a policy, that no action for loss or damage shall be sustainable, unless the same is brought within six months after the loss or damage shall occur, is valid. *McFarland v. Aetna Fire, etc., Ins. Co.*, 6 W. Va. 437; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

The mere pendency of negotiations between the parties, or the fact that occasional interviews are had between them in regard to the adjustment or settlement of a loss, will not, of itself, operate as a waiver of the above provision, or be an equitable estoppel. *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

Effect of Extension of Time.—After an insurance company has granted an extension of time within which an ac-

tion may be instituted on one of its policies, it can not withdraw it, nor attach conditions to it, without the consent of the party to whom the extension is granted. *Cochran v. London Assurance Corporation*, 93 Va. 553, 25 S. E. 597.

"The evidence of the plaintiff in this case, which is all that can be considered on the defendant's demurrer to the evidence, shows that the insurance company granted the plaintiff an extension of three months, after the time his right to sue would be barred by the terms of the policy, within which to institute an action; that the plaintiff accepted the benefit of the extension, and relied on it; and that the action was brought within the extended period. Though there was evidence upon which the jury might have inferred that the benefit of the extension was not accepted, yet, upon a demurrer to the evidence, or a motion to set aside the verdict of the jury, the court is bound to that interpretation of the facts, and that conclusion from the evidence, which the jury have sanctioned by their verdict." *Cochran v. London Assurance Corporation*, 93 Va. 553, 25 S. E. 597.

Waiver of Limitation.—The insurer may waive the limitation by not relying upon it after the time has expired. *Virginia Fire, etc., Ins. Co. v. Aiken*, 82 Va. 424.

Where a policy of insurance provides that suit must be brought upon it within six months after loss by fire, and there is a promise by the company, within the six months, to pay the policy, and the whole period runs out before the company refuses to pay, such promise is a waiver of the limitation, and stops the company from pleading it, and is not a mere suspension of time from the promise until the refusal to pay. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

When Limitation Commences.—An insurance policy contained a provision

that no action should be sustained thereon unless brought within six months after the loss should occur, and another stipulation that the loss or damage should be paid to the assured sixty days after the receipt by the company of satisfactory proof of loss. Held, that the limitation commenced to run when the loss occurred and not sixty days thereafter. *Virginia Fire, etc., Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349. See also, *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

In *Barber v. Fire, etc., Ins. Co. of Wheeling*, 16 W. Va. 658, 37 Am. Rep. 800, where the policy provided that no action should be sustained thereon unless commenced within six months after the loss should occur, and also that no action should be maintained until arbitrators had fixed the amount of the loss, it was held that the action could be commenced within six months after the arbitrators had fixed the amount of the loss, although more than six months after the loss occurred. See also, *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777.

The action mentioned in the condition of a policy of insurance which must be commenced within six months, is the one which is prosecuted to judgment. The failure of a previous action, from any cause can not alter the case, although such previous action was commenced within the period prescribed. *McFarland v. Aetna Fire, etc., Ins. Co.*, 6 W. Va. 437.

When Action Is Commenced.—Where service of summons on defendant's agent had been made within ten days of return day, and suit remanded to rules to be properly matured, and an alias summons had been issued and duly served, it was held, that the commencement of suit was the issuance of the original summons and saved the suit from being barred by the limitation clause in the policy. *Virginia Fire, etc., Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754. See the title ACTIONS, vol. 1, p. 133.

D. PARTIES.**1. In General.**

Generally, as to proper and necessary parties in actions, see the titles **CONTRACTS**, vol. 3, p. 456; **INSURANCE**; **PARTIES**.

"The determination of the proper parties to an action upon an insurance policy must be largely governed by the law and practice of the forum regulating suit upon ordinary contracts." *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94, quoting *Kerr on Ins.* 764.

2. Parties Plaintiff.

General Rule.—"The policy itself designates the party to whom the proceeds are primarily payable, and a suit upon a policy must, as a general rule, except where otherwise provided by statute, be brought by the one designated in the contract as the payee, or his privies." *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94, quoting *Kerr on Ins.* 764.

Legal Representatives.—A policy of insurance on a building insures K. and his legal representatives. The building having been burned after the death of K., his administratrix may maintain an action on the policy. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

"It is contended that by the terms 'legal representatives,' used in the declaration pursuing the tenor of the policy, the heirs at law of Alexander Kinnier were intended, so far as the insured building is concerned. I do not think this is the proper construction of the policy. The policy declared upon, and as set out, is a contract to indemnify Alexander Kinnier personally. The words 'legal representatives,' as used, are of the same import as the words executors, administrators, personal representatives. The policy as set out is a simple contract; and upon the death of Alexander Kinnier, passed like his bonds, notes, and other choses in action to his administratrix; and she only had a right of action upon it. We

have been referred by the counsel for the plaintiff in error in support of his objection, to the case of *Haxall v. Shippen*, 10 Leigh 536. That case involved incidentally the construction of a covenant for insurance entered into by the Mutual Assurance Society, a corporation created by the laws of this state. The covenant in terms stipulated for payment in case of loss to the assured, 'his heirs and assigns;' and it is construed in a chancery suit, in which the form of proceeding was not a question, as a covenant real, which enured to the benefit of the heir. Whatever may have been the proper construction of the covenant in that case, I do not think the policy in this case can be properly construed as intended to enure to the benefit of the heirs. However that may be, the statute (Code of 1873, ch. 126, § 19), it seems, would give the administratrix the right to maintain this action." *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, 91.

Persons Interested Though Not Parties to Policy or Named Jointly with Others.—By § 2415 of the Virginia Code, 1904, it is provided that "an immediate estate or interest in, or the benefit of a condition respecting any estate, may be taken by a person under an instrument although he be not a party thereto, and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." This section is applicable to actions on policies of fire insurance. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

Thus, any person having an interest in property insured, though no party to the policy, may institute and maintain an action in his own name to extent of the loss occasioned him by its

destruction. Va. Code, § 2415. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

Mortgagee.—Under Va. Code, 1887, § 2415, a mortgagee, whose interest extends to the whole loss, may sue. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

"The mortgagee may sue alone and in his own name, where the loss, if any, is payable to him as his interest may appear, when his interest equals or exceeds the full amount due under the policy." *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94, quoting *Kerr on Ins.* 764.

"*Colby v. Parkersburg Ins. Co.*, 37 W. Va. 789, 17 S. E. 363, holds that where a policy of fire insurance insures A in a given sum, part of it on one property, part on another, loss payable to B, mortgagee, as his interest may appear, and B's mortgage covers only one of the properties insured, B may sue on the policy in his own name and recover the total loss on both properties not exceeding his debt, notwithstanding his mortgage covers only one of the properties insured." *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

"In *Brown v. Ins. Co.*, 5 R. I. 394, it is held, that a policy of fire insurance effected by the owner and mortgagor of a stock of goods, by the terms of which the loss or damage, if, any, is made payable to the mortgagee, is, in legal effect, assigned by the former to the latter, with the consent of the insurer, as collateral security for the mortgage debt. A policy of insurance made payable to a third person as beneficiary, as his interest may appear at the time of fire or loss, does not, according to this view, insure such third party, or his interest in the subject of insurance. Therefore, his right to sue and recover on the policy depends upon his interest in the insurance money at the time of the loss, or more accurately speaking, at the time of the institution of his action." *Ritchie County Bank v.*

Fireman's Ins. Co., 55 W. Va. 261, 47 S. E. 94.

The defendant insurance company, in consideration of \$75 premium, by its agent, C, issued and delivered its policy to S. D. W. for \$2,500 as follows: \$1,500 thereof on a building used for a hotel, office and other purposes, then owned by S. D. W., and \$1,000, the residue, on hotel, office and kitchen furniture, loss, if any, under the first item of the policy, payable to B as its interest might appear at the time of fire. The property was totally destroyed by fire. Held, that B can maintain its action in its own name upon said policy against the company for said \$1,500. *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

Where the insured assigned to B before loss with consent of the insurer, and after loss B assigned to L, it was held that the legal title was in B, and that he might sue in his own name notwithstanding the assignment. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

Agents or bailees obtaining insurance in their own names, for the benefit of others, on property in their care or custody or the subject of the agency, or having an insurable interest in such property, may sue in their own names. *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777; *Deitz v. Providence, Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616.

A floating or open policy applies to the benefit of the person who may own the property at the time of the loss, although he had no interest in the property when the policy was issued; and extrinsic evidence is admissible to show who was in fact concerned. *Morotock Ins. Co. v. Cheek*, 93 Va. 8, 24 S. E. 464.

Upon a floating policy, issued to the manager of a warehouse, an action may be brought in the name of the manager to the use of himself and the owner of the goods destroyed, naming him. *Mor-*

stock Ins. Co. v. Cheek, 93 Va. 8, 24 S. E. 464.

As to rights under open or floating policy, see ante, "Property Included," III, E, 3.

Where an insurance contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the undisclosed principal may sue upon it. *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777; *Deitz v. Providence, Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616.

Where policies are issued "for the benefit of whom it may concern," any person who has an insurable interest therein at the time of the loss and whose interest was intended to be covered by the policy, may recover thereon. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

Generally, as to what constitutes an insurable interest, illustrations of persons held to have such interest, etc., see ante, "Insurable Interest," III, C, 2.

E. PROCESS AND SERVICE.

In General.—The same rules which govern the service of process on other corporations apply to fire insurance companies. See the titles INSURANCE; SERVICE OF PROCESS; SUMMONS AND PROCESS.

Service by Publication.—In *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77, where there was no agent in the county in which the action was brought, it was held, that service by publication was proper, although the company was doing business both in banking and insurance, and another kind of service is provided for in an action against banks.

Foreign Companies.—In Virginia it is provided by statute that every foreign insurance company doing business in the state shall appoint an agent in the city of Richmond upon whom process may be served, and that in case of his death or inability to act, process may be served upon the auditor of pub-

lic accounts. V. C., §§ 1266, 1267, as amended by acts, 1889-90, p. 9. *Continental Ins. Co. v. Kasey*, 27 Gratt. 216.

In West Virginia there is a similar statute providing for an agent upon whom process may be served. W. Va. Code, ch. 124, § 9.

F. PLEADING.

1. Declaration or Petition.

a. Statutory Forms.

(1) In Virginia.

On Virginia it is provided by statute that: "In an action on a policy of insurance, no particular form of action or declaration shall be necessary, but it shall be sufficient for the plaintiff to file a complaint in writing at common law setting forth the grounds of his action and the relief prayed for and filing therewith the original policy, or a sworn copy thereof upon which his action is brought and the loss or death relied upon as the ground of his recovery, and that he has performed all the conditions of said policy and violated none of its prohibitions, and in such complaint it shall not be necessary to set forth every condition or proviso of said policy nor to aver observance of or compliance therewith 'seriatim,' but a general averment to that effect shall suffice." Va. Code, 1904, § 3251; *Farmers, etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338; *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 815, 11 S. E. 120; *Virginia Fire, etc., Ins. Co. v. Saunders*, 84 Va. 210, 4 S. E. 584.

The object of the statute as expressed in its title, was "to simplify declarations in actions against insurance companies." *Virginia Fire, etc. Ins. Co. v. Saunders*, 84 Va. 210, 4 S. E. 584.

(2) In West Virginia.

In West Virginia it is provided that a declaration or count on policy of insurance, whether the policy be under seal or not, may be in effect as follows: "A— B complains of C— D— who has

been summoned to answer this: For that the defendant, by virtue of the policy of insurance herewith filed (or a copy of which is herewith filed), owes (here state the amount claimed under the policy) to the plaintiff for loss in respect to the property (or subject) insured by said policy caused by fire on or about the—day of—in the year—, at (or near to—stating the place at or near which the loss occurred).” W. Va. Code, 1899, ch. 125, § 61; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *Travis v. Peabody Insurance Co.*, 28 W. Va. 583; *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94; *Carson v. Phoenix Ins. Co.*, 41 W. Va. 136, 23 S. E. 552; *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616; *Rosenthal Co. v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670.

In *Ritchie County Bank v. Firemen's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94, the declaration in the form prescribed by § 61, of chapter 125 of the West Virginia Code, 1899, alleged that “the defendant by virtue of the policy of insurance thereto attached and therewith filed, owes to the plaintiff the sum of \$1,500 for loss in respect to the property insured by said policy, caused by fire on or about the 21st day of December, 1901, at the town of Cairo, in the said county of Ritchie.

Purpose and Effect of Provision.—

In *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584, Brannon, J., in speaking of the provisions of the West Virginia Code, ch. 125, §§ 61, et seq., says: “That statute was meant, not to change the form of action or pleading but only to present a short form of declaration instead of the prolix cumbrous forms of declaration which had been used upon policies of insurance, with all their stipulations, exceptions, provisos and conditions. It simply dispensed with allegations

hitherto necessary, not changing the nature of the action.”

“Pleadings in insurance cases by common law were complicated and difficult, owing to the many stipulations in policies, and the object of the statute is to simplify.” *Rosenthal Co. v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

When the declaration fails to state all the exceptions contained in the policy which materially qualify the defendant's liability or exempts the defendant from all responsibility, absolutely in certain instances, the variance is fatal. *Simmons v. Insurance Co.*, 8 W. Va. 474.

b. Time and Place of Filing.

By the Virginia Code, 1904, § 3251, it is provided that “such complaint shall be filed in the same court and at the same time at which a declaration in such cases is now required by law, and such action shall be matured in the same manner as at present.” *Virginia Fire, etc., Ins. Co. v. Saunders*, 84 Va. 210, 215, 4 S. E. 584.

c. Requisites and Sufficiency.

Substantial Compliance with Statute Sufficient.—All other allegations ordinarily used in common-law declarations on policies of insurance other than life policies, are no longer necessary, and if a declaration whether intended to be in the common-law form or in the form prescribed by the statute, in effect contains the allegations prescribed by the statute, it will be sufficient. *Travis v. Peabody Insurance Co.*, 28 W. Va. 583.

Declaration showing plaintiff's intention to proceed under the statute “to simplify declarations in actions against insurance companies” (Code, 1873, ch. 167, § 14), is a good statutory declaration, even though largely following the form of a declaration in debt. *Virginia Fire, etc., Ins. Co. v. Saunders*, 84 Va. 210, 4 S. E. 584.

A declaration in assumpsit on a policy of insurance, not intended to be drawn

after the form prescribed by ch. 66 of the West Virginia acts of 1877, is nevertheless sufficient if it in substance and effect sets forth the cause of action by averments equivalent to those prescribed by that statute, although it may be insufficient as a common-law declaration. *Travis v. Peabody Insurance Co.*, 28 W. Va. 583.

Inclusion of Common Counts in Addition to Count in Statutory Form.—

In an action of assumpsit on an insurance policy for recovery for loss by fire, there may be included in the declaration, with a count under § 61, ch. 125, W. Va. Code, the common counts or other counts proper in that form of action. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

"It is very common to insert a special count with common counts under the commonest principles of pleading. *Minor Inst.* 576, 941. Unless there is something peculiar in an insurance case, this is properly done here. If a party has a demand against an insurance company for loss by fire, and a demand for service or money lent could he not avoid multiplicity of action, and unite, in one declaration, the several claims as in ordinary cases? I think so." *Per Brannon, J.*, in *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584. See the title ASSUMPSIT, vol. 2, p. 1.

Matter in Defeasance Need Not Be Stated.—In actions on policies of fire insurance the usual rule applies that matters in defeasance of the plaintiff's action need not be stated in the declaration. Whenever there is a circumstance the omission of which is to defeat the plaintiff's right of action *prima facie* well founded, whether called by the name of a proviso or a condition subsequent, it must, in its nature be a matter of defense, and ought to be shown in the pleading by the opposite party. It is sufficient to state in the declaration those parts of the contract whereof a breach is complained of; or,

in other words, to show so much of the terms beneficial to the plaintiff in a contract as constitutes the point for the failure of which he sues and it is not necessary or proper to set out in the declaration other parts not qualifying or varying in any respect the material parts above mentioned. *Simmons v. Insurance Co.*, 8 W. Va. 474; *Morotock Ins. Co. v. Fostoria, etc., Co.*, 94 Va. 361, 26 S. E. 850; *Barber v. Fire, etc., Ins. Co.*, 16 W. Va. 658, 37 Am. Rep. 800. See the titles CONTRACTS, vol. 3, p. 443; PLEADING.

Where the plaintiff's application for insurance contains warranties which are not attached to the policy, in whole or in part, or set out in the policy, it is not necessary for the plaintiff to state such warranties in his declaration—they are matters in defeasance of the plaintiff's action—they are matters which should more properly come from the other side. *Simmons v. Insurance Co.*, 8 W. Va. 474.

Allegations of Plaintiff's Interest in Property.—

In an action of assumpsit on a policy, it is necessary for the plaintiff to allege an interest in the property insured. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

An allegation in a declaration on a policy of fire insurance that the defendant insured the plaintiff's property is insufficient as an allegation of interest in the property insured. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

In *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368, it was held, that "it is true that the declaration must allege such insurable interest in a general way, but this is proven *prima facie*, by the mere production of the policy. And if the company relies on the fact that the insured really had no insurable interest, it must establish its defense by proper proof."

Generally, as to necessity for, and what constitutes an insurable interest see ante, "Insurable Interest," III, C, 2.

Reference to Policy and Allegation of Performance of Conditions.—In action on policy it is sufficient that the declaration refer to the policy and allege, in general terms, the performance of all its conditions and the violation of none of its prohibitions. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

In an action on a policy of insurance on buildings, if the declaration is framed as authorized by the statute, Va. Code, 1873, ch. 36, § 44, it ought regularly, perhaps, to notice the fact, that the policy or a sworn copy of it is filed with it. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

But when it does not so appear that the policy was filed with the declaration, yet if the parties proceed in the case without its being called for by the defendant, and it is obvious that the defendant knew what it was without calling for it, the objection that it was not filed with the declaration can not be taken for the first time in the appellate court, though there was a demurrer to the declaration. *West Rockingham, etc., Ins. Co. v. Sheets*, 26 Gratt. 854.

Section 61 Makes Policy Part of Declaration.—Ch. 125, § 61, Code, 1899, in the form there given for a declaration on a policy of insurance, makes the policy part and parcel of the declaration, like an exhibit with a bill in chancery. It answers for averment. *Staats v. Georgia Home Ins. Co (W. Va.)*, 50 S. E. 815.

Allegations as to Notice and Proof.—A declaration in assumpsit on a policy of fire insurance having alleged that the loss was to be paid in sixty days after proof and notice given the defendant, in the manner required by the policy, it is necessary for the declaration to allege this manner, and that such proof and notice were accordingly given. And a failure to make these allegations, or the allegation of interest, is fatal to the declaration on

general demurrer. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

Allegations as to Adjustment.—In an action of assumpsit based on the adjustment of the loss as caused by the fire, it is necessary to allege that the adjustment was made with the defendant, and this is insufficiently done by an allegation that it (the adjustment) was made with an agent of the defendant; and it is also necessary to allege that the defendant promised to pay the amount of such adjustment. And a failure to make such allegations is fatal to the declaration on general demurrer. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

Averment of Performance—Proof of Waiver.—In the declaration on a policy of insurance framed under the statute, plaintiffs say they have performed on their part all the conditions of the policy, and have violated none of its prohibitions. Under this declaration they may prove a waiver of performance of the conditions of the policy by the insurer; and this will be equivalent to proof of the performance of such conditions. *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854. See also, *Levy v. Peabody Insurance Co.*, 10 W. Va. 560.

"When the plaintiffs say in their declaration that they have on their part performed all the conditions of the policy of insurance and have violated none of its prohibitions, of course they mean such as were not waived by the defendant. Such as were waived are, in effect, as if they had never been inserted in the contract. If the act of 1871-2, ch. 79, § 1, p. 58, Code, ch. 36, § 44, p. 372, had not been passed, proof of waiver of performance of any of the conditions of the policy would have been equivalent to proof of performance of such conditions under a declaration averring such performance. I think that the American authorities, or a decided preponderance of them, show that to be a correct rule with us,

while the English rule appears to be different." *West Rockingham, etc., Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

Allegations as to Award.—In an action on a policy of fire insurance it is not necessary that the declaration allege that there had been an award though the policy provides that no suit shall be sustainable until after an award. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120.

d. Amendment.

In an action on a policy for loss by fire claiming a certain sum as damages, or for loss to certain property, an amended declaration may be filed claiming larger damages, or on additional property, under the same policy, by the same fire. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584. See generally, the title AMENDMENT, vol. 1, p. 316.

Amendment of Copy of Policy Filed with Declaration.—A copy of a fire insurance policy filed with a declaration on such policy may be amended to conform to the original in case of variance. *Staats v. Georgia Home Ins. Co. (W. Va.)*, 50 S. E. 815.

2. Notice as Substitute for Writ and Declaration.

Where a motion is maintained on a policy of fire insurance, the notice takes the place of the writ and declaration. See ante, "Form of Action," X, B, under catchline, "Remedy by Motion after Notice under Virginia Code, § 3211."

3. Demurrer.

Generally, as to when demurrer will lie, form, proceedings thereon, etc., see the title DEMURRERS, vol. 4, p. 456.

To Plaintiff's Particular Statement of Facts.—In an action by a husband, for the use of his wife, on a policy of insurance, which policy described the property insured as the plaintiff's, and contained a provision that, if the insured is not the absolute owner of the property, it must be so expressed in writing in the policy, otherwise the in-

surance as to such property shall be void; the declaration was in the form prescribed by our statute (§ 61, ch. 125, W. Va. Code); the plaintiff, at the instance of the defendant, filed a particular statement of the facts he expected to prove at the trial. Among those facts he stated that the insured property belonged to his wife, and that he so informed the agent of the defendant at the time the insurance was procured, but that said agent, contrary to his instructions, and without his knowledge, made out the policy in his name, instead of that of his wife; the defendant then demurred to the declaration and this statement. Held, if the defendant desired to test the legal sufficiency of the plaintiff's case as thus presented, his demurrer was the proper proceeding. *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616.

Provisions of Charter Not Considered on Demurrer to Declaration.

The charter of an insurance company under which a policy is issued is not made a part of the declaration by filing the original policy, or a sworn copy thereof, with the declaration, under the provisions of § 3251 of the Virginia Code, as amended, under which the action is brought, and hence the provisions of such charter can not be considered on demurrer. *Farmers', etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338.

To Plea Amounting to General Issue.

—In an action upon a policy of fire insurance, a plea that such policy was made and issued to a different person than the person named therein, although of the same name, is equivalent to the general issue, and if objected to, ought to be rejected or, if demurred to, the demurrer should be sustained. *Travis v. Peabody Insurance Co.*, 28 W. Va. 583.

Effect of Erroneously Sustaining Demurrer.—Where additional statements are filed by the plaintiff in an action upon an insurance policy, which are

necessary in order to allow the plaintiff to show material facts therein stated bearing upon the waiver by the defendant of conditions contained in the policy, and the court erroneously sustains a demurrer to such statements, and thereby precludes the plaintiff from producing testimony upon said points, the court may at a subsequent term set aside the order sustaining said demurrer. *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670.

Where a demurrer thus sustained has precluded the plaintiff from introducing material testimony upon the trial, and the court, having discovered the error, sets aside the verdict of the jury, and awards a new trial upon that ground, this is not error. *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670.

4. Plea.

By the Virginia Acts, 1871-72, p. 57, Code, 1873, ch. 167, § 14, relating to actions on policies of insurance, it is provided that "the defendant may plead the general issue or such other special plea or pleas, as is now allowed by law." *Virginia Fire, etc., Ins. Co. v. Saunders*, 84 Va. 210, 4 S. E. 584.

Rejection of Special Pleas Where Matter Provable under Nonassumpsit.

—Where nonassumpsit has been pleaded in an action on a policy of fire insurance, and the matters set up in the special pleas offered by defendant are provable under that plea, there is no error in rejecting said special pleas. *Fire Ass'n v. Hogwood*, 82 Va. 342, 4 S. E. 617. See also, *Virginia Fire, etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973.

By ch. 125, § 64 of the West Virginia Code, 1899, it is provided that "to any declaration or count on a policy of insurance, whether the same be in the form prescribed by the sixty-first section of this chapter or not and whether the action be covenant debt, or assumpsit, the defendant may plead that

he is not liable to the plaintiff as in said declaration is alleged."

"In *Travis v. Peabody Insurance Co.*, 28 W. Va. 583, the plea of nonassumpsit was held to be good to such statutory declaration, as the declaration there was held in effect, a good statutory one, though not a good one under the common law." *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

5. Replication.

Necessity for Verification.—Where a common-law replication introduces new matter it should conclude with a verification and not to the country. *Virginia Fire, etc., Ins. Co. v. Saunders*, 84 Va. 210, 4 S. E. 584.

The first clause of § 27, ch. 167, Va. Code, 1873, p. 1093, providing that special traverses, or traverses with an inducement of new matter, shall conclude to the country, does not affect this rule. *Virginia Fire, etc., Ins. Co. v. Saunders*, 84 Va. 210, 4 S. E. 584. See the title PLEADING.

Duplicity.—Where the plea alleged misrepresentation in the application as to the value of the insured property, it was held that a replication that the agent of the insurer inspected the property and inserted the valuation in the policy is not double, as being both by way of estoppel and in confession and avoidance. *Virginia Fire, etc., Ins. Co. v. Saunders*, 86 Va. 969, 11 S. E. 794.

6. Additional Statements as to Nature of Claim or Defense.

a. Additional Particulars as to Nature of Claim, etc.

By ch. 125, § 62 of the West Virginia Code, 1899, relating to actions on insurance policies, it is provided that: "If good cause therefor be shown or appear, the court or judge in vacation, may order the plaintiff to file a more particular statement, in any respect, of the nature of his claim, or the facts expected to be proved at the trial, and may stay the action until a reasonable

time after such order is complied with; and such statement must be made under the oath of the plaintiff, his officer, agent, or attorney at law to the effect that the affiant believes the same will be supported by evidence at the trial. But no such order shall be made if it appear that there has been unreasonable delay on the part of the defendant in applying therefor." *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670; *Cappellar v. Queen Ins. Co.*, 21 W. Va. 576.

The sole object of the statement required by ch. 125, § 62, of the West Virginia Code, as appears by § 66, is to notify the adverse party in effect of the nature of the claim against it. *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 11 S. E. 50.

Such statement is sufficient if it, in effect, gives notice to the defendant of the nature of the plaintiff's claim. *Tucker v. Colonial Fire Ins. Co. (W. Va.)*, 51 S. E. 86.

Where the plaintiff in an action on a policy of fire insurance, being required to file a more particular statement of the nature of his claim, files a statement giving notice to the defendant insurance company that it would be held liable for the full face of the policy on the specific property insured thereby, and, in addition, that it would be held liable for the amount of fixtures not insured thereby, the part of such statement giving notice that the defendant would be held liable for the amount of fixtures is immaterial, and should be treated as surplusage. *Tucker v. Colonial Fire Ins. Co. (W. Va.)*, 51 S. E. 86.

b. Statements as to Nature of Defense, etc.

(1) Necessity for More Particular Statements.

By ch. 125, § 63, of the West Virginia Code, 1899, relating to actions on insurance policies, it is provided that:

"In like manner, if good cause therefor appear, and there be no unreasonable delay on the part of the plaintiff in applying for such order, the court or judge in vacation, may order the defendant to file a more particular statement, in any respect of the nature of his defense, or the facts expected to be proven at the trial, which statement shall be made under the oath of the defendant, his officer, agent, or attorney at law, to the effect that the affiant believes the same will be supported by evidence at the trial. *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670; *Cappellar v. Queen Ins. Co.*, 21 W. Va. 576.

(2) Specifications as to Breaches Claimed.

(a) Code Provision.

By ch. 125, § 64, of the West Virginia Code, 1899, relating to actions on insurance policies, it is provided that: "If in any action on a policy of insurance, the defense be that the action can not be maintained because of the failure to perform or comply with, or violation of any clause, condition or warranty in, upon or annexed to the policy or contained in or upon any paper which is made by reference a part of the policy, the defendant must file a statement in writing specifying by reference thereto, or otherwise, the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred, and such statement must be verified by the oath of the defendant, his officer, agent or attorney at law, to the effect that the affiant believes the matter of defense therein stated will be supported by evidence at the trial." *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670; *Rosenthal v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *Billmyer v. Hamburg-Bremen Fire Ins. Co. (W. Va.)*, 49 S. E. 901; *Cappellar v. Queen Ins. Co.*, 21

W. Va. 576; *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194.

No specification having been filed in the trial court of the defense that the policy of insurance was forfeited by the assignment of the right of the assured, that defense can not avail on writ of error. *Billmyer v. Hamburg-Bremen Fire Ins. Co.* (W. Va.), 49 S. E. 901.

Where the defendant relies upon the contract limitation, as to the time within which suit shall be brought, in an insurance policy, in defeasance of the action, the practice is to plead it, and not to take advantage of it by demurrer. *Barber v. Fire, etc., Ins. C.*, 16 W. Va. 658, 37 Am. Rep. 800.

(b) Effect as Putting Plaintiff on Proof.

In an action on a fire insurance policy under the declaration prescribed by § 61, ch. 125, W. Va. Code, 1899, if the defense is because of failure of the insured to comply with, or his violation of any clause, condition or warranty of the policy, though a precedent condition to recovery, no evidence is required of the plaintiff of his compliance therewith, unless the defendant file the statement required by § 64 of said chapter, specifying the clause, condition or warranty not kept or violated. When such statement of defense is filed, the burden of proof to show compliance with the clause, condition or warranty specified in it, if a condition precedent to recovery, is upon the plaintiff. *Rosenthal Co. v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021, overruling, on this point, *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622. See also, *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194; *Tucker v. Colonial Fire Ins. Co.* (W. Va.), 51 S. E. 86.

"Pleadings in insurance cases by common law were complicated and difficult, owing to the many stipulations in policies, and the object of the statute is to simplify. The statute al-

lows the simple form of declaration, and it then provides for a plain plea that the defendant 'is not liable to the plaintiff as in said declaration is alleged.' That is the general issue; but it does not put the plaintiff on proof of his compliance with all the conditions precedent of his policy. They are very numerous, and for this reason, in order to eliminate all conditions and clauses not really in issue, and narrow the controversy to those conditions and clauses actually in issue, the legislature required the insurance company to file a statement as a specification of the particular clause or condition violated by the insured. All other conditions and clauses not thus brought into actual issue are out of the case. This is just, and the statute should be given such construction. It is the insurance company which complains of default, and it should specify wherein such default consists, and not compel the other party to produce a host of witnesses, and ramble over the numerous clauses of the policy." *Rosenthal Co. v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

"It is no doubt true that if a common-law declaration is filed, or rather by common-law pleading, the plaintiff must allege and prove compliance with those warranties, because they are conditions precedent, and the declaration must aver that the plaintiff complied with them. 11 Ency. Pl. & Prac. 411, 413; *May on Ins.*, § 589. But the statutory form contains no such averment, and dispenses with it, and § 64 plainly renders proof of compliance with them not necessary on the part of the plaintiff, unless a statement is filed by the defendant that those warranties have not been complied with. When such statement is filed, the plaintiff is told wherein he has failed to observe the policy, and then he must prove such observance. The statute does not shift the burden of proof, but it does dispense with proof of observance of a clause or condition, when there is no

statement calling that particular clause or condition in question. Looking at the broad words of § 64 we can not say that it applies to some clauses and not to others." *Rosenthal Co. v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

"The case of *Flanagan v. Phenix Ins. Co.*, 42 W. Va. 426, 26 S. E. 513, by no means supports the position that the plaintiff must prove the precedent condition complied with, without a statement calling for it. It held, as we hold now, that the burden of proof of delivery of proof of loss is on the plaintiff when a statement demands it of him, but not otherwise." *Rosenthal v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

"The case of *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, does support the position of the defendant that the plaintiff must prove the making of an inventory and keeping books of purchase and sales as an indispensable call of his case, though the defendant has not filed any statement that the clause requiring such inventory and books had not been complied with, but with great reluctance we are compelled to overrule point 15 of that case, because it is in the teeth of the statute and emasculates its vigor and effect. To what does the statute apply? To what does it amount under that decision? That decision is all right under common law, as proof of loss is a condition precedent to recovery, and the declaration must aver it; but the statute dispenses with that averment by the statutory declaration, and no proof of it is required until the plaintiff is warned by a specification that he has failed in complying with the clause requiring it." *Rosenthal Co. v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

(3) Matter Relied on as Reply to Specifications.

By ch. 125, § 65, of the West Virginia Code, 1899, relating to actions on

insurance policies, it is provided that: "Upon the plea mentioned in the next preceding section, the plaintiff may join issue without other pleading. But if the plaintiff intends to rely upon any matter which may have been stated by the defendant as aforesaid, the plaintiff must file a statement in writing, specifying in general terms the matter on which he intends so to rely; and such statement must be verified by the oath of the plaintiff, his agent or attorney at law, to the effect the affiant believes the matter of reply therein stated will be supported by evidence at the trial." *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670; *Cappellar v. Queen Ins. Co.*, 21 W. Va. 576.

In an action of assumpsit on a policy of insurance against fire, the declaration alleges that the plaintiff has on his part performed all the conditions of the policy; this must be regarded as meaning such as have not been waived, and if the defendant pleads that a certain condition, specifying it, has been violated by the plaintiff, he may reply that the right to insist on the performance of this condition has been waived, specifying the manner in which it has been waived. *Levy v. Peabody Insurance Company*, 10 W. Va. 560.

c. Nature of Statements.

In an action of assumpsit against an insurance company to recover the amount of a policy, where the declaration is drawn in accordance with the form prescribed in § 61, ch. 125, W. Va. Code, and additional statements are filed, as required by §§ 62, 63, 65, of said chapter, such statements so filed must be regarded as informal pleadings. *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670.

Such statement by the plaintiff is not a part of the plaintiff's declaration and can not be demurred to. If it is too vague or otherwise insufficient, the

remedy is to object to the introduction of evidence under it. *Tucker v. Colonial Fire Ins. Co.* (W. Va.), 51 S. E. 86.

A statement under W. Va. Code, 1899, ch. 125, § 64, specifying a clause, condition or warranty of a policy of fire insurance not complied with or violated by the insured, is not a plea governed by strict principles, but only a specification, and is not open to demurrer for insufficiency. If too vague, evidence under it may be excluded. *Rosenthal Co. v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

"This argument treats the statement under § 64 as if it were a formal plea; but plainly it is not to be so treated. Look at the section. It will be seen that a formal plea is not contemplated, since all that it requires is a simple statement specifying the particular clause, condition or warranty violated or not complied with, and it does not require further specification, or that legal certainty required by formal pleading. The office performed by such statement is to tell the plaintiff what particular warranty he must show to have been complied with; it tells him what he must prove according to the common law. By common law he would have to prove compliance with clauses of the policy creating conditions precedent to recovery, and this statute is designed simply to point out the particular one of the many clauses with which he must prove compliance. This is the view taken in *Cappellar v. Queen Ins. Co.*, 21 W. Va. 576, where it is held, that such statements are not pleas, and that they can not be rejected for defects as if pleas, but that if too vague, advantage is to be taken of such defect by excluding evidence under them." *Rosenthal Co. v. Scottish Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021.

d. Remedy for Want of or Defective Statements.

By ch. 125, § 66, of the West Virginia Code, 1899, relating to actions on

insurance policies, it is provided that: "If either party to such action fail to file any statement required of him by the four preceding sections of this chapter or by the other party pursuant to any of the provisions of the said sections, or if the statement be adjudged insufficient in whole or in part, the court, as justice may require, may grant further time for filing the same, or permit the statement filed to be amended, or may, at the trial, exclude the evidence offered by the party in default as to any matter which he has so failed to state or has insufficiently stated. But no statement which, in the particulars required by or under the said section to be stated or referred to therein, is sufficient to notify the adverse party in effect, of the nature of the claim or defense intended to be set up against him, shall be adjudged insufficient." *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580.

Under § 66, ch. 125, W. Va. Code, 1899, the court may during the trial permit the plaintiff to file the special statement of any matter in waiver, estoppel, or otherwise in confession and avoidance, as provided for by § 65, as justice may seem to require; but this will not give defendant a continuance as matter of right, but it is within the sound discretion of the trial court. *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580. See generally, the title AMENDMENTS, vol. 1, p. 312.

G. EVIDENCE.

In General.—An action on a policy of fire insurance is a civil action, and the rules of evidence are the same as in other civil actions. *Simmons v. Insurance Co.*, 8 W. Va. 474. See the titles EVIDENCE, vol. 5, p. 295; INSURANCE; PAROL EVIDENCE; WITNESSES.

Admissibility of Parol Evidence.—

The general rule that when a contract is reduced to writing, the writing is regarded as not only the best, but the

sole evidence of the contract, and the parties are presumed to have rejected everything it does not contain, applies as well to policies of fire insurance as to any other class of written contracts. *Southern Mut. Ins. Co. v. Yates*, 28 Gratt. 585; *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

The insured will not be permitted in the absence of fraud, to prove that his application was filled up by the agent, that he was not questioned as to his books; that he did not tell him he would keep his books in an iron safe or secure in another building, and that the questions and answers were not read to him. *Virginia Fire, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

The exceptions to this rule that are sanctioned by the courts are found in those cases in which the insured is misled by the assurances or declarations of the agent of the insurer, or where the latter seeks to take advantage of a forfeiture of his own creation, or where the insured has given a correct description of the property which has not been followed by the insurers or their agents in preparing the policy, or where the parties stand on unequal ground and one of them uses his superior knowledge or influence to mislead the other as to the true import of the contract. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *Southern Mut. Ins. Co. v. Yates*, 28 Gratt. 585; *Virginia Fire Ins. Co. v. Morgan*, 90 Va. 585, 18 S. E. 191; *Virginia Fire, etc., Ins. Co. v. Gode*, 95 Va. 762, 30 S. E. 370, 378.

"In such cases the oral evidence is not offered to contradict the writing, but to show that the representation, as it is written, ought not to be used against the party upon the ground of an equitable estoppel." Per Staples, J., in *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

"Parol evidence is competent to prove that the application was filled up by the agent of the company, and that the

facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application. This is not a violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground that the contents of the paper was not his statement, though signed by him, and that the company, by the acts of its agent in the matter, is estopped to set up that it is a representation of the insured." *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616.

Parol evidence, not tending to vary the contract of the parties, but in confirmation of such contract, is admissible. *Southern Mut. Ins. Co. v. Trear*, 29 Gratt. 255. See the title PAROL EVIDENCE.

Evidence of Payment of Premium.—

See ante, "Possession of Policy as Evidence of Payment," III, C, 6, c.

Burden of Proof as to Incumbrances.

—See ante, "Burden of Proof as to Incumbrances," III, H, 2, b, (1), (d).

Evidence as to Waiver of Conditions.

—See ante, "Evidence," III, H, 8, g.

Evidence and Burden of Proof as to Compliance with Condition.—See ante, "Effect as Putting Plaintiff on Proof," X, F, 6, b, (2), (b).

Preponderance of Evidence Sufficient.

—Where the defense to an action on a policy is that the fire was caused by the insured, it is not necessary to prove beyond a reasonable doubt that the plaintiff intentionally and fraudulently set the property on fire. A preponderance of evidence to that effect is sufficient. *Simmons v. Insurance Co.*, 8 W. Va. 474.

H. INSTRUCTIONS.

In actions on fire insurance policies the usual rule as to instructions applies, and where an instruction asked correctly propounds the law, and there is some evidence tending to prove the case supposed in the instruction, such instruction should be given. Fire

Ass'n v. Hogwood, 82 Va. 342, 4 S. E. 617. See generally, the title INSTRUCTIONS.

Where a policy stipulates that the broker effecting the insurance shall be deemed the agent of the assured, and that if the latter had other insurances at the time the policy was issued, or afterwards procured, without consent in writing of company indorsed on policy, then the policy shall be void, and there was evidence tending to show that there was other valid insurance on the property and that the company's agent had notice of such insurance, then an instruction to the effect that if the party that effected the insurance was an insurance broker, he must be regarded as the assured's agent, and that if notice of the other valid insurance was given him, such notice was not notice to the defendant company, was proper and should have been given. *Fire Ass'n v. Hogwood*, 82 Va. 342, 4 S. E. 617.

"There was evidence tending to show that there was other insurance on the property, and other evidence tending to show that the company's agent had notice of such insurance; and this being so, the instructions asked and refused were pertinent to the case on trial, and as they correctly stated the law, they should have been given by the court. The question as to whether the company or its agent had notice of a policy of insurance existing on the property at the time of the insurance of the policy of insurance sued on or not, or, if knowing it, waived it, was a question which the defendant had a right to submit to the jury in his defense; and, as it was applicable to the case and question at issue, the hustings court of Norfolk should have given the instructions; and its refusal to give them is error, for which this court will reverse the judgment of the said court and remand the case for a new trial to be had therein; when, if the said instructions should be again asked, and the evidence be the

same substantially, they should be given." *Fire Ass'n v. Hogwood*, 82 Va. 342, 4 S. E. 617.

Where the question of the contract limitation contained in an insurance policy is not presented to the court by the pleadings, it is error for the court to instruct the jury as to the legal effect of such a clause. *Barber v. Fire*, etc., *Ins. Co.*, 16 W. Va. 658, 37 Am. Rep. 800.

I. JUDGMENT.

Generally, as to amount of recovery, see ante, "Measure of Insurer's Liability," VI.

As to the rule that the plaintiff is not limited in his recovery to the amount of loss specified in his proof of loss, see ante, "Nature, Purpose and Conclusiveness," VIII, B.

Necessity for Writ of Inquiry.—Under Va. Code, § 3385, judgment can not be entered, without a writ of inquiry at rules, in an action on an insurance policy providing that, if there be other insurances on the property, the loss, if any, shall be adjusted among the several insurers, as such policy is not such "a writing for the payment of money" as is contemplated by said section. *Commercial Union Ass'n Co. v. Everhart*, 88 Va. 952, 14 S. E. 836.

Conclusiveness on Appeal.—Where the case is submitted to the court, and the evidence as to the value of the property insured is conflicting, the appellate court can not interfere with the judgment of the court below on the ground that the judgment is excessive. *Southern Mut. Ins. Co. v. Kloeber*, 31 Gratt. 739.

XI. Insurer's Right to Contribution and Subrogation.

See generally, the titles CONTRIBUTION AND EXONERATION, vol. 3, p. 461; SUBROGATION.

Contribution.—The doctrine of contribution applies in cases of double insurance, where the engagements of the insurers are for the same person, upon

the same subject matter, and against the same risks. *Connecticut Fire Ins. Co. v. Merchants', etc., Ins. Co.*, 1 Va. Dec. 592.

"Now the doctrine of contribution is not founded on contract, but is bot-tomed on general principles of justice. It rests upon the principle of natural justice, that where there are several persons bound for the same person and same engagement, that all of them should contribute pro rata to the sat-isfaction or extinguishment of the com-mon burden, and it has therefore been well said by Mr. Kent in his Commen-taries that the doctrine applies very equitably to the case of double insur-ance, for in such cases the engage-ments of the insurers are for the same person, on the same subject matter and against the same risks. *Godin v. Lon-don Assurance Company*, 1 Burr. 492; *Aug. on Ins.*, § 26; *May on Ins.*, § 448, et seq.; *Thurston v. Koch*, 4 Dall. 348; *Newby v. Reed*, 1 Wm. Black 416, and note. But this doctrine has never been held to apply to other cases of insur-ance, and it can never have place ex-cept where there is an identity of in-terest, person and risk. *May on Ins.*, § 436. Such being the well-established rule on the subject, we have only to look to the *Wilson and Gordon* poli-cies to see that there is no identity of person or interest. In the case of the *Gordon* policy it is distinctly expressed in the policy that 'it is understood that the interest hereby insured consists of a ground rent, amounting to \$1,000 per annum,' etc., and in the case of the *Wilson* policies it is patent that they were made for the exclusive benefit of *Wilson's* estate, and that that estate alone had the right to enforce them. It is equally apparent that the interest secured by these policies are separate and distinct from those secured by the policies taken out by *Dooley*, trustee. It may be, as is contended by the ap-pellant, although such does not appear to be the fact from the record, that the appellee, by rebuilding, has re-

lieved itself of all liability under its policy to *Gordon*, but this collateral result can not operate to fasten upon that company a liability for which it is not bound either by contract or the law in regard to contribution. I am unable to perceive any ground upon which the contention of the appellant can be sustained, and the decree ap-pealed from must therefore be af-firmed." *Connecticut Fire Ins. Co. v. Merchants', etc., Ins. Co.*, 1 Va. Dec. 592.

The contribution or pro rata clause does not apply unless the concurrent insurance is upon the same interest in the property, as well as upon the same property. Hence, the insurer of a warehouseman is not liable for loss to goods in storage where the policy lim-its liability to loss affecting insured's interest in the goods, and provides that goods on storage be insured separately, and the depositors of such goods have insured them in a different company. *Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209.

Subrogation.—*R.'s* wood, piled on line of *B.* railway and insured with *W. F.* insurance company, is destroyed by the railway company's negligence, and paid for by the insurance company. Held, that the latter is subrogated to *R.'s* right of action against the railway to the extent of the amount paid under the policy. Action against the railway company for the amount paid under the policy, in the name of *R.*, for use of the insurance company, can not be released by *R.*, and a plea setting up such a release as a defense to the action, is properly rejected. *Bright-hope Railway Co. v. Rogers*, 76 Va. 443.

"The doctrine briefly stated is, where the property insured is destroyed by the negligence of a third person so that the assured has a remedy against him therefor, the insurer, by the pay-ment of the loss, becomes subrogated to the rights of the assured to the ex-tent of the sum paid under the policy,

and may bring an action in the name of the assured to recover the amount so paid. In such cases the assured stands in the relation of trustee to the insurer to the extent of the sum paid, and he can not even release the right of action, nor the action itself, if one has been commenced, so as to defeat the claim of the insurer to reimbursement from the wrongdoer for the injury. *Woods*, § 478." *Brighthope Railway Co. v. Rogers*, 76 Va. 443.

Where the insurer has paid a loss to the mortgagee covering only a part of the mortgage debt, he acquires no right to have from the mortgagee the evidence of the debt to an amount equal to the loss paid by him. The debt must be paid in full before he can take from the mortgagee any part of the debt by subrogation. *Phenix Ins. Co. v. First Nat. Bank*, 85 Va. 765, 8 S. E. 719.

Fire Limits.

See the title MUNICIPAL CORPORATIONS.

FIRES.

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CROSS REFERENCES.

See the titles DAMAGES, vol. 4, p. 162; EXPERT AND OPINION EVIDENCE, vol. 5, p. 774; NEGLIGENCE. As to fire department, see the title MUNICIPAL CORPORATIONS. As to fire limits, see the title MUNICIPAL CORPORATIONS. As to fire escapes, see the title MUNICIPAL CORPORATIONS.

I. Civil Liability.

A. NATURE OF LIABILITY.

Basis of Liability.—In an action for damage caused by a fire, it is no defense that the defendant was engaged

in a lawful act and did not intend that the plaintiff's property should be destroyed. The basis of such an action is negligence and the only defense is that there was no negligence. *Jordan v. Wyatt*, 4 Gratt. 151.

It is no ground of defense that the defendant was engaged in a lawful pursuit and intended no harm, and that his act would have been harmless but for his carelessness or negligence. He was not the less a trespasser; and in truth his only ground of defense in this or any proper form of action would have been that he was in no wise guilty of carelessness or neglect, but had proceeded with due caution and circumspection, and that the injury done by his act was occasioned by unavoidable accident. *Jordan v. Wyatt*, 4 Gratt. 151. But see post, "What Constitutes Negligence," I, B.

Cause of Action Assignable.—A cause of action against a railroad company for damages caused by fire, is assignable. *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799.

And a partial assignment will not prevent a court of law from taking jurisdiction. *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799.

Subrogation.—Where an insurance company pays the loss occasioned to a particular owner by a fire started from a railroad train, it is subrogated to the right of the property owner to sue the railroad company, although it does not pay the full amount of the policy; provided, however, that such payment constitutes a full settlement with the property owner. *Brighthope R. Co. v. Rogers*, 76 Va. 443.

B. WHAT CONSTITUTES NEGLIGENCE.

1. In General.

The general rule is that persons in the lawful use of fire must exercise ordinary care to prevent it from injuring others. What constitutes ordinary care and prudence depends upon the circumstances of the particular case. The greater the danger of communicating fire to the property of others, the more precautions and the greater vigilance will be necessary in order to measure up to the requirements of ordinary care. *Collins v. George*, 102 Va. 509, 46 S. E. 684.

As a general rule, where the responsibilities of a railroad company with regard to keeping its right of way free from combustible material and to keeping its engines in proper repair have been complied with, a railroad company fulfills its duty and is not liable in damages for the escape of fire. *White v. New York, etc., R. Co.*, 99 Va. 357, 38 S. E. 180; *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64, 48 S. E. 508; *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 51 S. E. 172.

The standard of a railroad company's conduct with respect of prevention of fires is not the usual conduct of other railroads. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

2. Accumulation of Inflammable Material on Railroad Right of Way.

May Constitute Negligence.—The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most approved and best constructed machinery. *Richmond, etc., R. Co. v. Medley*, 75 Va. 499; *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 51 S. E. 172.

Negligence in a railroad company may arise in many ways, and may consist just as much in negligently permitting combustible matter to accumulate on its right of way, where it is liable to be easily ignited by sparks issuing from its locomotives that are constantly passing, and thereby to communicate fire to the property of adjacent proprietors, as for an injury arising from negligence on the part of its employees, or in not providing proper machinery or suitable spark arresters. *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264.

A railroad company may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, operated by most skillful engineers, and it may do all that skill and science can suggest in the management of its locomotives, and still it may be guilty of gross neg-

ligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. *Richmond, etc., R. Co. v. Medley*, 75 Va. 499; *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Tutwiler v. Chesapeake, etc., R. Co.*, 95 Va. 443, 28 S. E. 597.

The duty of a railroad company with respect to the prevention of accumulation of combustible materials on its right of way requires such company to exercise greater vigilance during dry seasons than at other times. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

The true question in the issue touching the matter of negligence on the part of the defendant to be determined by the jury was, from the evidence and all the circumstances and surroundings including the dryness of the time, did the defendant permit such an accumulation of grass, weeds or leaves of a combustible nature within its right of way at the point where said fire occurred, exposed to ignition by its engine, as would not be permitted or done by a cautious and prudent man upon his own premises if exposed to the same hazard from fire as the accumulation of dry grass, weeds or leaves upon the said right of way of the defendant. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

The standard by which the conduct of a railroad company relative to the accumulation of combustible materials on its right of way is to be measured not by the conduct of other railroads, since to allow such a standard would permit railroads themselves to establish a standard for their own benefit. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

Question for the Jury.—A railroad company is not universally required to remove the dead grass and other inflammable material which may have accumulated on its right of way, nor does its failure to do so necessarily render it responsible in case of loss to ad-

jacent landholders; but whether the failure to remove such materials is negligence in any particular case is a question for the jury, in view of all the circumstances of the case. *Richmond, etc., R. Co. v. Medley*, 75 Va. 499.

"With respect to accumulations of combustible matter near the track of the road, there is some diversity of judicial opinion. In some of the cases it is held, that the leaving such matter exposed to sparks issuing from locomotive, is per se negligence which renders the company liable in case of loss. In others, it has been held to be a matter for the jury to determine, under all the circumstances, whether such conduct is actionable negligence. We are of the opinion that like all questions of care and diligence, it is a matter for the jury to determine, and no inflexible rule can be laid down on this subject. What may be reasonable care in one case, might be gross negligence in another. Still it may be safely said for a railroad company negligently to permit the accumulation of combustible matter along its line in such a situation as readily to ignite from sparks from its locomotive, is such conduct as will make it responsible for damages sustained by fires communicated from such matter to adjacent property." *Brighthope R. Co. v. Rogers*, 76 Va. 443, 454.

3. Use of Inadequate or Defective Mechanical Appliances on Engines.

On Railroad Locomotives.—A railroad company is liable, where the fire is caused by the negligence of its agents or to the want of proper machinery and spark arresters upon its locomotives. *Brighthope R. Co. v. Rogers*, 76 Va. 443, 454.

In employing so powerful and dangerous an agency as steam, it is incumbent upon the company to avail itself of the best mechanical contrivances and inventions in known practical use, which are effectual in preventing the burning of private property by the escape of sparks and coals from its

engines, and it is liable for injuries caused by its omission to use them. *Brighthope R. Co. v. Rogers*, 76 Va. 443, 454.

It is a matter of common knowledge that locomotive engines, propelled by steam, are exceedingly dangerous, and liable to cause unintentional fires. Such great danger and the frequency with which such fires occur have doubtless caused the courts to hold that the failure of those operating such machinery to use spark arresters or other appliances to prevent the emission of sparks makes them per se guilty of negligence. *Collins v. George*, 102 Va. 509, 46 S. E. 684.

It is the settled law of this state that a railroad company is liable where the fire is attributable to the want of proper spark arresters upon its locomotives. *Patteson v. Chesapeake R. Co.*, 94 Va. 16, 26 S. E. 393; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *Collins v. George*, 102 Va. 509, 46 S. E. 684.

In *Brighthope R. Co. v. Rogers*, 76 Va. 443, it was proved that the defendant used wood in an engine constructed for the use of coal, and as to whether this constituted negligence the court said: "We do not mean to affirm that the use of wood in a coal-burning engine is per se negligence. It is a circumstance from which negligence may often be inferred, because, as was proved in this case, the meshes in the wire netting of a spark arrester are made much larger when coal only is used for fuel than when made for wood, and sparks from wood are more dangerous than those from coal, because they retain fire for a much greater length of time. The consumption of wood as fuel in this particular locomotive, under the circumstances disclosed by this record, was negligence, and gross negligence, particularly on the day at the place of the fire, when, as is proved, the wind was high and blustering, and where there was an accumulation of a large quantity of com-

bustible matter liable at any time to be ignited."

On Stationary Engines.—There is not the same decree of danger and liability to cause unintentional fires by stationary steam sawmill engines operating in the county as in the case of locomotives. The operators of such engines can minimize the danger of causing such fires by removing dangerous combustible material, a greater distance from their engines than can railroad companies operating their locomotives over hundreds of miles of road on their narrow right of way. Again, operators of stationary engines can keep on hand appliances and means of putting out fires caused by their engines, which it is impossible for railway companies to do. *Collins v. George*, 102 Va. 509, 46 S. E. 684.

"The proof in this case shows," said the court, "that the use of spark arresters on sawmill engine was not customary in that county; that such arresters impede the powers of engines, and measurably prevent them from generating steam, when green wood is used for fuel (as is invariably the case with sawmill engines); the meshes of the arresters become clogged, and the draught of the engines lessened; that no up-to-date and what is considered a properly equipped sawmill engine is now sold with a spark arrester. We are of opinion that, while the failure to use spark arrester upon stationary sawmill engine is a circumstance from which negligence may often be inferred, it can not be said that such failure is per se negligence." *Collins v. George*, 102 Va. 509, 46 S. E. 684.

C. CONTRIBUTORY NEGLIGENCE.

Negligence in the plaintiffs contributing to a loss by fire is a defense at common law, the benefit of which the defendant may avail himself in a proper case. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

But in the exercise of his lawful

rights, every person has a right to presume that every other will perform his duty and obey the law, and it is not negligence for him to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14. See the title NEGLIGENCE.

Persons occupying farms along railroads are entitled, therefore, to cultivate and use them in the manner customary among farmers, and may recover for damages by fire resulting from the negligence of a railway company although they have not plowed the dry grass or taken other like unusual means to guard against such negligence. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

A person owning land contiguous to a railroad, is not obliged to keep the leaves falling from his trees from being carried by the wind to such railroad; nor to keep his lands clear of leaves and dry grass or weeds, or other combustible matter; nor, on failure to perform such acts, does he become contributory to the production of a fire originating in the carelessness of a railroad company. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

Negligence of the plaintiffs in such cases, which precludes a recovery, is where in the presence of a seen danger, as where the fire has been set, he omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Where the danger is not seen, such as the future continuance of defendants' negligence, plaintiff is not bound to guard against it by refraining from his usual course, being otherwise a prudent one, in the management of his property and business. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

Where a party wrongfully builds the wall of his house upon the right of way

of a railroad company, this will not alone justify the destruction of the house by any willful conduct of the railroad company. *Norfolk, etc., R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614.

D. PROXIMATE CAUSE.

See also, the title NEGLIGENCE.

A fire let loose by a party on his own land or elsewhere, and sweeping through its course, can not be divided into imaginary parcels, and some of them treated as collateral consequences of the rest. *Jordan v. Wyatt*, 4 Gratt. 151.

Where, therefore, a railroad company is responsible for the starting of a fire and the fire is carried by a high and unusual wind, the injuries caused by the fire being thus carried by the wind are not too remote to form the basis of a recovery against a railroad company. *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799.

Where a tenant, before the expiration of his term, vacated the house and left it unlocked and about three weeks thereafter someone went in and set fire to the house, the tenant was not liable to the landlord for the destruction of the house, such destruction not being the natural and proximate results of the negligence of the tenant. *Winfree v. Jones (Va.)*, 51 S. E. 153.

E. DAMAGES.

Proof Must Conform to Pleadings.—

Where the plaintiff, in his complaint claimed from the defendant damages for the destruction of 500 rails and about one mile of board fence, some wood upon his land, and a lot of growing timber, which, he alleged, was caused by the negligence of the defendant in permitting fire to emit from its locomotive and spread over his land, was not permitted to prove general damages done to his farm, but he was confined to the specific items of damage alleged in his complaint. *Stewart v. Baltimore, etc., R. Co.*, 33 W. Va. 23, 10 S. E. 26.

Damages to Trees, Firewood and Fencing.—The true rule in ascertaining the measure of damages as to timber injured and destroyed by fire is to find the difference between the market value of the timber where it stood before the burning and afterwards, although it may, as it often does, constitute a very considerable element in the value of the land. When the destruction of the timber is total, the market value thereof would measure the damage, and, when the destruction is partial, it would be the market value as it stood, when the fire occurred, reduced by the value of the timber in its then condition, and the same rule should apply with reference to firewood, rails, and fencing. *Stewart v. Baltimore, etc., R. Co.*, 33 W. Va. 88, 10 S. E. 26.

Damages to Grass Crops.—A crop of grass growing in a meadow, and partly matured, affords a basis for measurement of damages for the wrongful destruction of the crop by fire as for the value of the crop matured into hay; and evidence of the value of the usual crop of hay is admissible, and is not to be rejected as proving profits merely conjectural or speculative. *Kyle v. Ohio River R. Co.*, 49 W. Va. 296, 38 S. E. 489.

Damages from Different Fires.—Where, in an action for damages to an orchard caused by two fires, an instruction asked by the defendant directed the jury to ascertain separately the damage sustained by reason of each fire, it was held, that such direction was certainly unusual, if not unknown, in cases of this kind in this state, and if allowable at all could only be of advantage to the defendant in case one of the counts was faulty; and that in the case at bar it would have been improper to have given it, for the plain reason that the evidence had already developed the fact that the loss had not been attempted to be ascertained until after the second fire, and the damages therefor which the jury would have been required to ascertain under

each count would have been purely conjectural. Besides, if the defendant desired to have the damages ascertained in this way, he should have asked, when the taking of the testimony was begun, that the witnesses should be required to state what was the loss resulting from each fire, and not have laid by until evidence had been given of the entire loss before giving notice of his purpose to make such request. *Norfolk, etc., R. Co. v. Bohannon*, 85 Va. 293, 7 S. E. 236.

F. ACTIONS.

1. Jurisdiction.

A court of law is not deprived of its jurisdiction of an action against a railroad company for damages caused by a fire, by reason of a partial assignment of the cause of action to insurance companies which have paid a part of the loss. *Tyler v. Ricamore*, 87 Va. 460, 12 S. E. 799.

2. Pleading.

See generally, the title PLEADING.

Duplicity.—A declaration which avers that the property was set on fire directly by sparks from defendant's engine and also by fire communicated from the defendant's right of way is not subject to a demurrer, duplicity being a matter of form and not of substance. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207.

Averments of Ownership.—In an action for destruction of personal property by fire, and averment that the plaintiff was seized and possessed of the premises upon which such property was situated, was sufficient to show that the property was on his premises and in his possession, and although plaintiff's ownership ought to have been directly and positively averred, the averment in question was sufficient to maintain an action against a railroad company for the negligent destruction of the property. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207.

Declaration Held Sufficient.—In an action of trespass on the case brought

by the plaintiffs against the defendant, the court of the declaration upon which the case was tried alleged, "that on the 29th of October, 1874, and before and since that time, they were seized and possessed of a certain tract of land in said county of Brooke, in the state of West Virginia, situate on the waters of Harmon's creek, containing about two hundred and forty acres, being the same farm owned by David Snyder, deceased, late of said county, and known as the Snyder Mill property, except that part of said tract of land which was and had been for a long time owned by the defendant, consisting of a strip of said land one hundred feet in width, running through said farm, and which was used by said defendant for its railroad, except the ground on which the water grist mill stood, the said land of the plaintiffs being partly cleared and in a high state of cultivation, and the residue thereof being woodland, with valuable timber growing and being thereon, next prior to the grievances hereinafter named. And the said defendant for the last five years and more had been and still was possessed and in the occupation of the said strip of land of one hundred feet in width, running through said lands of plaintiffs as aforesaid, on which said land of defendant it had constructed a line of railroad which it then operated and had operated for a long time past, to-wit.; for more than five years last past, by continuously running trains of cars over said line of road, drawn by locomotives, propelled by fire and steam, and the said defendant, by reason of the possession of its said parcel of land, and its occupation and use for railroad purposes as aforesaid, of right ought to have prevented the dried grass, dried leaves and weeds, and other combustible matter from being and accumulating on its said line of road and its said land, to prevent the ignition of said combustible matter by fire from the locomotives of said defendant, used on its said rail-

road, and the spread of fire by the ignition aforesaid to and over the said lands of said plaintiffs, and doing damages thereto. Yet the said defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the said plaintiffs in that behalf whilst the said plaintiffs and defendant were so respectively possessed of their said respective tracts of lands as aforesaid, to-wit; on the 29th day of October, 1874, wrongfully and unjustly suffered and permitted dried grass, dried weeds and dried leaves, and other combustible matter to be and accumulate on its said land and railroad aforesaid, and thereby on the day and year last aforesaid fire emitted and dropped from a locomotive of said defendant on said land and railroad of defendant, ignited the said dried grass, dried weeds, dried leaves and other combustible matter aforesaid, which caused a conflagration thereof, which said conflagration spread rapidly to and over the said adjoining lands of said plaintiffs to such an extent that said conflagration destroyed about two and a half miles of rail and board fence, worth \$1,500, and growing timber and other forest timber, and injured the same to the extent and value of \$1,200, and burned and injured the pasture and growing wheat on said tract, and rendered the same useless to the amount of \$300," etc. The damages in this count were laid at \$7,000. It was held, that said count showed legal cause of action. and was good upon general demurrer. *Snyder v. Pittsburg, etc., R. Co., 11 W. Va. 14.*

Necessity of Negating Contributory Negligence.—It was not necessary for the plaintiffs to aver in the declaration that they were not guilty of negligence which contributed to the burning of their property. or in other words that they were not guilty of contributory negligence. *Snyder v. Pittsburg, etc., R. Co., 11 W. Va. 14.*

When Trespass Will Lie.—Where a

party, with a landowner's permission, cut wood upon such landowner's land and left it there, and the landowner, in clearing up other parts of his land, negligently allowed fire to escape from such portion to the portions occupied by the wood and the wood was consumed, it was held, that trespass *vi et armis* would lie for the destruction of the wood. *Jordan v. Wyatt*, 4 Gratt. 151.

"It can avail the defendant nothing that the act was done upon his own land, for it destroyed the plaintiff's property, which was there by the consent and contract of the parties, and as much under the protection of the law there as if lying on adjacent land of the plaintiff's. Suppose it had been, and the fire set in motion by the defendant on his own land, had extended into the plaintiff's and there consumed the plaintiff's goods, would not the act have been trespass, as substantially, if not so obviously, as if the defendant had entered upon the plaintiff's land and there applied the torch?" *Jordan v. Wyatt*, 4 Gratt. 151.

The court further said: "I doubt not that trespass on the case might have been maintained for the grievance in question; but it by no means follows that trespass is not also a proper remedy." *Jordan v. Wyatt*, 4 Gratt. 151.

"It is immaterial," said the court, "whether the stubble or the wood was the first consumed or whether the torch was applied to the wood or to inflammable matter touching it, or near it, or at whatever distance from it, or whether the flames expired with the wood, or extended beyond it. The whole conflagration was one continuous, entire, immediate act, embracing in its progress the plaintiff's property, completed only by the destruction thereof, and followed, as between these parties, by no collateral consequence whatever. It was, therefore, a trespass; and any mode or circumstance of the act that has been, or can

be relied upon to show it was not, will be found upon examination to be utterly irrelevant." *Jordan v. Wyatt*, 4 Gratt. 151.

J. Evidence.

a. Presumption and Burden of Proof.

Presumptions.—In *Bernard v. Richmond*, etc., R. Co., 85 Va. 792, 8 S. E. 785, it was held, that there was no presumption of negligence from the mere fact that a fire originated from a railroad locomotive.

This case, however, has been expressly overruled on this point. *Patteson v. Chesapeake*, etc., R. Co., 94 Va. 16, 26 S. E. 393.

And the rule as established by the later cases is that the burden is upon the plaintiff to show that the fire arose, as alleged, from sparks emitted by the engine in question, but that where the origin of the fire is thus fixed upon the railroad company, such company is presumptively chargeable with negligence, and must assume the burden of proving that it had observed every reasonable precaution, and availed itself of the best mechanical contrivances and inventions in known practical use to prevent the burning of property by the escape of fire, and that when this has been done, the railroad company has performed its duty, and can not be held liable. *White v. New York*, etc., R. Co., 99 Va. 357, 38 S. E. 180; *Patteson v. Chesapeake*, etc., R. Co., 94 Va. 16, 26 S. E. 393; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207.

But notwithstanding the evidence justifies the primary presumption that the fire started from a spark or coal of fire from the defendant's engine, it does not necessarily follow, and can not be inferred from that circumstance alone, that it originated on the right of way. *Atlantic Coast Line R. Co. v. Watkins* (Va.), 51 S. E. 172.

The burden of proof in an action against a railroad to recover damages caused by fire, is, as in any other action, based on negligence, upon the

plaintiff. *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64, 48 S. E. 508. See generally, the title NEGLIGENCE.

And this burden of proof is upon the plaintiff not only to show negligence, but that such negligence was the proximate cause of the injury. *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64, 48 S. E. 508.

The burden of proof rests upon the plaintiff to show that the fire began on the right of way, for, unless that fact be established, the alleged negligence of the railroad company in suffering combustible matter to accumulate on its right of way was not the efficient and proximate cause of the accident. *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 51 S. E. 172.

"It is * * * well settled that when damages are claimed for injuries inflicted through the alleged negligence of the defendant, not only is the burden of showing negligence by a preponderance of the evidence upon the plaintiff, but if the injury may have resulted from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff can not recover; neither can he recover if it was just as probable that the damage was caused by the one as by the other." *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64, 48 S. E. 508; *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 51 S. E. 172.

"The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. An inference can not be drawn from a presumption, but must be founded upon some fact legally established. This court has repeatedly held, that when liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being shown by competent evidence and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred;

some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess, or random judgment, upon mere supposition, without a single known fact." *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64, 48 S. E. 508; *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

b. Admissibility.

See the title EVIDENCE, vol. 5, p. 295.

Evidence of Other Fires.—Where evidence of other fires prior to the one forming the basis of the suit, is admitted on the trial without objection, such evidence can not be objected to on appeal. *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264.

Evidence of other fires is admissible for the purpose of determining whether or not there was negligence on the part of the defendant's employees, and defects in the defendant's engine, and also for the purpose of showing a negligent habit of the officers and agents of the defendant company. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264; *Patteson v. Chesapeake, etc., R. Co.*, 94 Va. 16, 26 S. E. 393; *Brighthope R. Co. v. Rogers*, 76 Va. 443. See also, *White v. New York, etc., R. Co.*, 99 Va. 357, 38 S. E. 180.

Such evidence is also admissible upon the question as to the probable cause of the fire. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207.

If the place the fire started and whence it spread was a place where fire had often caught from sparks from defendant's locomotives in their ordinary use in running, it tends to show a negligent habit on the part of the defendant in suffering combustible material to accumulate on its land at that place instead of amounting to a reason why the plaintiff should not recover, although the plaintiffs knew of such fires. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

But where the engine alleged to have caused the fire is identified, evidence

as to other fires along the line of the railroad is not admissible unless they are shown to have been caused by the same engine. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

Evidence as to fires in the same vicinity by duly equipped locomotives on the line of other railroad companies, is not admissible. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

Evidence as to the speed of the train at a point a mile and a half or two miles from scene of the fire is inadmissible. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

But see *Norfolk, etc., R. Co. v. Fritts*, 103 Va. 687, 49 S. E. 971, where it was held, that the speed of the train at the time of the fire must be considered.

Opinion as to Origin of Fire.—Where a witness who had testified as to having seen a certain fire near the right of way, was allowed to answer the question whether he saw anything from which the fire could have started except the railroad, it was held, that the question was not only leading and suggestive, but called merely for the opinion of the witness. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

Evidence of Value of Property Destroyed.—The owner of a stock of goods destroyed by fire is often unable to produce the best and most direct evidence as to the value of the goods, and hence an estimate of the total amount of the purchases made by him since he occupied the location at which he was at the time of the fire and of his annual sales from the same date, is admissible. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

c. Sufficiency.

Jury Question.—The question of negligence is a mixed question of law and fact and whether a fire was due to the negligence of a railroad company is peculiarly a question for the jury under all the circumstances of the

case. *Kyle v. Ohio River R. Co.*, 49 W. Va. 296, 38 S. E. 489. See the title NEGLIGENCE.

The plaintiff proved that the screen spark arrester in the engine was constructed with reference to burning coal exclusively, and that on several occasions the persons in charge of the locomotive had procured wood for use in the engine, and they insisted it might be inferred from all the evidence that it was so used at the time of the occurrence of the fire in question. On the other hand, the defendant proved that at that time coal only was used for the purpose of generating steam. It was held, that it was a question for the jury to decide which of these theories was correct. *Brighthope R. Co. v. Rogers*, 76 Va. 443.

Evidence Held Sufficient.—Where, in an action against a railroad company for damages to the plaintiff's orchard, said to have been caused by two fires, one of which was alleged to have started from a spark cast from the engine and the other to have been transmitted to the orchard by means of combustible material along the defendant's right of way, it appeared that soon after the defendant's train passed, a fire was discovered in the plaintiff's orchard, that such fire had started on the line between the plaintiff's and defendant's land about forty feet from the center of the track and that there was combustible material along the defendant's right of way, but that this material had not been burned at the time the first fire was discovered, but that after the second fire, this material was found partially burned, and it further appeared that defendant's engine sometime cast sparks forty feet; it was held, that the evidence was sufficient to sustain a finding and that the fires occurred as alleged in the plaintiff's declaration. *Norfolk, etc., R. Co. v. Bohannon*, 85 Va. 293, 7 S. E. 236.

The evidence showed that sparks issuing from the engine of the defendant company that passed down by the

plaintiff's woods late in the afternoon originated the fire that burnt the plaintiff's woods; that numerous fires were caused by the defendant's engines along the defendant's right of way before and after that day in the neighborhood of the plaintiff's land and that of four of said number, one occurred every day for four days in succession, and that one of said fires started from sparks cast forty feet from defendant's right of way, some on the adjacent lands. The evidence showed further that the fire in question, when first discovered was burning on the right of way of the defendant, where bunches of sedge had been allowed to grow and remain, and was also burning in the woodland of the plaintiffs, about ten yards from the defendant's right of way, and that the fire was continuous from the defendant's right of way to the place burning in the woods; that the fire extended about fifteen feet along the right of way; and that when the fire occurred it was a dry season. It was held, that taking the facts as upon a demurrer to the evidence, which the court was required to do under Va. Code, 1887, § 3484, the evidence was sufficient to sustain a verdict in favor of the plaintiff. *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264.

Where the barn which was destroyed was situated at the head of a ravine 940 feet from the defendant's railroad track, but it appeared that there was a strong draught by the ravine, and there was evidence that cinders hot enough to burn the hand had previously fallen in the barn yard, the question whether the barn was set on fire by sparks from the defendant's engine was for the jury, although there was positive testimony that hot cinders could not be thrown fifty yards even by an engine which was out of repair. *Patteson v. Chesapeake, etc., R. Co.*, 94 Va. 16, 26 S. E. 393.

Where the evidence tended to show that the defendant railroad company permitted combustible material to ac-

cumulate on its right of way; that there was a strong wind blowing from the railroad towards the property burned; that the progress of the fire was from the point where the combustible material was burned first; that an engine and train of the defendant passed at an opportune time to cause the fire; and that the engines of the defendant company were in the habit of throwing out sparks at this point, and sometimes beyond the mill which was burned, it was held, that the evidence was sufficient to sustain a verdict for the plaintiff. *Tutwiler v. Chesapeake, etc., R. Co.*, 95 Va. 443, 28 S. E. 597, citing *Norfolk, etc., R. Co. v. Bohannan*, 85 Va. 293, 7 S. E. 236.

In an action against a railroad company for the destruction of plaintiff's house by fire, it appeared that about ten minutes after defendant's "extra" train, drawn by three engines, had passed, the plaintiff's house was discovered to be on fire; that one of the engines emitted more fire than the other two, which condition did not exist until about three weeks before the fire; that for several weeks before the fire this "extra" was noted for the abundance and variety of sparks emitted by it, witnesses who had been in the service of other railroads testifying that they had never seen an engine throw out fire like the ones in question, some of the sparks thrown out being an inch in diameter and scattered, at times, from 75 to 100 yards. It appeared, further, that on the day of the fire in question the train which had just passed left a number of fires in its wake; that a high wind was blowing and it was a dry day. To repel the case thus made, the defendant showed that the engineer in charge of its train was competent and experienced; that the engines were in good condition, and equipped with approved spark arresters; and that the train was operated with due and reasonable care. It was held, that the evidence clearly raised an issue of fact as to the con-

dition and equipment of the defendant's engines and the character of their operation, and was sufficient to sustain a verdict for the plaintiff. *Norfolk, etc., R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614.

In *Brighthope R. Co. v. Rogers*, 76 Va. 443, the court, in considering the sufficiency of the evidence, said: "If it be conceded, as claimed by the defendant, that their locomotive was of the most approved construction, and their spark arrester was the same as used by the leading railroads of the country, the fact was nevertheless established that this same engine had on several occasions set fire not only to buildings but to fields and forest and combustible matter on and along the line of the road. The testimony of a dozen witnesses could not lessen the force of this evidence. With such an engine in use, it was the grossest negligence in the defendants to permit the accumulation of a large quantity of highly combustible matter along their track, especially at a point where there was a heavy grade, and a consequent increase in the volume of sparks emitted. The defendants were, therefore, liable upon the ground of gross negligence, a want of ordinary care in the conduct of their business. And upon this ground the jury must have found a verdict for the plaintiff."

In *Norfolk, etc., R. Co. v. Fritts*, 103 Va. 687, 49 S. E. 971, it was held, that the excessive speed at the time of the fire was not negligence per se, but that such speed would be considered in connection with the other circumstances of the case. "There can be no question," said the court, "that the harder an engine is worked, the more sparks and cinders it will discharge. The danger of the fire is therefore necessarily augmented by the speed of the train, especially when it is pulling up-grade, as it was here. At this time the property of the plaintiff was greatly exposed to danger by reason of its nearness to the railroad, the dryness

of the season, and a strong wind blowing directly to it from the passing engines. The burden was on the demurrant to show the exercise of reasonable care in the operation of its train and engines." And the court held, that it did not appear that the speed adopted under the circumstances was a necessity to the railway service or a duty owned by the defendant to its patrons or the public, and it was for the jury to say whether or not the fire was the result of the negligent operation of the train, and that the question having been taken from the jury by a demurrer to the evidence, the appellate court could not say that the jury would not have been justified by finding a verdict for the plaintiff.

Where in an action against a railroad company for damages caused by a fire alleged to have been started by defendant's engine, it appeared that the engine threw out sparks visible in the daytime, which, on the same day on which the fire sued for occurred, set fire to every tract of land through which it passed throughout the county, there was no error in refusing to set aside a verdict for the plaintiff. *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799.

Evidence held insufficient to sustain a verdict for the plaintiff based on the theory that the fire started upon the defendant's right of way. *Atlantic Coast Line R. Co. v. Watkins (Va.)*, 51 S. E. 172.

Evidence upon a demurrer to the evidence held sufficient to sustain a judgment for the plaintiff. *Norfolk, etc., R. Co. v. Fritts*, 103 Va. 687, 49 S. E. 971.

Evidence Held Insufficient.—In an action against a railroad company for damages caused by fire, the defendant's general superintendent testified that the engine from which the fire started was a new one built by standard manufacturers; that he, as an expert, thoroughly inspected the engine, which was equipped with the most modern appliances in general use, and that

everything was in first-class and perfect order; that he made frequent and habitual inspection trips over the road to see that the rules of the company in respect to keeping the roadway free from such fire; that the spark arrester on the engine was the best in use, and was in perfect order, but that no spark arrester had ever been invented which would entirely prevent the emission of sparks. Defendant's section-master testified that thirty minutes after he saw the smoke he was on the spot with his gang of hands, and endeavored to arrest the fire; that defendant's right of way was entirely free from inflammable matter; and that the fire started outside of such right of way, in which testimony he was corroborated by another witness. It appeared further that a high wind was blowing with such force as to carry sparks from twenty to sixty feet from the track, and that defendant's right of way was only forty feet each way from the center of the track. There was also testimony that the engine was operated in a judicious manner. It was held, that the defendant company was not liable. *Bernard v. Richmond, etc., R. Co.*, 85 Va. 792, 8 S. E. 785.

Where it appeared that about two weeks before the fire the engine in question was returned to the defendant from reputable locomotive works to which it had been sent for repair, and it appeared from the evidence of the parties who repaired the engine that it left their hands in first-class order, equipped with the most approved spark arrester, and during the two weeks preceding the fire the engine was repeatedly examined, the last inspection being on the day of the fire, and each time the spark arrester was found in good condition, and that the engine had been successfully tested by being used to haul heavy freight trains before being used in the passenger service in which it was engaged at the time of the fire, and that on the day of the fire the engine had run 95 miles, a

large part of which distance being through woodland and past sedge fields and lands containing other inflammable material, but that the fire forming the basis of the suit was the only one which occurred along the route, it was held, that the defendant had successfully borne the burden imposed by the proof that the fire was started by sparks from its engine. *White v. New York, etc., R. Co.*, 99 Va. 357, 38 S. E. 180.

Where the evidence was such as to show that the fire might have been caused in several ways, for some of which the defendant would not have been responsible, and did not show that it was caused in a way which would have made the defendant responsible, a verdict for the plaintiff could not stand. *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64, 48 S. E. 508.

Evidence in an action for damages to woodland caused by a fire communicated from the defendant's sawmill, held, such as to sustain a verdict for the defendant. *Collins v. George*, 102 Va. 509, 46 S. E. 684.

4. Instructions.

Must Conform to Evidence.—Where there is no evidence that the fire originated outside of the plaintiff's premises and was thence communicated to the plaintiff's premises, it was reversible error to give instruction based upon such theory. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207.

The instructions should not be based on part of the evidence, to the exclusion of other parts. *Norfolk, etc., R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614. See the title INSTRUCTIONS.

In an action against a railroad company for damages caused by a fire the court was requested to instruct the jury as follows: (1) "If the jury believe from the evidence that the woods on the land of the plaintiffs adjoining the railway were ignited by particles of fire that issued from the defendant's engine and by means thereof the shat-

ters, woods manure, and down timber on said land were consumed and the growing trees thereon injured, and stumps and butts of trees upon said woodland burnt down into the ground, leaving large and dangerous holes in many places in said woodland, this does not of itself justify the inference of negligence, but the fact of negligence must be established by additional evidence, and the burden of proof is on the plaintiffs to show it."

(2) "If the jury believe from the evidence that the right of way of the defendant was as clear of inflammable matter as it reasonably could be, running through a large body of woodland, and that the fire was communicated by the defendant's right of way, this of itself does not establish the fact that the defendant was guilty of negligence in this case." It was held, that the instructions as asked were erroneous in that they singled out certain facts which a part only of the evidence tended to prove, and ignored all of the other facts which the remainder of the evidence tended to prove, and that the court properly amended the first instruction by adding that "the above circumstances are to be considered along with the other circumstances attending said fire, in determining whether there was negligence or not," and that the second instruction was properly amended by substituting for the concluding clause, "this of itself does not establish the fact that the defendant was guilty of the negligence in this case," the following clause "then such fact, along with any other fact if any, is to be considered in determining whether or not the defendant company was guilty of negligence." *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264.

In an action against a railroad company for damages caused by a fire, the court instructed the jury that although the jury might believe from the evidence that the defendant's train was supplied with the most approved appa-

ratus for the prevention of the emission of sparks, and that said engines were operated by the most skillful engineers, and that the defendant company did all that skill and science could suggest, if the company negligently allowed the accumulation of dangerously combustible matter on their right of way, easily to be ignited by fire from its furnaces, and if they further believed from the evidence that said fire, by igniting said combustible matter on the said company's right of way, was thence communicated to the adjacent property of the plaintiffs, then the said defendant company was liable for all the damages resulting to their property by reason of said negligence; and that if they believed from the evidence that numerous fires had been occasioned along the defendant's road, either prior to or subsequent to the day of the fire sued for, by sparks issuing from the defendant's locomotive, such fact may be considered by the jury for the purpose of determining whether or not there was negligence on the part of the defendant's employees, or defects in the defendant's engine, and also for the purpose of showing a negligent habit of the officers and agents of the defendant company." There was evidence tending to prove that the fire which destroyed the property of the plaintiffs was burning, when first discovered, bunches of sedge on the right of way of the defendant company; that it extended fifteen feet along the right of way; and that the fire occurred in the fall of the year, during a dry season. It was held, that the instruction was justified by the evidence. *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264.

In an action against a railroad company for damages caused by fire, the defendant's counsel requested the following instruction: "For a railroad company to permit grass and weeds to grow and remain upon its right of way, outside of its water table, and more than four feet from its track,

through a sparsely settled region of country and not near to valuable buildings, when such grass and weeds are in such quantity and so small in growth that they can not be mown, is not negligence; and that negligence is the want of ordinary care in this case, by which is meant such care as men of ordinary care and prudence use under like circumstances. It was held, that this instruction was properly refused, there being no evidence to show that the neighborhood or point at which the fire caught on the defendant's land was sparsely settled or that there were no valuable buildings near; and that the instruction was also erroneous in that it requested the court to say to the jury in fact that the permission by the defendant of a certain state of facts did not constitute negligence, and in that in this connection the instruction separated a few facts from their connection with other facts and sought to make them the basis of an instruction. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

Instruction as to Negligence.—An instruction that if the jury believed that the defendant used wood in its locomotive when its necessity and convenience required, and that such locomotive was built for the exclusive use of the coal, then the defendant was guilty of negligence, was held, to have been intended by the court and understood by the jury to have meant that if the defendant used wood at the time of the accident it was guilty of negligence. *Brighthope R. Co. v. Rogers*, 76 Va. 443.

An instruction, in an action against a railroad company for damages caused by a fire, that a company using the dangerous and powerful agency of steam has imposed upon it the duty of exercising reasonable caution and prudence and failure to exercise this is negligence, is proper. *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799.

An instruction in such an action that the defendant was charged with the

duty of providing the best practicable contrivances in known use to prevent the burning of private property, was proper. *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799.

In an action against a railroad company for damages caused by fire, the defendant requested the following instruction: "The burden of proof is on the plaintiff, and before he can recover in this action, he must satisfy you by a preponderance of evidence that the defendant was guilty of negligence in this matter at issue in this case, which is: Did the defendant, on the 29th day of last October, keep its railroad ground, at the place where the fire was on said railroad ground, as free from grass, weeds and leaves, or either of them, as men of ordinary care and prudence do under the same or similar circumstances?" It was held, that the latter part of this instruction, commencing with "did the defendant, etc.," was properly refused, in that it was not sufficiently explicit, and might have misled the jury. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

In an action against a railroad company for damages caused by fire, the defendant requested the following instruction: "Unless the plaintiffs have proved by a preponderance of evidence that the defendant failed to keep its ground at the place where this fire started, as from grass or weeds or leaves as other railroads managed with care and prudence are kept, then the plaintiffs can not recover in this action, and your verdict must be for the defendant." It was held, that this instruction was properly refused in that it sought to measure the standard of defendant's conduct by the conduct of other railroads. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

Instructions as to Contributory Negligence.—In an action against a railroad company for damages caused by fire, the defendant requested the following instruction: "If the plaintiffs knew the place where this fire started,

and from whence it spread to their land and was a place where fire had often caught from sparks emitted from the defendant's locomotive in their ordinary use in passing and permitted grass and weeds to grow and remain upon their lands adjoining said place to the same extent the defendant allowed grass and weeds to grow and remain upon its adjoining lands, the plaintiffs are guilty of contributory negligence and can not recover in this action." It was held, that this instruction was properly refused as not stating the true rule as to what constituted contributory negligence. *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

In an action against a railroad company for the destruction of the plaintiff's house by fire, a requested instruction that if the jury believed from the evidence that the defendant, through accident or design, erected the house in question with the northern side placed entirely, or almost entirely, on the right of way of the defendant company, with a window in said northern side left open, with an inflammable curtain therein, and that if the jury should be of the opinion that such an act on the part of the plaintiff constituted negligence, then they must find for the defendant company, without any regard to the question whether or not such negligence had anything to do with causing the injury complained of, was properly refused. This instruction was also subject to the objection that it disregarded the plaintiff's evidence as to the origin of the fire. *Norfolk, etc., R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614.

The court was requested to instruct the jury as follows: "That if they believed from the evidence that the plaintiff through either accident or design caused to be partially erected upon the defendant's right of way a frame building which had a window in it on the railway side, that the wall of the house which contained said window rested in part upon the defendant's right of way,

and that the sash was left open, with curtain of inflammable material therein, the jury must find a verdict for the defendant company, although they may believe from the evidence that the fire was caused by an engine of the defendant company, and that such engine was at the time in a defective condition." It was held, that this instruction assumed the acts of the plaintiff to contribute to the injury sustained by him; and that it was also erroneous in that it required the jury to disregard the evidence of the plaintiff as to the origin of the fire and the cause of the damage sustained. *Norfolk, etc., R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614.

Instruction as to Cause of Fire.—In an action for damages caused by two fires, an instruction simply stating to the jury that, in determining whether the fires originated from the sparks from the engine or from igniting from the combustible matter on the defendant's right of way, they had the right to consider all the evidence in the case, was manifestly correct under the evidence. *Norfolk, etc., R. Co. v. Bohannon*, 85 Va. 293, 7 S. E. 236.

Instructions as to Damages.—In an action for damages to an orchard by fire, the court instructed the jury that the measure of the damage sustained by the plaintiff was "the cost of replacing the trees the first proper season for planting after the burning, and the value of the care and labor bestowed on said trees by plaintiff before the burning, with interest on the value of the care and labor from the time it was bestowed." It was held, that this instruction was obviously faulty not only in failing to make the question of damages depend upon the actual value of the trees, but in omitting from the calculation certain elements of value which must necessarily be taken into consideration in estimating the loss or damage resulting from the destruction of a vigorous and growing orchard of young fruit trees.

The court said: "The instruction given by the court, in lieu of instruction 1 and 2 asked by the defendant, stated the rule in cases of this kind as well, perhaps, as it can be done, when it said that 'the measure of recovery is the value of the property destroyed.' And although that instruction authorized the jury to assess separate damages on each count of the declaration, which, as we have seen, was certainly improper in this case, if permissible at all in cases of this description under our practice, yet that was an error of which the defendant can not complain, as it states substantially what he had

previously asked." *Norfolk, etc., R. Co. v. Bohannon*, 85 Va. 293, 7 S. E. 236.

II. Criminal Liability.

Where an indictment for unlawfully, wilfully and maliciously setting fire to the woods near the plantation of A. M. and burning said woods and a fence belonging to A. M., was described in the record of the finding, as indictment, "for setting fire to the woods and burning the same," it was held, a sufficient record of the finding. *Ehart v. Com.*, 9 Leigh 671. See the title ARSON, vol. 1, p. 722.

Firms.

See the title PARTNERSHIP.

FIRST.—Under a bequest to a daughter of the testator of the **first** child a certain negro woman shall raise, the legatee is entitled not to the **first** born child after the death of the testator, and thereafter raised, but to the **first** child that shall be raised, whether born before or after the testator's death. *Ellison v. Woody*, 6 Munf. 368.

FISH AND FISHERIES.

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CROSS REFERENCES.

See generally, the titles ANIMALS, vol. 1, p. 373; GAME AND GAME LAWS; NAVIGABLE WATERS; OYSTERS.

I. Nature of Fishing Rights.

Fishing rights are valuable, and are property, and can be taken for the public good only upon due compensation made. *Alexandria, etc., R. Co. v. Faunce*, 31 Gratt. 761.

II. Power of Regulation.

Right of State to Regulate Fisheries.
—See the title OYSTERS.

Where not restricted by the United States constitution, a state is entitled to legislate over her public property and regulate its use, especially fisheries and oyster beds within her limits; the same being the common property of her citizens, never ceded to the United States. *Boggs v. Com.*, 76 Va. 989.

"The state holds the property of the soil in some senses in trust for the en-

joyment of the public rights, among which is the common liberty of taking fish, as well shellfish as floating fish, and may regulate the mode of enjoyment, so that they may not render the public property less valuable, or destroy it altogether." *McCready v. Com.*, 27 Gratt. 982, citing *Smith v. Maryland*, 18 How. U. S. R. 71. And see specifically, the title OYSTERS.

Grotius says, "the sovereign who has dominion over the land or waters in which the fish are, may prohibit foreigners from taking them." *McCready v. Com.*, 27 Gratt. 982.

Concurrent Jurisdiction in Virginia and Maryland under Compact of 1785.

—The effect of article 8 of the compact of 1785 between Virginia and Maryland, that all laws and regulations which may be for the preservation of fish in the river Potomac or the river Pocomoke shall be made with the mutual consent and approbation of both states, is to give the state of Virginia concurrent jurisdiction with the state of Maryland, over the Potomac river from shore to shore, and over that part of the Pocomoke river which is within the limits of Virginia, to enact such laws, with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters. *Hendricks v. Com.*, 75 Va. 935.

But see, for a criticism of *Hendricks v. Com.*, 75 Va. 935, the case of *Wharton v. Wise*, 153 U. S. 155, where it is held, that the provisions of the seventh and eighth sections of the compact of 1785, which give mutual rights of fishery to the citizens of the two states, refer only to the Potomac river, and do not operate to give such rights in Pocomoke river and sound. And see generally, the title OYSTERS.

III. Statutory Provisions.

Act of 1898 a Valid Exercise of the Taxing Power.—The act of March 3, 1898 (acts 1897-98, p. 864), regulating

the catching of fish in the waters of the commonwealth, is a valid exercise of the taxing power. The tax imposed is equal and uniform, as all fishermen in the same class are taxed alike. Imposing a license and taxing the fishing tackle is not double taxation. The title of the act is sufficient to cover the body, and the business can not be reached on the ad valorem system. Whether or not a business can be reached by the ad valorem system is primarily for the legislature, and its determination of that question will never be held erroneous unless it is manifestly so. The act also sufficiently designates the object to which the tax imposed by it is to be applied. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448. See the title TAXATION.

Not an Ex Post Facto Law.—The act of March 3, 1898 (acts 1897-98, p. 864), regulating the catching of fish in the waters of the commonwealth, relates wholly to the future, and is not ex post facto, and it is not rendered so because the indictment in this case charges the defendant with violating its provisions both before and after the date of its approval; but for acts committed before its approval and prohibited thereby, the defendant can not be convicted. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

IV. Borders of Public Waters a Public Common.

See generally, the title NAVIGABLE WATERS.

Property of the Commonwealth.

It is true that all the beds of the bays, rivers, and creeks, and the shores of the sea within the jurisdiction of the commonwealth, and not conveyed by special grant or compact according to law, are the property of the commonwealth, and may be used by all the people of the state as a common for the purposes of fishing, subject to reservations and restrictions imposed. *McCandlish v. Com.*, 76 Va. 1002.

Act of 1780—Restriction of Right to Shores.—The act of 1780 exempts from location and grant all unappropriated lands on the Chesapeake bay, or the sea shore, or on the shore of any river or creek in the eastern part of the state which have remained ungranted, and have been used as a common to all the good people of the commonwealth. Held, the preamble of the act shows that it was intended to reserve to the poor and others the privilege of fishing; and it was only intended to reserve the shores or the lands on the shores necessary for the enjoyment of the privilege. *Garrison v. Hall*, 75 Va. 150.

V. Rights of Owners.

Just Compensation for Damages.—F. leased from Mrs. O. the land and a fishery in the Potomac river, where the tide ebbed and flowed, with all the privileges attached thereto, for five years, at a rent of \$500 a year. He built the necessary buildings, and cleaned out the fish berth, and was largely engaged in carrying on the fishery. Pending the lease the Alexandria and Fredericksburg Railway company, upon proceedings against O., had the land for their roadbed condemned, and paid into court the damages assessed. In building the road the company made embankments along the line of the river, pulling down some of F.'s buildings, throwing obstructions into the fish berth, and materially damaging the fishery. In an action by F. against the company to recover damages for the injury done to him, held, the leg-

islature has frequently recognized the rights of owners in their respective fisheries on the Potomac, and by various statutes has protected them in their rights, and the company could not in making their road injure the fishery of F. without making just compensation for the injury. *Alexandria, etc., R. Co. v. Faunce*, 31 Gratt. 761.

Payment of Damages into Court Does Not Preclude a Recovery by Lessee.—So in the same case, it was held: The assessment and payment of the damages into court does not preclude F. from the recovery of damages for the injury he has sustained as lessee of the fishery. *Alexandria, etc., R. Co. v. Faunce*, 31 Gratt. 761.

VI. Offenses.

Jurisdiction.—Catching and taking fish in the waters of the commonwealth without having first taken out license therefor, and paid the tax required by law, is a violation of a revenue law of the state, of which class of offenses county and corporation courts, police justices, and justices of the peace, have concurrent jurisdiction. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 443.

Compact of 1785.—A citizen of Maryland is liable to prosecution and conviction for the violation of 18th and 20th sections of ch. 100, Code of Virginia, 1873, relating to fishing in the Potomac river, which were enacted with the consent and approbation of the state of Maryland. *Hendricks v. Com.*, 75 Va. 935.

FIXED.—In *Sharpe v. Robertson*, 5 Gratt. 518, 638, it is said: "This mode of compensating the judges is objected to, inasmuch as it is not fixed, but variable, depending on the number of days the judge may attend, and also because it is not permanent, but may be diminished or entirely taken away by lessening the terms of the court, or repealing the law. * * * Fixed does not mean unchangeable; otherwise the increase, as well as diminution, would be unconstitutional; and the provision against diminishing would have been supererogatory." See generally, the title JUDGES.

Fixed Damages.

See the title DAMAGES, vol. 4, p. 169.

FIXTURES.

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CROSS REFERENCES.

See the title IMPROVEMENTS.

As to where the question arises as to the disposition of property between personal representatives and heirs, see the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

I. Definition and Construction

Definition.—A fixture is an article which was a chattel, but which, by being affixed to the realty, becomes accessory to it and parcel of it. *Green v. Phillips*, 26 Gratt. 752.

Construction.—The words "fixtures and appurtenances" have acquired a peculiar and appropriate meaning, and are to be construed according to such meaning, having due reference to the context and to the connection in which the words are used. *Lewis v. Rosler*, 16 W. Va. 333; *Patton v. Moore*, 16 W.

Va. 428, 37 Am. Rep. 789. See 1 Va. Law Reg. 626; 2 Va. Law Reg. 203.

II. Determination of What Are Fixtures.

A. GENERAL RULE.

The true criterion of a fixture is the united application of the following requisites: (1) Annexation to the realty or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; (3) the intention of the party making the an-

nexation to make a permanent accession to the freehold. *Green v. Phillips*, 26 Gratt. 752.

"Whether a chattel becomes a fixture depends upon the character of the act by which it is put into its place, the uses to which it is put, the policy of the law connected with its purpose, and the intention of those concerned." *Gartlan v. Hickman* (W. Va.), 49 S. E. 14, 19.

B. ANNEXATION.

Maxim.—The ancient rule that whatever is affixed to the soil belongs thereto is expressed in the maxim "quicquid plantatur solo, solo cedit." *Shelton v. Ficklin*, 32 Gratt. 727.

Permanency or Manner of Attachment.—The rule seems to be that the article or erection to become a fixture, must be actually annexed to the realty or something appurtenant thereto. *Green v. Phillips*, 26 Gratt. 752.

With regard to factories and the machinery necessary to carry out the purposes for which they are erected, the cases on this subject differ only in this—some hold that there must be an actual attachment, however slight and temporary, in order to change the character of the chattels from personalty into realty; while others hold that there need be no actual annexation, if the machinery is essential to the objects and purposes for which the building in which the machinery is placed was erected. *Green v. Phillips*, 26 Gratt. 752. See post, "Nature and Use of Article," II, D.

In *Green v. Phillips*, 26 Gratt. 752, the court said: "It is true that many cases may be found which hold, that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly attached to the real estate that the connection can not be severed without breaking or otherwise injuring the freehold. But the general course of modern decision, both in England and in the American

courts, is against adopting, as the criterion, for determining the character of chattels as fixtures, whether the annexation to the realty be slight and temporary, or immovable and permanent, and in favor of declaring everything a fixture which has been attached to the realty with a view to the purposes for which it is held or employed, however slight or temporary the connection between them."

"In the present age, the marvelous increase of manufactures have called into existence numerous establishments, in which the building is mere incident or accessory to the machinery or apparatus which it contains. As was said by Lord Mansfield in *Lawton, Ex'or v. Salmon*, 1 H. Bl. 259: In cases of this description, to require substantial or even nominal annexation, would exclude things absolutely essential to the enjoyment or use of freehold, and include others which are comparatively trivial and unimportant. Whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them is such that it may be severed without physical or lasting injury to either." *Green v. Phillips*, 26 Gratt. 752.

"The rule that objects must be actually and firmly affixed to the freehold to become realty, or otherwise to become personalty, is far from constituting a criterion." *Winston v. Merchants' Ins. Co.*, 4 Metc. R. 306, quoted with approval in *Green v. Phillips*, 26 Gratt. 752.

There are numerous cases which hold that the machinery of a manufactory is to be regarded as part of the realty, whether it is attached to the body of the building, or merely connected with the other machinery by running bands of gearing, which may be thrown off at pleasure without injury to the freehold. It would seem absurd and inconsistent to make the presence of a ligature, a belt, or screw, or nail, essential to the operation of a

Rule, which is founded upon considerations of a different nature. *Green v. Phillips*, 26 Gratt. 752.

C. INTENTION.

See post, "Agreement," II, E.

In deciding whether an article or erection is a fixture it becomes necessary to ascertain whether it was the intention of the party making the annexation to make a permanent accession to the freehold. *Green v. Phillips*, 26 Gratt. 752.

"The chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent accession to the freehold." *Gartlan v. Hickman* (W. Va.), 49 S. E. 14, 18.

Where a rolling mill company was operating a rolling mill erected on a three-acre lot, and had purchased two large pieces of machinery, weighing from fifty to sixty hundred weight, known as "railroad spike machines," for the purpose of attaching them to said mill, and manufacturing railroad spikes with them, had brought said machinery on a car which was standing on a railroad switch belonging to said rolling mill company, near said mill, on said lot, one of which machines was unloaded and the other still on the car, and the foundations in said rolling mill had been prepared to receive said machines, and while in this condition they were levied on under an attachment against said rolling mill company, and sold as personalty, held that, under this state of facts, said machines were a part of the realty of said rolling mill company, and could not be levied on and sold as personalty, and an action of detinue for the recovery of said machines could not be maintained by the purchaser of said machines under an attachment levied on them as personalty, for the reason that under the facts shown they must have been regarded as part of the realty.

McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408.

If an engine and boiler have been bought by the owner of a mill, and hauled into the mill yard with the bona fide intention of attaching them to the mill and they are necessary for the purpose for which they are to be used, they must be regarded as a part of the realty. *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *McFadden v. Crawford*, 36 W. Va. 671, 15 S. E. 408.

D. NATURE AND USE OF ARTICLE.

Whether the property in personalty or what the law denominates "fixtures" and is therefore a part of the realty and passes with it, depends not less upon its relation to the realty and the use to which it was put than upon its nature. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393; *Gartean v. Hickman* (W. Va.), 49 S. E. 14, 19.

The article to constitute a fixture must be applied to the use or purpose to which that part of the realty with which it is connected is appropriated. *Green v. Phillips*, 26 Gratt. 752.

Reason for the Rule.—In cases where a building is erected for manufacturing purposes, the machinery gives character and value to the building, and not the building to the machinery. Each must lose its vitality and value by a separation from the other. The public good and individual interest are therefore both subserved by regarding them as substantially the same, and keeping them together. *Green v. Phillips*, 26 Gratt. 752.

Determined by Evidence in Particular Case.—Whether the machinery and apparatus used in operating a manufactory are fixtures or not must be determined by the evidence in the particular case. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393.

No Limitation on Kind of Articles.—There seems to be no limitation concerning the kind of severable chattels which may be owned by one person upon another's land. *Shelton v. Ficklin*, 32 Gratt. 727.

Whatever Essential to Use of Building.—The true rule deduced from all the authorities seems to be this: That where the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purpose for which the building is used will be considered as a fixture, although the connection between them is such that it may be served without physical or lasting injury to either. *Green v. Phillips*, 26 Gratt. 752; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393; *Shelton v. Ficklin*, 32 Gratt. 727; *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *McFadden v. Crawford*, 36 W. Va. 671, 15 S. E. 408; *Haskin, etc., Co. v. Cleveland Ship Bldg. Co.*, 94 Va. 439, 26 S. E. 878.

Where Machinery Permanent in Character and Essential.—Where machinery is permanent in its character and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building. *Haskin, etc., Co. v. Cleveland Ship Bldg. Co.*, 94 Va. 439, 26 S. E. 878.

Where Machinery Constitutes Most Important Part of Structure.—In *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, the court said: "In this age of marvelous development of industries and multiplication of manufactures, it is a matter of common knowledge that it is the machinery and apparatus necessary for the production of the particular manufacture which form the principal part of the manufactory, and that the building in which they are placed and to which they are affixed serves but to enclose and protect them. They mainly constitute the manufactory, while the building is generally only the incident."

B., to secure a debt of \$3,000 for money lent to him by S., conveyed to C. in trust a lot of land in the town of F., described as containing one acre

of land on which B. has erected a planing mill and spoke factory; and by the same deed he conveyed and assigned to C. a policy of insurance he had taken out on the said planing mill, spoke factory and machinery, and covenanted to keep the policy in full force until the debt was paid. The lot building, independent of the machinery, was not worth more than \$1,000. It was held, that the machinery in the building passed under the deed. *Shelton v. Ficklin*, 32 Gratt. 727.

Where the machinery in dispute consisted in part of four enormous steel tanks, one hundred and five feet long and six and a half feet in diameter, the doors of each weighing seven and a half tons, and the whole of such enormous weight that they had to be shipped in parcels and put together on the premises of the appellant; this machinery practically constituting a vulcanizing works; no building being there until these enormous structures had been put together and placed in position on heavy solid foundations of concrete and brick; the buildings then being erected around this machinery, the whole constituting one structure for the purpose of vulcanizing wood; following the rule of *Green v. Phillips*, 26 Gratt. 752, it was held, that the machinery constituted part of the realty and formed the most important part of the structure in question. *Haskin, etc., Co. v. Cleveland Ship Bldg. Co.*, 94 Va. 439, 26 S. W. 878, citing *Shelton v. Ficklin*, 32 Gratt. 727; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393.

Furniture.—Mirrors, wardrobes, and other heavy articles of furniture, though fastened to the walls by screws with considerable firmness, must be regarded as chattels. *Green v. Phillips*, 26 Gratt. 752.

Doors, Windows, Blinds, etc.—Doors, windows, blinds and shutters, capable of being removed, without the slightest damages to a house, and even though at the time of a convey-

ance or mortgage, actually detached, would be deemed a part of the house, and pass with it. *Green v. Phillips*, 26 Gratt. 752.

Tramway for Use of Furnace.—A tramway built for the use of a furnace is as much a part of the furnace as any other machinery, and is therefore real estate—a fixture. *Childs v. Hurd*, 32 W. Va. 68, 9 S. E. 362.

Engines or Apparatus Generating Motive Power.—The following extract of the opinion of Chief Justice Shaw in *Winslow v. Merchants' Ins. Co.*, 4 Metc. R. 306, is quoted with approval in *Green v. Phillips*, 26 Gratt. 752: "In general terms, I think it may be said that when a building is erected as a mill or manufactory, and the water-works or steam works relied upon to move it are erected at the same time, and the machinery to be driven by them are essential parts of it, adapted to be used with it and in it, they are parts of it, and pass with it by a conveyance, attachment or mortgage."

It has been repeatedly held, that a steam engine, erected for the purpose of furnishing the motive power of a manufactory, is to be regarded as a fixture, or, in other words, as a part of the manufactory itself. *Green v. Phillips*, 26 Gratt. 752.

Stills.—In *Poage v. Bell*, 3 Rand. 586, it was quæred, whether stills were to be considered as real or personal property.

A still, not fixed to the freehold, is personal property. *Crenshaw v. Crenshaw*, 2 Hen. & M. 22.

Carding Machines.—In *Poage v. Bell*, 3 Rand. 586, it was quæred, whether carding machines are to be considered as real or personal property.

E. AGREEMENT.

See ante, "Intention," II, C.

General Rule.—Whatever may be the rule of the common law respecting fixtures, in the absence of any agreement of the parties, it is well settled at this day that the contract of the

parties will fix the character and control the disposition of personal property, which, in the absence of a contract, would be held to be a fixture; in other words, the parties interested may control the legal effect respecting such property by express agreement. *Shelton v. Ficklin*, 32 Gratt. 727.

Parties may, by agreement, fix the character and control the disposition of property which, in the absence of such agreement, would be held to be a fixture, if no absurdity, or general inconvenience will result from the transaction. *Tunis Lumber Co. v. Dennis Lumber Co.*, 97 Va. 682, 34 S. E. 613.

Where Freehold Would Not Be Injured by Severance.—The law would seem to be well settled that in annexing chattels, where they are not so incorporated as to render identification and severance without serious damage to the freehold impracticable, they may retain the nature of chattels, if the parties so agree. *Shelton v. Ficklin*, 32 Gratt. 727.

Building Erected or Machinery Installed with Landowner's Consent.—Where a building is erected by one man upon the land of another, by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it. *Andrews v. Auditor*, 28 Gratt. 115, cited in *Shelton v. Ficklin*, 32 Gratt. 727.

The owner of land executes a lease thereon for oil and gas purposes, by which it is agreed that the lessees shall have the privilege at any time to remove therefrom all machinery and fixtures placed on said premises. Under this lease, the lessees and their assignees, for the purpose of exploring for oil and gas, placed on the land an engine, wooden oil-well rig, wooden oil tanks, casing, pipes, rubber belt,

and other appliances of like character, necessary for the prosecution of that work. Afterwards the lease was forfeited and terminated for the nonpayment of rent. It was held, that said machinery and fixtures did not become parts of the freehold. *Gartlan v. Hickman* (W. Va.), 49 S. E. 14.

Thornton on Oil & Gas, at § 567, says: "When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property, although it is annexed to the soil, shall retain its character as personality, then, except as against persons who occupy the relation of innocent purchasers without notice, the intentions of the parties will prevail, unless the property be of such a nature that it necessarily becomes incorporated into and a part of the realty by the act and manner of annexation." Quoted in *Gartlan v. Hickman* (W. Va.), 49 S. E. 14, 19.

By agreement between the United States government and the owner of land, the government erected buildings on the land, intended to be and actually used by operatives employed by the government in dressing stone to be employed in the erection of public buildings at Washington; and under the agreement the government has the right to remove the buildings. It was held, that the buildings are personal property. *Andrews v. Auditor*, 28 Gratt. 115.

Building Erected without Landowner's Consent.—If a building is erected on land against the will of the landowner, or without his consent, it becomes realty, and can not be removed therefrom without the commission of waste. *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975.

F. PRESUMPTION.

In the absence of all evidence as to whether the machinery and apparatus used in operating a manufactory are fixtures, except the language of a mortgage on the "land and buildings, and on all engines, machines, tools, ap-

pliances, connection attachments and contrivances of every kind used in operating the manufactory," the court will not presume that said engines, machinery, etc., are not fixtures in order to defeat a recovery on an insurance policy which contained a clause which avoided the policy if there is a chattel mortgage on the property insured. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393.

III. Severance.

A. WHO MAY SEVER.

In General.—To convert an article, which is part of the freehold, into a chattel state by severing it from the realty, the act of severance must be done by one having the authority or right to do so; and it must be severed with the intention of converting it into a chattel state. *Lewis v. Rosler*, 16 W. Va. 333.

Severance by Tenant.—See post, "Severance," IV, C.

Severance by Mortgagee.—See post, "As between Mortgagor and Mortgagee," V.

B. SEVERANCE BY ACT OF GOD.

When a flood washes out from a mill the engine, boiler, burrs and mill irons, which were fixtures in the mill, they are not converted into personal property. *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789.

C. MANNER OF SEVERANCE.

The removal must be effected without any substantial injury to the freehold. *Graeme v. Cullen*, 23 Gratt. 266.

D. PREVENTION OF SEVERANCE.

Equity will take jurisdiction by injunction to preserve the inheritance, and when a mill is about to be dismantled by execution creditors of the owner, who have levied on the fixtures attached thereto, equity will interfere to prevent it. *Patton v. Moore*, 16 W. Va. 428, 47 Am. Rep. 789, citing *Fenell v. McMillan*, 6 W. Va. 223; *Green v. Phillips*, 26 Gratt. 752.

E. EFFECT ON NATURE OF PROPERTY.

What then is the criterion by which we are to determine whether that which was once part of realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest, is incapable of reannexation to the soil, and yet remains realty. The true rule would rather seem to be, that which was real shall continue real, until the owner of the freehold shall by his election give it a different character. *Patton v. Moore*, 16 W. Va. 428, 37 Am. Dec. 789.

In *Franks v. Cravens*, 6 W. Va. 185, the court said that in that case it was unnecessary to consider the question whether the property became a part of the freehold or not, since by its subsequent severance and removal several miles, it was converted, so far as the parties to this bill were concerned, into personal property and that it received this character from the date of its severance and removal.

A tract of land is conveyed in trust to secure a debt to A. At the date of the deed, an engine, boiler, and other machinery used as, or in connection with, a saw mill, were upon the land. Subsequently these articles are removed to another tract of land several miles distant, and as such, while there, are again conveyed in trust to secure a debt due to another creditor, and subsequently sold, and pass into the possession of other parties. A bill is filed by the cestui qui trust in the first deed against the purchasers, who had been in the possession of the property for some years, to compel its restoration to himself, or his trustee, on the ground that it was trust property, and was a part of the freehold, and bought with notice of these facts. Held, that although this property may have been a part of the freehold it was, by its removal from the land on which it was first located, converted into personal

property, as between the creditor and third parties, whatever its nature before. *Franks v. Cravens*, 6 W. Va. 185.

IV. As between Landlord and Tenant.

See the title LANDLORD AND TENANT.

A. RELAXATION OF ANCIENT RULE.

The old rule that "whatever is affixed to the soil belongs thereto" has been greatly relaxed in modern times in favor of tenants of a limited interest. *Shelton v. Ficklin*, 32 Gratt. 727; *Graeme v. Cullen*, 23 Gratt. 266.

B. TRADE FIXTURES.

See post, "Severance," IV, C.

How Determined.—Whether or not a structure erected by a tenant on the leased premises is a trade fixture, is, in the absence of any duty or obligation on the part of the lessee to erect it, a question of facts to be determined by the jury under proper instructions from the court. *Tunis Lumber Co. v. Dennis Lumber Co.*, 97 Va. 682, 34 S. E. 613.

Buildings Erected by Tenant Pursuant to Covenant.—Buildings erected by tenant on the leased premises, pursuant to a covenant in the lease which obliges him to erect them, are not removable as trade fixtures, unless the right of removal is expressly or impliedly reserved in the lease. *Tunis Lumber Co. v. Dennis Lumber Co.*, 97 Va. 682, 34 S. E. 613; *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392.

C. SEVERANCE.

See ante, "Severance," III.

1. Voluntary Erection as a Prerequisite to Removal.

Between landlord and tenant it is an essential element of removable structures that they be erected by the tenant of his own volition, and for his own benefit intending that they should remain his property, and not in fulfillment of a duty or obligation owing by him to the lessor. *Tunis Lumber Co.*

v. Dennis Lumber Co., 97 Va. 682, 34 S. E. 613.

2. Time for Removal.

During Term of Lease.—A tenant may remove fixtures which he has put on leased premises at any time during his lease or while he continues as tenant. *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362; *Graeme v. Cullen*, 23 Gratt. 266.

As between landlord and tenant, fixtures erected by the latter, and which he is entitled to remove, must be removed during the term. *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975.

Within a Reasonable Time.—"What is a reasonable time for the removal of the chattels is a question to be determined from all the facts and circumstances of the case." *Gartlan v. Hickman* (W. Va.), 49 S. E. 14, 19.

The owner of land executes a lease thereon for oil and gas purposes, by which it is agreed that the lessees shall have the privilege at any time to remove therefrom all machinery and fixtures placed on said premises. Under this lease, the lessees and their assignees, for the purpose of exploring for oil and gas, placed on the land an engine, wooden oil-well rig, wooden oil tanks, casing, pipes, rubber belt, and other appliances of like character, necessary for the prosecution of that work. Afterwards the lease was forfeited and terminated for the nonpayment of rental. It was held, that said lessees, or the owners of the machinery and fixtures, had a reasonable time after the termination of said lease in which to remove said property from the land. *Gartlan v. Hickman* (W. Va.), 49 S. E. 14.

Where Prompt Removal Not Necessary.—Thornton on Oil & Gas, at § 576, says: "Contingencies may arise that will not require the lessee to remove his fixtures at the expiration of the lease, or even within what would have otherwise been a reasonable time. Thus, where there arose a dispute between the lessor and lessee as to when

the lease expired, and the controversy was taken into the courts and was decided against the lessee, it was held, that the lessee could remove the fixtures at the termination of the suit, although the lease had long before expired, and, if the lessor had refused to permit the lessee to so remove them, he was liable in damages." Quoted in *Gartlan v. Hickman* (W. Va.), 49 S. E. 14, 19.

"Thornton, at § 574, says: 'Thus, it was decided in New York that trade fixtures did not cease to be the tenant's property by reason of the mere fact that he did not remove them during his term, and that he could remove them after his term expired without subjecting himself to any damages for such removal, even though he be liable to an action for trespass for an entry on the premises demised. * * * In Illinois it was held, that the tenant had a reasonable time within which to remove trade fixtures, and what was a reasonable time was a proper question for the jury, under the instructions of the court.' The author cites *Berger v. Hoerner*, 36 Ill. App. 360; *Nigro v. Hatch* (Ariz.), 11 Pac. 177. The same author says at the same section: 'This is undoubtedly true where a forfeiture of the lease takes place; and, if the tenant is denied the right after the forfeiture to remove them, he may bring an action therefor, especially if the lease contain an agreement giving him the right to make such removal.' Quoted in *Gartlan v. Hickman* (W. Va.), 49 S. E. 14, 19.

After Expiration of Life Tenancy and Termination of Lease.—After the expiration of a life tenancy in a town lot by death, and the termination of a lease thereunder, the lessee can not remove buildings put on such lot during the continuance of such tenancy. Such buildings become a part of the realty, and go to the person entitled to the remainder. *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975.

Abandonment.—After the expiration of the lease, and the surrender of the premises to the landlord, a tenant can not enter on the premises, and remove any fixtures, for when he quits the premises, leaving his fixtures behind him, it will be presumed that he intended to abandon them. *Childs v. Hurd*, 32 W. Va. 68, 9 S. E. 362; *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975.

3. Severance with Owner's Consent.

Where certain brass and copper fixtures of a salt furnace had been severed by the tenant and placed in a warehouse in order to protect them from thieves and it was not shown by the record what the tenant's authority or right to so sever the property was; that is, whether it was done with the owner's consent or not; *Moore, J.*, delivering the opinion of the court, said: "If done with the owner's consent, it is clear from the testimony that the severance was only temporary and for the purpose of safekeeping, and was not a severance of that permanent nature as to give the chattel character." *Lewis v. Rosler*, 16 W. Va. 333.

4. Severance without Authority.

But if the severance be done by the tenant without the authority or right to do, then under the well-established principles, the severance can not change the character of the article from realty to personalty. *Lewis v. Rosler*, 16 W. Va. 333.

V. As between Mortgagor and Mortgagee.

See the title MORTGAGES AND DEEDS OF TRUST.

In General.—The general rule of the common law that all buildings and their fixtures annexed to the freehold become a part of it and inure to the benefit of those who are entitled to it applies to property subject to a deed of trust or mortgage. *Greame v. Cullen*, 23 Gratt. 266.

If machinery under mortgage is placed in a mill already mortgaged, it

becomes subject to the realty mortgage, to the extent that is necessary to keep the security thereof unimpaired, so far as the personality mortgage is concerned. If such machinery is mortgaged to its full value, and it will not damage the mill property by its removal, the mortgagee or purchaser may remove the same; otherwise, he must make good the damage caused by such removal. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237. See ante, "Severance," III.

Machinery already under mortgage which is annexed to the freehold, which freehold was already under mortgage, becomes part of the freehold, and therefore subject to the realty mortgage, if it can not be severed without material injury to the freehold. *First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. 1000.

Severance by Mortgagee.—Where machinery under mortgage is annexed to a freehold already under mortgage, if the machinery can be severed without material injury to the freehold, the owner of the mortgage on such machinery or a purchaser under him may remove it. *First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. W. 1000; *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. W. 237.

VI. As between Vendor and Purchaser.

See the title VENDOR AND PURCHASER.

Fixtures are a part of the realty and pass with it. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393.

When a purchaser of real property makes permanent improvements thereon attached to the freehold, and then being unable to pay for it, surrenders the property to the vendor, without express reservation of the improvements, and cancels the contract of purchase, the improvements go with the property back to the vendor. *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789.

VII. As Subject to Execution.

General Rule.—Things which pertain to the realty and pass under the designation of fixtures are not the subject of the levy of a fi. fa. Min. Ins. (3d Ed.) 1022; *Green v. Phillips*, 26 Gratt. 752; *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *McFadden v. Crawford*, 36 W. Va. 671; 15 S. E. 408; *Shelton v. Ficklin*, 32 Gratt. 727; *Franks v. Cravens*, 6 W. Va. 185; *First Nat. Bank v. Anderson*, 75 Va. 250; *Morotock Ins. Co. v. Rodefer*, 92 Va.

747, 24 S. E. 393; *Haskin, etc., Co. v. Cleveland Ship Bldg. Co.*, 94 Va. 439, 26 S. E. 878.

Effect of Annexing Lien Property.—

If an engine and boiler, after being levied on under an execution, are, with the consent of the execution creditor, attached to a mill by the owner, who is the debtor, with the intent that they shall become a part of the realty, the lien of the execution is thereby released. *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789.

Flight of Accused as Evidence of Guilt.

See the title CRIMINAL LAW, vol. 4, p. 86.

FLOATABLE STREAMS.—The public in this state have a right to use as a highway, not only tidal rivers in which the tide ebbs and flows, and fresh water rivers capable of being profitably used to carry on commerce in the natural state, without artificial improvements, but also **floatable streams**; that is, such streams as are capable of being profitably used by the public, in their natural state, to float logs or timber, or the products of mines or tillage, to markets or mills. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60. And see the titles NAVIGABLE WATERS; WATERS AND WATERCOURSES.

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See the title WATERS AND WATERCOURSES.

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See the title TRUSTS AND TRUSTEES.

Food.

See the title ADULTERATION, vol. 1, p. 183.

FOR.—In *Gorrell v. Bier*, 15 W. Va. 311, 320, it is said: "The first clause of art. 9, § 3, constitution, ordains that: 'The same person shall not be elected sheriff for two consecutive full terms.' This is the provision of the constitution that the contestant insists rendered the defendant in error ineligible to the office at the election in October, 1878, to fill the vacancy. It is inferred from the argument of the contestant's counsel by the stress he seems to put upon the word *for* that he interprets that word as meaning, or equivalent to, 'during,' and interprets this clause of the constitution as rendering the sheriff ineligible to re-election to the office during the period of four years next succeeding the termination of a full term of the office to which he had been elected. Had such been the intention of the framers of the constitution, they would have used language as definite and significant as that used in the 4th section of art. 7, of the constitution which ordains, that: 'The governor shall be ineligible for said office for

the four years next succeeding the term for which he was elected.'” See generally, the titles PUBLIC OFFICERS; SHERIFFS AND CONSTABLES.

For Collection.—In *Carroll v. Exchange Bank*, 30 W. Va. 518, 4 S. E. 440, 447, it is said: “Here there is nothing to indicate that the Penn Bank was not the owner of the Carroll sight draft. If Carroll had drawn that draft payable to his own order, and indorsed it **for collection**, then it would have shown clearly that he had not parted with the ownership of it. But he directs the drawee to ‘pay to the order of Penn Bank.’ This would indicate that the Penn Bank, being designated the payee owned the draft.” See the title BANKS AND BANKING, vol. 2, p. 270.

For Her Support.—A testator by will deposits with his executor, for the benefit of his daughter, a sum of money and certain personal property, the annual interest and income from which he directs “to be paid to her **for her support**” during her life. Held, the interest and income are liable for her debts. The words **for her support** only show the motive for the gift. *Young v. Easley*, 64 Va. 193, 26 S. E. 401.

For Life.—See the titles ESTATES, vol. 5, p. 160; LANDLORD AND TENANT; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS. And see AT, vol 2, p. 70.

For Religious Worship.—See the title DISTURBING MEETINGS, vol. 4, p. 733.

For Value Received.—See the titles BILLS, NOTES AND CHECKS, vol. 2, p. 416; CONTRACTS, vol. 3, p. 309.

FORBEARANCE.—As constituting consideration, see the title CONTRACTS, vol. 3, p. 357.

Forbearance in the sense of the statute in relation to usury, is the giving a further day for the return of a loan when the time originally agreed on is passed; and if the rate of interest agreed on for such **forbearance** is over six per cent. per annum, it is usurious. *Graeme v. Adams*, 23 Gratt. 225. See also, the title USURY

FORCE.—As to what **force** used by a conductor will justify a passenger in jumping from a train, the court, in *Bogges v. Chesapeake, etc., R. Co.*, 37 W. Va. 297, 16 S. E. 525, 526, said: “It is a difficult matter to define **force**, or say in exact language what in such a case as this is the show of **force**, short of actual **force**, which would justify the party in jumping from the train into danger. It assimilates itself somewhat to the question of duress under the law of contracts. There the question is, is this contract the act of the will of its maker, or his enforced act—the creature, not of his will, but of coercion by the other party? Here the question is, was the act of jumping from the train the willing but reckless act of the plaintiff, or his unwilling act, attributable to the wrongful act and coercion of the conductor?”

FORCE AND ARMS.—Indictment at common law, for taking a horse, “unlawfully and injuriously,” the usual form with **force and arms** being also used; held, this does not describe the act as one that constitutes a breach of the peace. The court said: “It is charged that the taking was ‘unlawful and injurious;’ and though the usual phrase ‘with **force and arms**’ is previously inserted, these words alone do not imply such a force as will sustain an indictment. If connected with the description of an ordinary trespass only, they do not show such a violence as is indictable. *Rex v. Storr*, 3 Burr. 1698; *Rex v. Bake & al Id.* 1731.” *Com. v. Isreal*, 4 Leigh 675, 677.

Forced Sale.

See the titles JUDICIAL SALES; SHERIFFS' SALES.

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I. Definition and Distinctions

Definition.—A forcible entry, under our statute giving civil redress by summary proceedings, is precisely what would constitute a forcible entry for which at common law a party might be punished criminally. It therefore lies when a party enters on land in the possession of another, and, either by his behavior or speech, gives those who are in possession just cause to fear he will do them some bodily harm if they do not give way to him; whenever the entry is "with strong hand or multitude of people." *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168; *Pauley v. Chapman*, 2 Rob. 235.

Forcible Entry and Detainer Distinguished from Ejectment.—In *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 550, the court said: "The action of unlawful entry and detainer now bears in some degree the same relation to the action of ejectment, now final, which the action of ejectment, before July 1st, 1850, then not final, bore to the writ of right, which was then abolished. English speaking people have it ingrained into them that they ought not to be required to lose or give up their land without having, if they see fit, two trials; hence the action of un-

lawful entry, when not barred (three years), is frequently used as a preliminary skirmish to fool the enemy, before the final battle is brought on by an action of ejectment." See the title EJECTMENT, vol. 4, p. 874.

In *Olinger v. Shepherd*, 12 Gratt. 462, Moncure, J., said: "There is a material difference between an action of ejectment and an action of forcible or unlawful entry. The title or right of possession is always involved in the trial of an action of ejectment. The plaintiff can not recover without showing that he is entitled to the possession; and the defendant, without having any right to the possession himself, may generally prevent a recovery by the plaintiff by showing an outstanding right of possession in another. The remedy for a forcible or unlawful entry was designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. The entry of the owner is unlawful if forcible, and the entry of any other person is unlawful, whether forcible or not. If the defendant enters unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right of possession. His actual

possession, of itself, gives him a right of possession against any person not having a right of entry."

In *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 553, the court said: "So that, under our present law, the action of unlawful entry and detainer, as prescribed by ch. 89 of present Code, holds in this respect, as to finality of judgment, somewhat the same relation to the present action as ejectment prescribed by ch. 90, Rev. Code of 1819, held to the writ of right. Prior to the Code of 1849 'the whole effect of a judgment for the plaintiff in ejectment was to put the lessor of the plaintiff into possession of the land; and the only point decided is that he has a better title to the possession than the defendant.' *Chapman v. Armistead*, 4 Munf. 382, 397. It is a recovery of the possession, not of the seisin or freehold, without prejudice to the right as it may afterwards appear, even between the same parties. He who enters under it in truth and substance can only be possessed according to his right. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a tremor. If he has no title, he is in as a trespasser. If he has no right to the possession, then he takes only a naked possession."

In *Emerick v. Tavener*, 9 Gratt. 220, 228, the court said: "But it is supposed that if this be correct as to the action of ejectment, yet there may be a distinction between that action and the writ of unlawful detainer given by our statute; and it is suggested that the latter is a summary proceeding for the recovery of the very possession, against the party actually holding it and claiming it unlawfully; and that such an unlawful detainer is a tort in the nature of a trespass committed (in the case in judgment) by Alton, for which *Emerick*, who had no control over him, should not be held responsible in a proceeding of this character. I do not perceive any good reason for a distinction upon this point between

the action of ejectment and the writ of unlawful detainer. I regard the latter as the mere substitute for the former to recover possession in those cases in which the right to the possession only is in controversy, in which the plaintiff is required to show no title to sustain his action, and in which the possession of the defendant has not continued more than three years (the statutory limitation in this form of proceeding) against the consent of the plaintiff; and upon whatever right and proofs he could maintain in such a case an action of ejectment against the defendants, he can upon the same right and proofs maintain this proceeding. As to the suggestion that the unlawful detainer is a tort in the nature of a trespass, for which the original tenant having no control over the party actually holding the possession ought not to be held responsible, it may be remarked, that the foundation of the action of ejectment is a supposed trespass, and yet we have seen he is clearly liable in that action."

Forcible Entry and Detainer Distinguished from Trespass.—An action of forcible entry and detainer, may be maintained where trespass will not lie; as, for instance against the owner of the land. If he has the right of entry, he will not commit a trespass by entering, though such entry be with force, unless he also committed a breach of the peace. The law will not give damages against him in an action of trespass *quare clausum fregit*, but, in an action of forcible entry it will compel him to restore the possession. *Davis v. Mayo*, 82 Va. 97.

II. History.

In *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 552, *Holt, J.*, said: "In the time of *Bracton* (1263) 'a person disseised might recover seisin by force with a multitude of friends to assist him, provided he made this attempt *flagrante disseisine*.' But the state of things in a hundred years was so al-

tered, and the ideas of men were so different, that these forcible vindications of a man's property were thought incompatible with a well-ordered government. It was accordingly enacted by statute—5 Rich. III, ch. 7 (1382)—that none from thenceforth make entry into any lands and tenements but in cases where entry is given by the law, and in such not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and by statute of 15 Rich. II, ch. 2, upon complaint made to any justice of the peace of such forcible entry, he was to take sufficient power of the county, go to the place, try the fact, restore the disseisee, imprison the disseisor, etc. See 3 Reeves, Hist. Eng. Law, 392. By statute—8 Hen. VI, ch. 9 (1422)—this summary proceeding in case of forcible entries was enlarged, and rendered more effectual, including a detainer by force as well as forcible entry. The act of February 12, 1814 (1 Rev. Code 1819, pp. 455, 459, § 1), follows the language of the statute of 5 Rich. above, adding: '(1) And that none who shall have entered in a peaceable manner shall hold the same afterwards against the consent of the party entitled to the possession thereof.' It then proceeds to provide in great detail and fullness the remedy; the form of complaint; the form or warrant issued by the justice; the form of oath for the jury, embracing the charge, what they shall find; and the form of verdict, showing the facts that are to be therein found."

"By the statute of 5 Rich. 2, Stat. 1, ch. 8, forcible entries and detainers were made a public offense; and upon conviction, the party evicted was restored to the possession, as a consequence of the conviction, unless the wrongdoer had three years' possession before the institution of the prosecution." *Allen v. Gibson*, 4 Rand. 468, 472.

III. Nature and Purpose.

A. NATURE.

In General.—"The action of 'unlaw-

ful entry or detainer,' as it is now called in our statute, is the oldest action for the recovery of possession of land that remains to us." *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544.

A Civil Action.—A warrant for a forcible or unlawful entry upon lands and tenements and turning another out of possession, or for unlawfully and against his consent withholding possession from the party entitled, is a civil action. *Kincheloe v. Tracewell*, 11 Gratt. 587, 598.

B. QUESTIONS INVOLVED.

Only Question of Possession Involved.—In an action of forcible entry and detainer the only question involved is, whether the plaintiff is entitled to possession as against the defendant. *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180; *Davis v. Mayo*, 82 Va. 97; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *VanGunden v. Kane*, 88 Va. 591, 14 S. E. 334; *Moore v. Douglass*, 14 W. Va. 708; *Duff v. Good*, 24 W. Va. 682; *Hays v. Altizer*, 24 W. Va. 505; *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544; *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 354; *Bulkley v. Sims*, 48 W. Va. 104, 35 S. E. 971; *Allen v. Gibson*, 4 Rand. 468; *Emerick v. Tavener*, 9 Gratt. 220; *Kincheloe v. Tracewell*, 11 Gratt. 587; *Olinger v. Shepherd*, 12 Gratt. 462.

Question of Title Not Involved.—The action of unlawful detainer does not try title. Even the owner can not by this form of action recover against a person rightfully in possession though such person may have no title or claim of any kind to the land. *Allen v. Gibson*, 4 Rand. 468, 477; *Emerick v. Tavener*, 9 Gratt. 220; *Olinger v. Shepherd*, 12 Gratt. 462; *Davis v. Mayo*, 82 Va. 97; *VanGunden v. Kane*, 88 Va. 591, 14 S. E. 334; *Hays v. Altizer*, 24 W. Va. 505; *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544; *Bulkley v. Sims*, 48 W. Va. 104, 35 S. E. 971; *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 854.

But in *Corbett v. Nutt*, 18 Gratt. 624, it was held, that a proceeding of unlawful detainer may be maintained against a party in unlawful possession of land, where such unlawful possession has not continued for more than three years, though the legal title to the land is the only question involved in the cause.

"Mr. Hogg, in his most valuable work on Pleading and Forms (2d Ed., at page 27), in speaking of the action of unlawful entry and detainer, says: 'This action is brought to determine the right of possession, and the matter of title can not be determined therein, and is only considered as it might bear upon the mere right of possession. It can, therefore, rarely, if ever, be brought directly in issue in this action, but merely collaterally.'" Quoted in *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 854.

Question of Damages Not Involved.

—The action of forcible entry and detainer does not savor of an action for damages, but is entirely an action to recover possession. *Olinger v. Shepherd*, 12 Gratt. 462, 466.

C. PURPOSE.

The remedy for an unlawful or forcible entry was designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. *Olinger v. Shepherd*, 12 Gratt. 462, 471; *Moore v. Douglass*, 14 W. Va. 708; *Davis v. Mayo*, 82 Va. 97; *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Duff v. Good*, 24 W. Va. 682.

IV. Elements.

A. POSSESSION.

See post, "To Show Extent of Possession," XI, A, 2.

1. Necessity for Possession.

Possession under claim of title is all that is necessary to maintain an action of unlawful entry and detainer. *Fore*

v. Campbell, 82 Va. 808, 1 S. E. 180; *Supervisors v. Ellison*, 8 W. Va. 308.

2. Character of Possession Necessary.

In General.—In order to maintain the action of unlawful entry or detainer, it is essential that the plaintiff shall have actual possession or the right to the possession, and that defendant should be a wrongdoer; but where he has the right it is not essential that he should also have the actual or physical possession, the *pedis possessio*, at the time the unlawful entry is made by defendant. *Storrs v. Feick*, 24 W. Va. 606; *Duff v. Good*, 24 W. Va. 682; *Chancey v. Smith*, 25 W. Va. 404.

"The possession to which this summary remedy applies is not confined to the *pedis possessio* or actual enclosure of the occupant. It applies to any possession which is sufficient to sustain an action of trespass." *Duff v. Good*, 24 W. Va. 682, 685.

Actual Occupancy.—The possession to which the proceeding for unlawful entry will apply, is not confined to actual occupancy or enclosure but it is any possession which is sufficient to sustain an action of trespass. And thus actual possession of a part of a tract of land under a bona fide claim and color of title to the whole, is such a possession of the whole or so much thereof as is not, in the adverse possession of others, as will sustain this proceeding. *Olinger v. Shepherd*, 12 Gratt. 462; *Moore v. Douglass*, 14 W. Va. 708.

Plaintiff being in actual possession when defendant entered, and the entry being unlawful, plaintiff is entitled to recover possession of the premises, any possession being a legal possession against a wrongdoer. *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538.

Constructive Possession.—Actual possession under a bona fide claim of the whole and color of title thereto, is possession of the whole, or so much thereof as is not in the actual posses-

sion of others. *Moore v. Douglass*, 14 W. Va. 708; *Olinger v. Shepherd*, 12 Gratt. 462; *Hays v. Altizer*, 24 W. Va. 505; *Duff v. Good*, 24 W. Va. 682.

Where there is actual possession of part of a tract of land under a bona fide claim and color of title to the whole, the party in actual possession of such part has a sufficient possession of the residue of the tract to entitle him to an action of forcible entry and detainer against a wrongdoer who enters upon such residue, who has not the right of entering thereon. But the owner of such residue or those authorized under him, may lawfully enter upon such residue without force and hold the same. *Moore v. Douglass*, 14 W. Va. 708.

3. Unlawful Withholding.

a. Necessity for.

It is necessary to show that the defendant unlawfully withholds the possession. *Power v. Tazewell*, 25 Gratt. 786.

b. Time of.

To sustain an action of forcible entry and detainer, it is necessary to show that at the date of the complaint defendant unlawfully withheld from the plaintiff possession of the land in dispute. *Lawson v. Dalton*, 18 W. Va. 766.

To entitle the plaintiff to recover upon a warrant of unlawful detainer, he must prove that the defendant withheld the possession at the date of the warrant. *Kincheloe v. Tracewell*, 11 Gratt. 587.

c. Duration of.

To sustain an action of forcible entry and detainer, possession must be shown to have been unlawfully withheld for three years prior to the commencement of the suit. *Lawson v. Dalton*, 18 W. Va. 766.

Constructive Withholding of Possession.—"A party may unlawfully detain the possession from him having right, without being himself in the actual possession, but through the agency and

instrumentality of another who is." *Emerick v. Tavener*, 9 Gratt. 220, 229.

4. Abandonment.

Rule as to Abandonment.—A party who is in possession of lands under claim of title, makes it his as against the world except as to the true owner, and it remains his as against all persons entering without his consent, unless he abandons the land; and he may recover the possession of the land by a writ of unlawful entry and detainer, even of the true owner, who has entered upon the same without the occupant's consent and without his abandonment of such land. *Mitchell v. Carder*, 21 W. Va. 277.

If an occupant of land having no valid title has, in point of fact, so abandoned the possession of land with no intent of resuming it, then any one may take possession and hold it against him, even though he promptly institute proceedings to recover possession. *Mitchell v. Carder*, 21 W. Va. 277.

What Constitutes.—If a person in possession of land under claim of title leaves it with the intention of returning and taking possession of it at a future time, he does not abandon such land, even though no one be upon the land for a considerable length of time. An abandonment takes place only when one in possession leaves with an intention of not again resuming possession, for abandonment is a question of intention; and mere lapse of time does not constitute abandonment, though it is proper to be considered in ascertaining the intention of the party who has left land which he has been occupying. *Mitchell v. Carder*, 21 W. Va. 277.

Evidence of Abandonment.—The promptness or delay of a former occupant in instituting suit or demanding possession of one, who has entered on the land, is proper evidence to be considered in ascertaining such intention of the first occupant, and a wide range should be allowed, for it is generally only from all the surrounding facts and

circumstances that the intention of an occupant of land can be ascertained, when he has left its possession. *Mitchell v. Carder*, 21 W. Va. 277.

Burden of Proof.—The burden of proving clearly an abandonment rests on the one who asserts it. *Mitchell v. Carder*, 21 W. Va. 277.

B. RIGHT OF POSSESSION.

See post, "To Show Right of Possession," XI, A, 1.

1. Necessity for.

If the defendant in an action of forcible entry and detainer has entered unlawfully, the plaintiff is entitled to recover without any regard to the question of his right of possession. His actual possession of itself gives him the right of possession against any person not having the right of entry, since any possession is a legal possession against a wrongdoer. *Olinger v. Shepherd*, 12 Gratt. 462; *Corbett v. Nutt*, 18 Gratt. 624, 648; *Davis v. Mayo*, 82 Va. 97; *Basore v. Henkel*, 82 Va. 474; *Fore v. Campbell*, 82 Va. 808, 812, 1 S. E. 180; *Hurst v. Dulaney*, 84 Va. 701, 5 S. E. 802; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Hawkins v. Wilson*, 1 W. Va. 117; *Moore v. Douglass*, 14 W. Va. 708, 709; *Storrs v. Feick*, 24 W. Va. 606; *Duff v. Good*, 24 W. Va. 682; *Chancey v. Smith*, 25 W. Va. 404.

Illustrative Cases.—Where premises granted in 1857 for Springfield Division, Sons of Temperance, came into possession in 1872 of D. and others, trustees, who kept possession until February 15, 1884, when M., claiming to act with authority, declaring the division's charter revoked, took possession of the premises and organized a new division under the same name; a majority of the old division repudiated M.'s action, changed the name of old division, and again elected D. and others trustees. On the 18th, M. and others had the court appoint themselves trustees of the new division. On the 26th, D. and others failed in

an attempt to get the court to rescind its order of 18th. D. and his associates then brought unlawful detainer against M. and his associates to recover possession of the premises. It was held that the withholding of possession by M. and his associates is unlawful, without regard to the title or right of possession of D. and his associates, the latter being in possession when M. and his associates took possession. *Davis v. Mayo*, 82 Va. 97.

In action to recover possession of an oyster bottom assigned plaintiff under ch. 254, § 6, acts (Va.) 1883, 1884, it was improper for the trial court to instruct the jury that, if they believed the plaintiff was in possession of this bottom under the assignment, they should find for him. The ground of the action was that the defendant unlawfully withheld the possession of the premises; and, unless this were so, there was no ground for the action, and the verdict must have been for the defendant. *Hurst v. Dulaney*, 84 Va. 701, 5 S. E. 802.

In 1844, mountain land was patented to H., who held actual, exclusive possession thereof by open, notorious and habitual acts of ownership, paying the taxes, etc.,—the county record showing no other claim to it—for more than the statutory period of limitation. In 1882, after the land had been purchased and paid for at a judicial sale of the land of H., B. entered forcibly under claim of title under an older patent, and was committing waste on it when the purchaser obtained an injunction. On motion to dissolve, it was held, that on the strength of such possession merely, without regard to title otherwise, the injunction should be perpetuated. *Basore v. Henkel*, 82 Va. 474.

2. Ownership Immaterial.

Title in State.—"Even if the land belongs to the state, the person in the actual possession will be entitled to all the remedies which the law provides for the protection of the actual

possession against tort feorsors." *Duff v. Good*, 24 W. Va. 682, 685; *Moore v. Douglass*, 14 W. Va. 708; *Olinger v. Shepherd*, 12 Gratt. 462.

Title in Defendant.—In a proceeding of unlawful entry or detainer if the defendant has entered unlawfully, the plaintiff is entitled to recover without any regard to the question of his right of possession; and this though the land, from which he is ousted, is the land of the party who ousted him. *Moore v. Douglass*, 14 W. Va. 708, 709; *Olinger v. Shepherd*, 12 Gratt. 462.

3. Immaterial as to How Right Obtained.

A party who is entitled to the possession of land as against the defendant, no matter how, or in what manner or mode he may have acquired such right, or whether he has ever been in possession or not, may bring an action of unlawful detainer for the recovery of the possession. *Hawkins v. Wilson*, 1 W. Va. 117, 124; *Allen v. Gibson*, 4 Rand. 468.

4. Where Right of Possession Depends upon Title.

The Virginia Code, 1860, ch. 134, § 1, gives the remedy of unlawful detainer where there has been an unlawful entry upon land, or where the entry having been lawful, retains possession unlawfully for a term less than three years; and this action is allowed though the right of possession may depend altogether upon the validity of the title under which defendant claims. *Corbett v. Nutt*, 18 Gratt. 624, 648.

C. THE FORCE REQUIRED.

Necessity for Force.—The act of 1814 gave a civil remedy for the immediate recovery of the possession, in certain cases, even where no force occurred. The court, in *Allen v. Gibson*, 4 Rand. 468, saying: "This act was remodeled by the act of 1814 so as to make a civil remedy for the immediate recovery of the possession in certain

cases, even where no force occurred. It provides, first, that 'none shall enter on land or tenements, but in cases where entry is given by law; and in such case, not with strong hands nor multitude of people, but only in a peaceable and easy manner. None who shall have entered in a peaceable manner shall hold the same against the consent of the party entitled to the possession thereon.'"

It is necessary to show that the defendants' entry was unlawful. *Power v. Tazewell*, 25 Gratt. 786.

Where Entry Is by Owner.—The entry by the owner of land where another is in possession is unlawful, if forcible. *Davis v. Mayo*, 82 Va. 97; *Moore v. Douglass*, 14 W. Va. 708; *Olinger v. Shepherd*, 12 Gratt. 462; *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 553; *Moore v. Douglass*, 14 W. Va. 708, 709; *Duff v. Good*, 24 W. Va. 682.

Entry by Other than Owner.—The entry of any person other than the owner of land is unlawful whether forcible or not. *Davis v. Mayo*, 82 Va. 97; *Moore v. Douglass*, 14 W. Va. 708; *Olinger v. Shepherd*, 12 Gratt. 462; *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 553; *Duff v. Good*, 24 W. Va. 682.

Character of Force Necessary.—To sustain a complaint for forcible entry, the force must be actual, not constructive; otherwise the remedy given for an unlawful entry would be unnecessary. *Pauley v. Chapman*, 2 Rob. 235.

The act of 1814 provided that: "If any shall enter, or shall have entered, into any lands or tenements, in case where entry is not given by law, or, if any shall enter, or shall have entered, into any lands or tenements, with strong hand, or with multitude of people, even in case where entry is

given by law, the party turned out of possession, by such unlawful, or by such forcible entry, by whatever right or title he held such possession, or whatever estate he held or claimed in the lands or tenements of which he was so dispossessed, shall, at any time, within three years thereafter, be entitled to the summary remedy herein provided." *Allen v. Gibson*, 4 Rand. 468, 472.

Illustrative Cases.—Possession of certain premises had been held by plaintiff for a number of years. Plaintiff had cut the hay on said land, when defendant entered on the premises and erected a fence in such a manner as to include said land within his own farm and removed the hay which plaintiff had cut. Plaintiff removed the newly erected fence but was threatened with violence if he interfered with the one defendant put in its place. Defendant then began destroying the line fence. It was held, that these facts constituted sufficient ground to sustain an action of unlawful entry and detainer. *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168.

The defendant entered upon improved land of the plaintiff. It was shown that the defendant and his hands cut down timber growing upon the land in controversy at the place where the defendant entered, built thereon a small cabin and covered the same with clapboards, put a floor in the house, and a door, fastened up said door and then left the premises; that while the defendant was building the house neither the plaintiff nor any other person was present, except the hands engaged in such work, and that no other violence of force was committed by the defendant than the cutting the timber, building the house, and fastening up the door as charged. Upon these facts the court considered that the entry was not "with strong hands or with a multitude of people" as would be necessary to sustain an action of forcible entry and detainer. *Pauley v. Chapman*, 2 Rob. 235.

V. By and against Whom Action Lies.

A. GENERAL RULE.

A party who is entitled to the possession of land as against the defendant, no matter how, or in what manner or mode he may have acquired such right, or whether he has ever been in possession or not, may bring an action of unlawful detainer for the recovery of the possession. *Hawkins v. Wilson*, 1 W. Va. 117, 124.

"His actual possession, of itself, gives him a right of possession against any person not having a right of entry." *Duff v. Cood*, 24 W. Va. 682, 685.

B. OWNER OF PREMISES.

A party, who is in possession of lands under claim of title, makes it his as against the world except as to the true owner, and it remains his as against all persons entering without his consent, unless he abandons the land; and he may recover the possession of the land by a writ of unlawful entry and detainer, even of the true owner, who has entered upon the same without the occupant's consent and without his abandonment of such land. *Mitchell v. Carder*, 21 W. Va. 277.

One in possession of land under bona fide claim of title, never having abandoned such possession, may recover in an action of unlawful entry and detainer against the owner who enters without the consent of the party in possession. *Mitchell v. Carder*, 21 W. Va. 277.

"If a person in possession of public land may recover from a stranger who ousts him without legal right, a fortiori, he may recover against him for an unlawful entry upon land not vested in the state but belonging to some third party. But while this is true as against a tortfeasor it is not true as against the owner, who has the right to the possession. The owner, or he who has the right to the possession, if he ac-

quires the possession peaceably and without force, will not be compelled by this action to restore the possession to an actual occupant who has no right to the possession. *Olinger v. Shepherd*, 12 Gratt. 462." *Duff v. Good*, 24 W. Va. 682, 685.

C. OCCUPANT OF LAND OF THIRD PARTY.

If a person in possession of public land may recover from a stranger who ousts him without legal right, a fortiori, he may recover against him for an unlawful entry upon land not vested in the state but belonging to some third party. *Olinger v. Shepherd*, 12 Gratt. 462; *Duff v. Good*, 24 W. Va. 682.

D. OCCUPANT OF PUBLIC LANDS.

The rule as to forcible entry and detainer applies as well to public as to private lands, for although there can be no adversary possession against the commonwealth, yet a person in actual possession of land of the commonwealth is entitled to all the remedies which the law provides for the protection of the actual possession against tortfeasors. *Mears v. Dexter*, 86 Va. 828, 824, 11 S. E. 538; *Olinger v. Shepherd*, 12 Gratt. 462. See the title PUBLIC LANDS.

Occupant of Oyster Beds.—T., having under the act of April 1st, 1873, obtained an assignment of certain oyster beds, for the planting and sowing of oysters for one year; and having paid the tax and had the beds staked off as required before the 1st of May, 1874, has such an exclusive interest in them, that he may maintain an action of unlawful detainer against a party who enters upon said beds and holds them against him, and though the act of April 18th, 1874, repealed the act of April 1st, 1873, the repeal could not defeat the interest which had been vested in T., and on which he had paid the tax before the repealing act was passed, though the beds were not

staked off until after its passage. *Power v. Tazewell*, 25 Gratt. 786.

E. AS BETWEEN MORTGAGOR AND MORTGAGEE.

See the title MORTGAGES AND DEEDS OF TRUST.

Mortgagee.—Under the act of 1814, a mortgagee may obtain possession of the mortgaged premises after forfeiture, by the mode of proceeding therein pointed out. *Allen v. Gibson*, 4 Rand. 468.

Mortgagor.—The provision of the Virginia Code, 1887, that, "the payment of the whole sum, or the performance of the whole duty, or the accomplishment of the whole purpose, which any mortgage or deed of trust may have been made to secure or effect shall prevent the grantee, or his heirs, from recovering at law, by virtue of such mortgage or deed of trust, property thereby conveyed, wherever the defendant would in equity be entitled to a decree, vesting the legal title in him, without condition." Va. Code (1887), ch. 124, § 2742, applies to an action of unlawful detainer. *Davis v. Teays*, 3 Gratt. 283; *Faulkner v. Brockenbrough*, 4 Rand. 245.

F. AS BETWEEN VENDOR AND PURCHASER.

See the title VENDOR AND PURCHASER.

1. When Contract Is Executory.

In General.—The vendee in an executory contract, having a mere equitable right, can not maintain an action of unlawful detainer against his vendor. His remedy at law is an action for damages. *Hawkins v. Wilson*, 1 W. Va. 117.

A vendee in an executory contract who was not in possession at the time of the alleged unlawful entry, can not maintain the action of unlawful entry and detainer against his vendor or his vendor's alienee. *Supervisors v. Ellison*, 8 W. Va. 308.

In *Hawkins v. Wilson*, 1 W. Va. 117, 121, where the vendee in an executory

contract for the purchase of land brought unlawful detainer against the vendor for the possession of the land, the court said: "In *Harrison v. Middleton*, 11 Gratt. 527, it was held, that 'a landlord who sells lands, in the possession of his tenant, by agreement under seal, and the tenant refuses to deliver possession, the landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession.' This affirms the right of the vendor, in an executory contract for the sale of land, to bring the suit to obtain the possession. And the inference would seem fair that the converse of the proposition was equally true, that the vendee in an executory contract for the purchase of land, could not bring the suit to obtain the possession." "But when the case of *Middleton v. Harrison* is carefully considered, it will be found to embrace both propositions, substantially. For the learned and able judge of the circuit court of Jackson county, who tried the cause in the court below, instructed the jury substantially to that effect. And Judge Moncure, in delivering the opinion of the court of appeals, says expressly that, 'in regard to the instructions, I think the court did not err in refusing to give those which were asked for by the parties, or in giving those which were given by the court.'"

When Conditions in Sale Unperformed.—One who has sold to another a tract of land on condition and has afterwards conveyed such tract to a third party, can not, on failure to perform the condition, maintain the action of unlawful detainer for possession of that tract in his own name. *Dobson v. Culpepper*, 23 Gratt. 352.

Breach of Warranty.—Defendant in unlawful detainer was put in possession under a written contract of sale with general warranty. Defendant had paid part of the purchase price but plaintiff could not give good title because of certain incumbrances out-

standing. Plaintiff served notice on defendant to deliver possession. Held, plaintiff could not have maintained an action on contract for the unpaid purchase money and a fortiori not for unlawful detainer. *Rosenberger v. Bowen*, 84 Va. 675, 5 S. E. 699.

2. Where Tenant Refuses to Deliver Possession.

A landlord sells land in possession of his tenants, by agreement under seal, and the tenant refuses to deliver possession; the landlord is the proper party to institute a proceeding of unlawful detainer, to obtain possession. *Harrison v. Middleton*, 11 Gratt. 527; *Hawkins v. Wilson*, 1 W. Va. 117.

G. AS BETWEEN LANDLORD AND TENANT.

See the title LANDLORD AND TENANT.

Tenant Denying Landlord's Title.—

It has been held, that where a tenant disclaims to hold under his lease, he becomes thereby himself a trespasser; his possession then becomes a tortious one, and the lessor's right of entry is complete; and he may sue at any time within the period of limitation. *Emerrick v. Tavener*, 9 Gratt. 220.

Tenant Refusing to Surrender Possession.—Unlawful detainer will lie to recover an oyster ground in the public waters of the commonwealth, leased for a term of years by one in possession to another person, who takes possession under the lease, and refuses to surrender the premises at the expiration of the lease. *Stuart v. Andrews*, 1 Va. Dec. 449.

Substitution of Real Party in Interest.—When in an action of unlawful detainer the lessor is, on his own motion, substituted for the lessee as defendant, it is no objection to the judgment for plaintiff that defendant was not in actual possession, possession of the lessees being their own possession. *Van Gunden v. Kane*, 88 Va. 591, 14 S. E. 334.

H. JOINT TENANTS, TENANTS IN COMMON AND COPARCENERS.

1. As against Strangers.

"As against all others than his companions, a joint tenant, tenant in common, or coparcener, is entitled to the possession of the whole. One parcener or tenant in common may enter for all; and if he enters generally, it is in point of law an entry for all. And one parcener could, in assize, recover the whole against an abator; for she had right against all who had no right." *Allen v. Gibson*, 4 Rand. 468, 477.

One joint tenant or tenant in common may, in an action of unlawful detainer, recover the possession of the whole land, without joining his cotenant in the action. *Voss v. King*, 33 W. Va. 241, 242, 10 S. E. 402; *Allen v. Gibson*, 4 Rand. 468.

2. Inter Se.

"One joint tenant or tenant in common might maintain a warrant of forcible entry and detainer against his companion." *Allen v. Gibson*, 4 Rand. 468, 477.

C., of Monongalia county, W. Va., executed to K. & L. an "oil lease of 101 acres, dated August 11th, 1885, for the term of twenty years;" C., the lessor, retaining full use and enjoyment of the premises for the purpose of tillage, except such as may be necessary for oil development purposes, right of way, etc. K. & L. were to commence operations within one year or thereafter pay \$5.50 per month until the work is commenced, and a failure to comply with either one or the other of these conditions shall work an absolute forfeiture of the lease." Lessee assigned to defendant, Hukill, September 29th, 1885, and lease and assignment were recorded June 29th, 1886. Hukill had not commenced to bore for oil up to March 7th, 1888. By lease of that date, C., the owner in fee, still in actual possession, demised said 131 acres, excluding ten acres around the buildings, to

R., for the sole and only purpose of drilling, etc., for oil and gas for the term of two years, or as long thereafter as gas or oil is found in paying quantities; R. not to disturb, unnecessarily, growing crops or fences. R. was to complete one well within six months, or pay \$40 in advance for the right to drill during the two years by paying \$130 in quarterly payments, and then the lease was to become null and void, unless a well was drilled in the premises. This lease was assigned by R. to Thomas and others, plaintiffs, on March 10th, 1888, and on March 30th, 1888, lease and assignment were recorded. No one under this lease ever entered or attempted to enter or operate for oil. On last of March, 1889, defendant, Hukill, with C.'s, the lessor's, consent, entered, put down five producing wells, at a cost of \$30,000, and was producing oil in paying quantities when this action of unlawful entry and detainer was brought against him by plaintiffs for possession, on January 14th, 1890. The case was heard, verdict found, and judgment rendered June 19th, 1890, after the two years had expired. Held, plaintiffs were then not entitled to recover the possession of the premises from defendant, Hukill; that the oil thus produced by Hukill in paying quantities did not then give plaintiffs the right to recover the possession of the premises from defendant, Hukill, in this action. *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522.

I. AS BETWEEN OPPOSING TENANTS.

The simple fact, that a tenant moves off the leased premises during his term, does not entitle his landlord to enter and put another tenant in possession; and if the landlord does so enter during the term, the first lessee may recover the premises from the second lessee by action of unlawful entry and detainer. *Chancey v. Smith*, 25 W. Va. 404.

Where a lease for years contains a

clause of forfeiture for breach of its covenant to pay rent or other covenant, but no clause of re-entry for such forfeiture, demand and re-entry is not the only mode by which the landlord may enforce the forfeiture; he may do so by making a new lease, to another person. In such case the second lessee may, after notice, maintain unlawful detainer against the first lessee in possession. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

J. OCCUPANTS IN SEVERALTY.

T. leases land to E. by deed which is executed by E., and he thereby acknowledges that he is in possession under the lease, and covenants to restore the possession at the end of the term. E. holds over after the term expires for seven years; and whilst in possession executes a deed by which he conveys a part of the leased premises to A. in fee simple, with a covenant of warranty, and puts A. in possession and disclaims to hold under T. T. then institutes a proceeding of unlawful detainer against E. and A. It was held, that E. and A. were properly joined in this proceeding, though they did not hold the land jointly, but each held a part of the land in severalty; and if only one of them held any part of the land, T. is entitled to a judgment against him, though there should be a judgment for the other. *Emerick v. Tavenor*, 9 Gratt. 220.

K. REMAINDERMEN.

A remainderman may recover in an action of unlawful detainer land conveyed by the life tenant to a third party, provided he himself did not join in the grant. Such action may be brought within three years from the death of the life tenant. *Hope v. Norfolk, etc.*, R. Co., 79 Va. 283.

The act of 1814 provided that: "If any shall enter, or shall have entered, in a peaceable manner, into any lands or tenements, in a case where such entry is lawful, and after the expiration

of his right, shall continue to hold the same against the consent of the party entitled to the possession, the party so entitled, as tenant of the freehold, tenant for years, or otherwise, shall be entitled to the like summary remedy, at any time within three years after the possession shall have been so withheld from him against his consent." The court in the case of *Allen v. Gibson*, 4 Rand. 468, 473, commenting on this section said: "The terms of the third section, in their literal import, can be applied only to the cases of persons originally entering by a title which gives a temporary, or defeasible estate, or to the representatives of the first taker of such an estate; and the expression of the complaint seem to have contemplated only such cases, in which the complainant, or some one under whom he claims (other than the person in possession), once had the possession, the restitution of which he prays. This expression only applies to the return of possession from one who received it, or took it, from another, to that other, or to some one claiming under him. It does not, in strictness, apply to a delivery of possession by a vendor to a vendee, or a mortgagor to a mortgagee. Such a delivery could not properly be called a restitution. If this distinction between one entitled in reversion or remainder after a temporary or defeasible estate, and a purchaser from the party in possession, was in the mind of the legislature, when these clauses were penned (as I do not think was the fact), the distinction was completely discarded in the after clauses of the law, which give the summary remedy to any one entitled to the possession, if he pursues it within three years of the period at which his right to possession accrued."

L. TRUSTEES.

See the title TRUSTS AND TRUSTEES.

The trustee of a married woman in whom her property is vested to her

sole and separate use, may maintain the action of unlawful detainer against the lessee of her husband, he having no power to make such lease without the consent of the trustee. *Pannill v. Coles*, 81 Va. 380.

By two deeds a lot of ground was conveyed to certain persons by name and their successors, to be held in trust for the Methodist Episcopal Church of Petersburg. A house of worship, called the Union Street Methodist Church, was built upon this lot, in which this church worshipped until 1842, when they built a house of worship on Washington street in the city, and in 1844 they resolved that the Union Street Church should be appropriated to the use of the colored congregation; which was constituted of persons who were members of the Methodist Episcopal Church of Petersburg. These continued to worship there, and to be represented at the quarterly conference held at the Washington Street Church, until 1865, when they connected themselves with the African Methodist Episcopal Zion Church. After this change was made, in the year 1866, the then trustees of the Methodist Episcopal Church property, who were the regularly constituted successors of the original trustees, agreed with the persons who, according to the rules and discipline of Zion Church, were then the trustees and official authorities of said congregation, as part of Zion Church, that until the said property should be required for the use of the Methodist Episcopal Church South, the said first trustees would permit said trustees and congregation to occupy the same as a place of worship without rent, they paying insurance and repairs; and to this the said trustees and congregation agreed; and they held the said property on these terms; until 1871, without claiming any other right thereto. In 1871, the trustees of the colored congregation resigned, and others were elected; and then the judge of the cir-

cuit court of Petersburg made an order appointing the persons elected trustees of said church, in whom the legal title to the land owned by said congregation should be vested. And these trustees from that time claimed the premises and the legal title thereto. The trustees of the property thereupon demanded possession of it, which was refused; and they brought this proceeding of unlawful detainer. It was held, that the plaintiffs, as the regularly appointed successors of the original trustees in the deeds conveying the property, may maintain the action to recover the possession of the church building against the defendants, who claim to be the trustees of the A. M. E. Zion Church in Petersburg, and to be invested with the title to the property belonging to said church; and as such to be in possession of the property in controversy. *Allen v. Paul*, 24 Gratt. 332.

M. EXECUTORS AND ADMINISTRATORS.

See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

N. WIDOWS.

The interest of the widow in real estate of her deceased husband, before assignment of dower, is an interest for which she may maintain an action of unlawful detainer. *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233.

O. MUNICIPAL CORPORATIONS.

See the title MUNICIPAL CORPORATIONS.

The city of Norfolk is the owner of the ground which she has not disposed of, covered by water, lying between Parker street and the portwarden's line, both as riparian proprietor and as having had long possession thereof. Held, that the city may maintain an action of unlawful entry and detainer, against any intruder upon said water lots. *Norfolk City v. Cooke*, 27 Gratt. 420.

VI. Notice to Quit and Demand for Possession.

See post, "Notice to Quit as Evidence," XI, A, 4. •

A. NECESSITY FOR.

General Rule.—If defendant holds land not adversely but under the plaintiff, notice to quit or demand of possession must be shown before the action of unlawful detainer can be maintained. *Bowyer v. Seymour*, 13 W. Va. 12; *Hays v. Altizer*, 24 W. Va. 505; *Zink v. Wilson*, 3 W. Va. 503; *Williamson v. Paxton*, 18 Gratt. 475; *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. 392; *Johnston v. Hargrove*, 81 Va. 118; *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Demand and Re-Entry Where Necessary.—In *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 550, the court said: "In *Bowyer v. Seymour*, 13 W. Va. 12 (1878), Judge Haymond discusses the whole subject with ability and at length. It was there held (point 4); 'But, if the landlord in such case, instead of availing himself of the action of ejectment under the sixteenth section of said chapter 93, brings an action of unlawful detainer, he can not sustain such action, if at all, unless he prove not only a demand for the rent due at the time, place, and in the manner prescribed by the common law in such case, but must also, where a re-entry can be made on the leased premises, or any part thereof, prove such re-entry, or its equivalent, before the commencement of his action. There is, from some cause, an evident reluctance against using ejectment in such cases.'"

Possession under Contract to Purchase.—One in possession under agreement to purchase, can not be ousted before his lawful possession is determined by demand or otherwise. *Williamson v. Paxton*, 18 Gratt. 475, 491. *Locke v. Frasher*, 79 Va. 409.

In *Williamson v. Paxton*, 18 Gratt. 475, 491, Moncure, P., says: "One who is put in possession upon an agreement

for the purchase of land, can not be ousted by ejectment, before his lawful possession is determined by demand of possession or otherwise; and the action of unlawful detainer stands on the same footing in this respect with the action of ejectment." *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. 392.

Failure to Demand Rent.—H., tenant of J., rent payable first day of each month, was in default for rent for preceding month, and J. notified H., that unless he quit the premises in five days he would proceed against him for the unlawful detainer thereof. Next day H. tendered the rent to G., who had been acting as J.'s agent in the matter, but G. refused to receive it. Seven days after the notice, J. brought unlawful detainer for the premises. It was held, that as J. had made no demand for the rent in arrear, his action was not maintainable, either at common law or under the Virginia Code, 1873, ch. 130, § 4. *Johnston v. Hargrove*, 81 Va. 118.

When Stipulation Exists as to Termination of Lease.—Where a lease provides that the same shall terminate and cease whenever the lessee, from any cause, ceases to work for the lessor, and it appears that the lessee had ceased to work for the lessor before the action was commenced, said lessee is not entitled to notice to quit. *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299.

As between Vendor and Purchaser.

—A vendor in an executory contract for the sale of land put the vendee in possession, it being part of the contract that if certain conditions were not performed the contract should not take effect but that in such case the vendee should hold as tenant for one year. Held, that on failure to perform the condition, the vendor might maintain the action of unlawful detainer without notice to quit, it appearing that the tenant was not a tenant from year to year, but a tenant by sufferance. The court

said in this case, "if any demand and refusal were necessary to determine any right of possession of defendant, there had been such demand and refusal." Ch. 135, § 20, Va. Code, 1860, did not apply in this case. *Williamson v. Paxton*, 18 Gratt. 475. See *Twyman v. Hawley*, 24 Gratt. 512; 2 Min. Inst. p. 203; *Allen v. Bartlett*, 20 W. Va. 46; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

C. purchases and receives possession, but no conveyance, of land from M., who, later, conveys same to P. The latter brings unlawful detainer against C. without notice to her to surrender it. The action can not be maintained. The notice is essential. *Twyman v. Hawley*, 24 Gratt. 512; *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. 392.

B. WAIVER OF NOTICE TO QUIT.

Where Party Claims to Hold in Fee.—Where a party claims to hold land in fee, no notice to quit is necessary as a prerequisite to the bringing of an action of unlawful detainer. *Emerick v. Tavenor*, 9 Gratt. 220.

Where Tenant Disclaims Landlord's Title.—Where a tenant as such sets his landlord at defiance, or does an act disclaiming to hold of him as tenant, such tenant forfeits his right to any notice to quit, and the action of unlawful detainer may be brought immediately. *Emerick v. Tavenor*, 9 Gratt. 220; *Allen v. Paul*, 24 Gratt. 332; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

. VII. Defenses.

A. ADVERSE POSSESSION.

In an action of unlawful detainer where the defendants have been put into possession of the premises by the plaintiffs, the defendant can not set up a plea of adverse possession unless they prove that they disclaimed to hold of them or bona fide abandoned possession of the premises or asserted and claimed an adverse right to the premises, with notice thereof to the plain-

tiffs three years before the institution of the action. *Allen v. Paul*, 24 Gratt. 332; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

As to what constitutes such adverse possession, see the title ADVERSE POSSESSION, vol. 1, p. 199.

Sufficiency of Mere Disclaimer.—In *Allen v. Paul*, 24 Gratt. 332, it was quered, whether the mere disclaiming the landlord's title and claiming to hold in fee for three years is sufficient to defeat a recovery of the premises in an action of unlawful detainer.

B. RIGHT OR TITLE IN PREMISES.

1. Title or Right of Possession.

General Rule.—When the plaintiff shows that he has been turned out of possession forcibly, or by one having no right to do so, he has made out his right to restitution which can not be defeated by any evidence in regard to the title or right of possession. *Olinger v. Shepherd*, 12 Gratt. 462; *Davis v. Mayo*, 82 Va. 97.

Right of Entry.—"By the common law, one who had a right or title to enter into land, had a right to enter and hold with force." *Allen v. Gibson*, 4 Rand. 468, 471.

"Even since the statutes against forcible entries and detainers, a party having a right of entry is not responsible in a civil action, or in a common indictment for trespass." *Allen v. Gibson*, 4 Rand. 468, 471.

2. Plaintiff's Want of Right or Title.

When one is let into possession of land under a conveyance from another, and enjoys the property, he can not set up want of title in such other person, or his incapacity to convey, to defeat an action by such other person for the recovery of possession. *First English*, etc., *Church v. Arkle*, 49 W. Va. 92, 38 S. E. 486.

Estoppel to Deny.—In an action of unlawful detainer by a landlord against a tenant, the tenant can not deny the landlord's title. *First English*, etc.,

Church v. Arkle, 49 W. Va. 92, 38 S. E. 486. See the title *ESTOPPEL*, vol. i, p. 281.

Where Premises Part of Public Domain.—In *Olinger v. Shepherd*, 12 Gratt. 462, 472, the court said: "That the defendant, in an action of forcible entry, can not defend himself by showing that the land in controversy is a part of the public domain, has been decided in Alabama, *Cunningham v. Green*, 3 Alab. R. 127, and in Tennessee, *Pettyjohn v. Akers*, 6 Yerg. R. 448; and I am not aware that the contrary has been decided anywhere. I can see no reason for a different rule in regard to public and private lands. There is the same reason for the protection of the actual possession against unlawful invasion in both cases."

Where Premises Owned by Religious Society.—Where one leases a lot from the trustees of a church, in an action of unlawful detainer by such trustees against him for recovery of possession, he can not set up that the church holds the lot in violation of § 1, ch. 57, W. Va. Code, limiting the ownership of real estate by a church to so much as may be necessary as a place of public worship, or burial place, or residence of a minister. None but the state can attack such ownership, as violating that statute. *First English, etc., Church v. Arkle*, 49 W. Va. 92, 38 S. E. 486.

Where property was conveyed to certain persons by name and their successors, to be held in trust for a certain church, it is immaterial to the support of an action of unlawful detainer, whether such persons acquired any personal ownership in the property by the deed of conveyance; it not being competent for the defendants who claim to hold as successors of the plaintiffs' tenants to deny the plaintiffs' title. *Allen v. Paul*, 24 Gratt. 332.

Forfeiture for Nonpayment of Taxes.—The fact that during the tenancy the title of the landlord has been forfeited for the nonpayment of taxes on the land in controversy constitutes no valid

defense to an action of unlawful detainer, brought to dispossess the tenant, as the plaintiff is entitled to be placed in statu quo, unless, perhaps, the tenant has made a distinct disclaimer, and has been holding adversely for more than three years, or can sustain some other valid defense. *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

3. Subsequent Conveyance by Plaintiff.

C. and wife sell her land to D., but do not convey it to him. D. fails to comply with his contract; and C. and wife convey the land to G., the son of C.'s wife; and then C. and wife bring unlawful detainer against D. to recover the land. It was held, that though D. can not question the title of C. and wife as at the time of the sale, he may show in his defense that they had since conveyed the land to G. *Dobson v. Culpepper*, 23 Gratt. 352.

4. Where Possession Obtained by Fraud.

But a person in possession of land and claiming title to it, who is by fraud or mistake induced to believe that another has a better right to it, and to take a lease from him, may set up such fraud or mistake and show that he has good title. *Alderson v. Miller*, 15 Gratt. 279; *Locke v. Frasher*, 79 Va. 409; *Turpin v. Saunders*, 32 Gratt. 27; *Suttle v. Richmond, etc., R. Co.*, 76 Va. 284.

5. Under Executory Contract.

C. and wife sell her land to D., but do not convey it to him. D. fails to comply with his contract; and C. and wife convey the land to G., the son of C.'s wife; and then C. and wife bring unlawful detainer against D. to recover the land. It was held, that if D. had complied with his contract, so that he was entitled to a conveyance, he might have set up the defense under the statute in this proceeding. *Dobson v. Culpepper*, 23 Gratt. 352.

"In *Dobson v. Culpepper*, 23 Gratt. 352, Judge Moncure says the provisions of the Code (§ 20, ch. 135), concerning

equitable defenses in ejectment (which is the same as § 20, ch. 90, Code), applies as well to the action of unlawful detainer as to the action of ejectment, which are concurrent remedies in such case, and continues: 'A vendor of land who has put the purchaser in possession, whilst the contract remains executory, has the legal title as to such purchaser, and, unless the said provisions of the Code apply to the case, may demand possession of the purchaser, and recover it of him by an action of ejectment or unlawful detainer, at least, unless since the date of the purchase the interest of the vendor in the land has terminated, or been transferred by him to another.' 2 Bart. Law Prac., p. 1167; *Burnett v. Caldwell*, 9 Wall. 290, 19 L. Ed. 712; *Williamson v. Paxton*, 18 Gratt. 475; *Locke v. Frasher*, 79 Va. 409." *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 854.

In *Dobson v. Culpepper*, 23 Gratt. 352, the court said: "There can be no doubt, and it is not controverted, but indeed admitted, by the counsel for Dobson, that either Culpepper and wife or their donee, Simcoe, are entitled to recover the said land of him in an action of unlawful detainer, unless at the time of the bringing of such action there had been such payment or performance of what was contracted to be paid or performed on the part of the vendee, as would in equity entitle him, or those claiming under him, to a conveyance of the legal title of such land from the vendors, or those claiming under them, without condition, according to the Code of 1860, ch. 135, § 20. That provision of the Code is contained in the chapter concerning the action of ejectment; but it is not confined to that action, either in its literal terms, or its substantial meaning. It applies, as well to the action of unlawful detainer, as to the action of ejectment, which are concurrent remedies in such a case as this. *Williamson v. Paxton*, 18 Gratt. 475, 505."

Plaintiff's Failure to Perform Condition of Sale.—At the trial it was shown in evidence that defendant was in possession of a tract of land, under written contract with plaintiff to convey by deed with general warranty; that there were at the time, vendor's and judgment liens on the land; that nearly the whole contract price and part of the vendor's lien had been paid to avoid a sale therefor; that defendant, being able and willing to pay the balance, demanded a deed, which plaintiff failed to give, himself not having the title; but that the plaintiff afterwards demanded possession. It was held, that the plaintiff can not maintain his action. *Rosenberger v. Bowen*, 84 Va. 675, 5 S. E. 699.

C. STATUTE OF LIMITATIONS.

1. In Virginia.

Where in unlawful detainer plaintiff fails to prove that defendant has not unlawfully held possession of the land for three years or more before the commencement of the action, he can not recover. *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. 392; *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180; *Williamson v. Paxton*, 18 Gratt. 475, 502; *Allen v. Paul*, 24 Gratt. 332.

2. In West Virginia.

a. In Justice's Court.

In West Virginia, if defendant has held adverse possession of the land in controversy for more than two years previous to the bringing of the action, the action of unlawful detainer can not be maintained, and in the absence of evidence to the contrary the holding is presumed adverse. *Hays v. Altizer*, 24 W. Va. 505. See W. Va. Code, ch. 50, § 211. See the title JUSTICES OF THE PEACE.

In *Duff v. Good*, 24 W. Va. 682, the court said: "There was error in the court instructing the jury, as it did, 'that the statutory period of three years governs in the trial of this action as to the statute of limitation.' This action was commenced before a justice under

the provisions of chapter 50 of the Code and by the express terms of § 211 of said chapter the right to bring this action is limited to two years after the cause of action accrues. If the plaintiffs could not have recovered before the justice by reason of the fact that the entry of the defendants had been more than two years before they commenced their action, they could not recover for the same reason after the case had been transferred to the circuit court. For, if the justice had not jurisdiction to render judgment for the plaintiffs, the removal of the same action to the court would not confer jurisdiction to render such judgment. *Hays v. Altizer*, supra (24 W. Va. 505). This error was plainly to the prejudice of the plaintiffs in error, because although they may have had no right to enter upon the land, yet if they did in fact enter upon it, the plaintiffs could not evict them in this form of action brought before a justice after their possession had continued beyond two years."

In *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, the court, in referring to the time within which an action of forcible entry and detainer must be brought said: "The period of three years has been the bar to such suit for more than 500 years and remains the bar in our present statute."

b. In Circuit Court.

To sustain an action of unlawful entry and detainer, the plaintiff must show that his right of action accrued within three years from the commencement of his action, otherwise he will be remitted to his action of ejectment. *Billingsley v. Stutler*, 52 W. Va. 92, 43 S. E. 96; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762. See W. Va. Code, ch. 90, § 1.

3. Where State Is a Party.

At the trial of an action of forcible entry and detainer, an instruction based on the idea that defendant might resist the claim of the state to an oyster bot-

tom in question by proof of long possession, was improper, as time does not run against the state. *Hurst v. Dulaney*, 84 Va. 701, 5 S. E. 802.

D. RE-ENTRY BY PLAINTIFF.

Certain lands of the plaintiff were alleged to be unlawfully detained by the plaintiff. Defendant set up as a defense, the fact that plaintiff's son during the time of the alleged wrongful withholding, had entered upon the premises in dispute and gathered several bushels of apples from the trees thereon and placed them in a building on the premises. It was held, that this state of facts did not constitute such a re-entry on the land as to defeat the action. *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168.

E. TENDER OF RENT WITHIN STATUTORY PERIOD.

H., tenant of J., rent payable first day of each month, was in default for rent for preceding month, and J. notified H., that unless he quit the premises in five days he would proceed against him for the unlawful detainer thereof. Next day H. tendered the rent to G., who had been acting as J.'s agent in the matter, but G. refused to receive it. Seven days after the notice, J. brought unlawful detainer for the premises. It was held, that service of notice on H. to quit did not revoke G.'s agency, and the tender of the rent in arrear within the statutory period of five days, would, even had there been a demand for the rent, have defeated the action under the statute. *Johnston v. Hargrove*, 81 Va. 118.

F. PLAINTIFF'S FAILURE TO PAY REQUIRED STATE RENT.

Plaintiff brought an action of forcible entry and detainer against defendant to recover possession of certain oyster grounds in the public waters of the commonwealth, which said grounds had been assigned to the plaintiff by the county oyster inspector. It was held, that the failure of the plaintiff to pay

the required rent to the state for such grounds did not constitute such a defense as could be taken advantage of by the defendant. *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538.

VIII. How Statutes Construed.

In *Allen v. Gibson*, 4 Rand. 468, 476, the court said: "The policy of the statute, upon this construction, was strongly objected to, as subjecting the party in a summary way, upon a short notice, and before two magistrates only, to be turned out of possession; and it was insisted, that being in derogation of the common law, it should be construed strictly. I do not see the force of this objection. The justice may adjourn from time to time, as the justice of the case may require, so as to enable the party to make a full defense, and to produce all his evidence. The party may have the assistance of counsel, as in any other court; may save all questions of law by exceptions; and is entitled for any apparent error, to a writ of error or supersedeas, though not to an arbitrary appeal, as in ejectment. He can not, therefore, be turned out of possession by any erroneous proceeding. At the same time, he can not delay the plaintiff in the pursuit of his rights, at pleasure, by arbitrary appeal; nor does this proceeding affect his right in any other controversy on the same subject, or in any other form. As, therefore, the defendant can in no case be turned out of possession, unless it is apparent that he ought to surrender the possession of the demand of the plaintiff, and to retain it would be unjust, I can not see any objection to giving his statute a liberal construction, as a remedial statute, even if the question under consideration, were, upon the words of the statute, more doubtful than I think it is."

IX. Pleading and Practice.

A. STATUTORY PROVISION.

Chapter 89, § 1, W. Va. Code, pro-

vides as follows: If any forcible or unlawful entry be made upon lands, or if when the entry is lawful or peaceable, the tenant shall detain the possession of land after his right has expired, without the consent of him who is entitled to the possession, the party so turned out of possession, no matter what right or title he had thereto, or the party against whom such possession is unlawfully detained, may within three years after such forcible or unlawful entry, or such unlawful detainer, sue out of the clerk's office of the circuit court of the county in which such land, or some part thereof, may be, a summons against the defendant to answer the complaint of the plaintiff, that the defendant is in possession and unlawfully withholds from the plaintiff the premises in question (describing the same with convenient certainty); and no other declaration shall be required. *Gas Company v. Wheeling*, 7 W. Va. 22.

B. APPLICATION SUBJECT TO GENERAL REGULATIONS.

In *Gas Co. v. Wheeling*, 7 W. Va. 22, the court said: "Even under former law, when the proceeding was instituted by a warrant from a justice of the peace, requiring an officer to summon the wrongdoer to appear before two justice of the peace, who, by that authority, should hold the proceeding, was an action subject to a statute applicable to civil actions generally. *Harrison v. Middleton*, 11 Gratt. 527; *Kincheloe v. Tracewell*, 11 Gratt. 587. When, by subsequent legislation, it was provided that the proceeding should be commenced by a summons sued out of the clerk's office of the circuit court, and that the case should be heard and determined by that court, if there had been doubt on the subject before, none can now remain, that the proceeding was and is an action, to which general statutory and judicial regulations of practice are applicable, except so far as they may be excluded by special provisions."

It was held, in *Olinger v. Shepherd*, 12 Gratt. 462 that, in a case of forcible entry and detainer, pending when the Code of 1849 went into operation, the subsequent proceedings might conform to the provisions of the Code.

C. COMPLAINT OR SUMMONS.

1. Necessity for Separate Complaint.

In *Olinger v. Shepherd*, 12 Gratt. 462, Moncure, J., said: "I do not consider a separate complaint to be now necessary, but the only complaint which the present law seems to contemplate, is embodied in the summons." See Va. Code (1904), § 2716.

It seems that under the Virginia Code of 1849, a separate complaint was not necessary in a proceeding for an unlawful detainer; that the only complaint necessary was that embodied in the summons. *Olinger v. Shepherd*, 12 Gratt. 462.

2. Time for Issuing.

In *Gas Co. v. Wheeling*, 7 W. Va. 22, the court said: "But if the statute does not authorize the return of the summons to a rule day, the party may have it issued within three years after the cause of the proceeding accrued, early enough to have the process served, at least ten, and not more than ninety, days before a term of the court. If he will exercise the necessary forethought, he may so regulate the commencement of the proceeding as to bring it within all these conditions. Moreover, in a case of unlawful entry or detainer—though perhaps not in the case of forcible, but not otherwise unlawful entry—the party may bring his action of ejectment and may, as conveniently as by the proceeding in question, have the like redress, with the important additional advantage that the judgment will conclude further litigation on the subject."

3. Form and Sufficiency.

a. Form of Complaint.

The act of 1814 in prescribing the forms of proceeding in enforcing the remedy of forcible entry and detainer,

proceeds: "The party so turned out of possession or so held out of possession, may exhibit his complaint, etc., in the following form, or to the following effect: "A. B. complains that C. D. unlawfully, and against his consent, withholds from him the possession of a certain tenement, etc., whereof he prays restitution of the possession. *Allen v. Gibson*, 4 Rand. 468, 472.

b. Recital as to Where Court to Be Held.

In an action of unlawful detainer the writ need not state at what place in the county the court, to which the writ is returnable, will be held. *Cunningham v. Sayre*, 21 W. Va. 440.

c. Omission of Words "Unlawfully Withholding."

In *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361, the court said: "One question is whether the summons was good against the motion to quash it. The defect is alleged to be in its omission of the words 'unlawfully withholding.' Code, 1891, ch. 50, § 212, says that the summons shall require the defendant 'to answer the action of the plaintiff for unlawfully withholding from the plaintiff the premises.' The present summons requires the defendants 'to answer the complaint of Joseph Simpkins in a civil action for the recovery of the possession of real estate situated,' etc., and states that 'the plaintiff will also claim \$100 damages for the unlawful detention of said property.' Even if we did not have the clause in § 26, ch. 50, that 'no summons shall be quashed or set aside for any defect therein, if it be sufficient on its face to show what is intended thereby,' I should have no halt in saying that this summons notifies the defendants that they are both charged with unlawfully withholding the premises. If not, why does it say that its object is recovery of possession? To recover by action is to obtain what is detained unlawfully; that is, against the right of the party; to obtain what he

has not, and the other party has; and, when the summons says it is to recover possession, it fairly means to get actual possession from a defendant having it. But this is not all. It says damages will be claimed 'for the unlawful detention of said property.' Its plain meaning is that both defendants unlawfully withheld possession. No other construction would be anything but very technical."

If the warrant does not state the withholding of the possession by the defendant, that may be aided by the complaint which states the fact. *Kincheloe v. Tracewell*, 11 Gratt. 587.

d. Description of Premises.

The summons, in an action of unlawful detainer, should so describe the premises that their locality may be ascertained and the premises identified with reasonable certainty, having in view the delivery of possession thereof from such description. *Board of Education v. Crawford*, 14 W. Va. 790; *Allen v. Gibson*, 4 Rand. 468; *Gorman v. Steed*, 1 W. Va. 1; *Hawley v. Twyman*, 24 Gratt. 516; *Turberville v. Long*, 3 Hen. & M. 309; *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361.

Sufficiency of Description.—Description of premises in summons in unlawful detainer before a justice shall describe the premises with convenient certainty, so as to enable the sheriff to deliver possession; but that description need not be so certain as in itself and alone to enable him to do so, because he may deliver as the plaintiff, or information from other sources, may direct, so he does not violate the description in the summons. If that description can be rendered certain by extrinsic evidence, it is sufficient. *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361.

"This court held in *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361 (Syl., point 3), 'If that description can be rendered certain by extrinsic evidence, it is sufficient;' and in the case

at bar the description in the summons was aided by the complaint so as to make it specific, and described the property with convenient certainty. In § 26, ch. 50, of the Code, it is provided that 'no summons shall be quashed or set aside for any defect therein if it be sufficient on its face to show what is intended thereby;' and there can be no doubt that the defendant knew what was intended by this summons, and, if he had any doubt, the complaint, which was referred to in the summons, would have informed him." *Thorn v. Thorn*, 47 W. Va. 4, 34 S. E. 759.

In an action of forcible entry and detainer, the complaint on which the original summons or warrant was issued by the justice under the act of February 27, 1864, may be looked to by the court in aid of the description of the premises contained in the warrant or summons. *Moore v. Douglass*, 14 W. Va. 708.

Necessity for Minute Description.—

The act of the legislature passed March 27, 1864, did not require that a minute description of the premises demanded should be made by metes and bounds in either the warrant or complaint. The act only requires that the premises should be described with reasonable certainty, and to do so, was held not to be necessary that a minute description of the premises should be given by metes and bounds. *Moore v. Douglass*, 14 W. Va. 708; *Board of Education v. Crawford*, 14 W. Va. 790.

In a writ of unlawful detainer, under the act of 1814, the omission to state in the complaint the estimated quantity of the land in dispute, is not fatal, if the complaint contains a reasonably certain description. *Allen v. Gibson*, 4 Rand. 468.

As Compared to Description in Ejectment.—In *Board of Education v. Crawford*, 14 W. Va. 790, the court said: "I doubt if the same precision of description ought to be required by law in the description of the premises

in controversy in unlawful entry and detainer as in our present action of ejectment, because in the present action of ejectment the right of the parties to the property, as well as the right to the possession thereof, may be tried and determined, and in many cases the verdict and judgment is conclusive upon the parties as to the right of property."

Amendment.—A justice's summons in a suit of unlawful detainer defective for an insufficient description of the property, may be amended on appeal to the circuit court when substantial justice will be promoted by such amendment. *Drinkard v. Heptinstall*, 55 W. Va. 320, 47 S. E. 72, citing *Thorn v. Thorn*, 47 W. Va. 4, 34 S. E. 759; *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361.

Illustrative Cases.—The property as described in a deed of conveyance and which can be made certain by the sheriff in executing a writ of possession, is a sufficient description in a summons of unlawful entry and detainer. *Billingsley v. Stutler*, 52 W. Va. 92, 43 S. E. 96.

A summons against a defendant "to appear before a justice at his office in the township of Town, at Raleigh Courthouse, in the said county, on the 25th day of March, 1871, to answer the complaint of the board of supervisors of Raleigh county, in a civil action, for unlawfully entering and withholding from the plaintiff a certain town lot known as the Spring Lot, immediately in front of the courthouse, marked on the town plat R., enclosed by a plank fence, supposed to contain — acre" under the two hundred and eleventh and two hundred and twelfth sections of chapter fifty of the West Virginia Code, is substantially defective in not describing the lot with convenient certainty in that it fails to state the town or county in which the lot lies, and the circuit court may quash it. *Supervisors v. Ellison*, 8 W. Va. 308.

The description, in a summons of

unlawful detainer, or premises, as "a certain house and appurtenances;" import land within the meaning of ch. 134 of the West Virginia Code of 1860, to the extent of the land on which the house stands and the garden attached to it, but no further. *Hawkins v. Wilson*, 1 W. Va. 117.

A summons issued in an action of unlawful detainer by a justice of the peace described the premises in controversy as "one certain schoolhouse, and lot, situate in Kanawha county, and state of West Virginia, in the school district of Union, and subdivision No. 15 of said school district." It was held, that the description of the premises in controversy is not sufficiently certain to meet the requirements of the law in such case. *Board of Education v. Crawford*, 14 W. Va. 790.

C. B. brought his action of unlawful entry and detainer before a justice against S., in which the summons to defendant was "to answer the complaint of C. B. in a civil action for the recovery of possession of lot No. 37," etc., and after the description of the premises in question, "being the same lot upon which said S. resides, and unlawfully withholds the possession from the plaintiff." Held, sufficient, under § 212, ch. 50, Code of West Virginia. *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 854.

4. Service.

See the title SERVICE OF PROCESS.

Time for.—The summons in an action of forcible entry and detainer shall be served at least ten days before the return day thereof. Ch. 89, § 2, W. Va. Code. *Gas Co. v. Wheeling*, 7 W. Va. 22.

Sufficiency.—Where, on a warrant of unlawful entry and detainer against two, the warrant is executed on one, but not on the other, the plaintiff proceeds against the one upon whom the warrant has been executed, no further proceedings can be had upon that war-

rant against the one upon whom it has not been executed before the return day thereof. *Harman v. Odell*, 6 Gratt. 207; *Bowyer v. Seymour*, 13 W. Va. 12, 19.

5. Return.

In General.—The summons in an action of forcible entry and detainer may be returnable to any term of the circuit court of the county in which the land in dispute or some part thereof may be. *Gas Co. v. Wheeling*, 7 W. Va. 22.

The provision of § 2, of chapter 124, of the West Virginia Code, as amended in 1871, "that process shall be returnable within ninety days from its date," is applicable to a summons in unlawful detainer. *Gas Co. v. Wheeling*, 7 W. Va. 22.

In *Gas Co. v. Wheeling*, 7 W. Va. 22, the court said: "The purpose of section two of chapter eighty-nine was not to withdraw a summons in forcible or unlawful entry or unlawful detainer from the influence of the provision that 'process shall be returnable within ninety days from its date.' That section does not specify whether the process shall be returnable to the next term of the court after its date or a subsequent term, or whether to the first or a later day of the term. It was clearly not intended to allow the summons, at the pleasure of the plaintiff, to be made returnable at any term of the court he might name, in the distant future."

In *Gas Co. v. Wheeling*, 7 W. Va. 22, the court said: "As chapter eighty-nine left the regulations of section two of chapter one hundred and twenty-four, relative to the direction and manner of service of the summons and the verification of the return applicable to suits for forcible or unlawful entry or unlawful detainer, so it left the rule as to the time after the date, within which the summons should be returned, likewise applicable to the same class of cases."

History of Regulations.—In *Gas Co.*

v. Wheeling, 7 W. Va. 22, the court said: "In the year 1813, the warrant of forcible or unlawful entry or detainer was made returnable not less than ten, nor more than twenty, days after its date. This continued to be the law, till, in the year 1849, in the Code, and in the year 1857, the same provision was enacted, which, in 1869, was adopted as a part of the Code of this state, except that by the Code of Virginia the summons was returnable to, and the cause heard in, the county court; and by the act of 1857, the county or circuit court; whereas, by the law in the Code of this state, the summons, when not brought before a justice, is returnable, and the case heard and determined, in the circuit court."

Necessity for Limit.—In *Gas Co. v. Wheeling*, 7 W. Va. 22, the court said: "Unquestionably there should be a legislative limit to the time within which a summons in forcible or unlawful entry or unlawful detainer shall be returnable. Otherwise a party might require another to appear and answer at any time that he might fix, however remote, no matter how inconvenient, by change of residence or other circumstance, it may have become for him to do so. Thus it would be in the power of one party to delay another and keep him in suspense for years, or to wait till under the statute the time was about to expire within which he might institute the proceeding; and then have the summons made returnable after any number of years—even many more, than, computed from the time when the right accrued, would bar the suit—and so avoid the operation of the statute of limitations, intended for the protection of the party having the possession. As a legislative prescription of the time within which the summons should be returnable is undeniably proper, and is found in section two of ch. one hundred and twenty-four, and no where else, we can not but attribute to that section such application to this subject."

Return to Rules.—Under ch. 170 of the W. Va. Code of 1860 and ch. 135 of the same Code a summons in unlawful detainer should be returnable to the court and not to the rules. *Gorman v. Steed*, 1 W. Va. 1; *Gas Co. v. Wheeling*, 7 W. Va. 22.

In *Gas Co. v. Wheeling*, 7 W. Va. 22, the court said: "There is no very strong reason why the summons in unlawful detainer should, or should not, be returnable to a rule day—unless the provision of the statute that process shall be returnable within ninety days, and the failure of the court to sit within such time after the party determines to sue, be deemed to furnish such reason. Process has long been, and still is, returnable to the first day of the term of a court, in cases in which an appearance can not be made, if at all, for any practicable purpose, till the next rule day thereafter; because the case must be matured at rules for trial in court. That a summons in forcible or unlawful entry or unlawful detainer should be returnable to a rule day, is certainly far more reasonable than that practice. Upon such an appearance the defendant might plead, and from that time to the sitting of the court each party could prepare for trial. But the legislature, in § 2, of chapter 89, has provided that in forcible or unlawful entry or unlawful detainer, on the return of the summons executed, whether there is an issue or not, a jury shall be impanelled to try the complaint of unlawful holding; so that there is, generally at least, no necessity for rules to mature the cause for trial. And the supreme court of appeals, in the case of *Gorman v. Steed*, held, that in such case a summons could not be made returnable to rules. W. Va. 1."

D. THE PLEA.

Form of Plea.—If, in an action of forcible entry and detainer, the defendant appears, he shall plead to the summons, and his plea shall be "not guilty." Ch. 89, § 2, W. Va. Code.

Gas Co. v. Wheeling, 7 W. Va. 22; *Supervisors v. Ellison*, 8 W. Va. 308.

Failure to File.—See post, "Where Defendant Fails to Plead," XII, E.

X. Jurisdiction.

As to jurisdiction of the hustings court of Richmond, see Va. Code, § 3072.

A. CIRCUIT COURT.

General Statement.—An action of forcible entry and detainer may be heard and determined at any term of the circuit court of the county in which the land in dispute or some part thereof may be. *Gas Co. v. Wheeling*, 7 W. Va. 22.

Where Judge Is Interested.—In *McConaughey v. Bennett*, 50 W. Va. 172, 40 S. E. 540, it was quæred, whether when a judge of a circuit court is interested in a case, which, but for such interest, would be proper for the jurisdiction of his court, an action of unlawful detainer could be brought in any county in an adjoining circuit, as in other action.

B. JUSTICE OF THE PEACE.

Where Title to Land Arises.—In a warrant of unlawful entry and detainer issued by a justice to recover the possession of land, if it appear to the justice by the answer of the defendant, or upon the trial of the defendant, or upon the trial of the warrant, that the title to the land in controversy will come or is property in question between the parties, and the relation of landlord and tenant does not exist between them, the justice has no jurisdiction to try the merits of the cause and it is his duty to dismiss the warrant at the plaintiff's costs. *Hughes v. Mount*, 23 W. Va. 130. See the titles DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 697; JUSTICES OF THE PEACE.

On the trial of a warrant issued by a justice in unlawful detainer, if answer of title is filed by the defendant setting forth therein the facts showing

that such title will come in question on the trial thereof, which answer shall be properly verified by his affidavit or that of his agent or attorney, if the justice be of opinion that the facts therein stated show that the title of real property will so come in question he shall dismiss the action at the costs of the plaintiff, unless the plaintiff or his agent or attorney shall file an affidavit denying the truth of such facts. *Watson v. Watson*, 45 W. Va. 290, 31 S. E. 939; *Hughes v. Mount*, 23 W. Va. 130.

Where Defendant Relies on Equitable Claim.—In an action of unlawful entry and detainer before a justice, if the defendant holds possession alone upon a purely equitable claim, having no writing or colorable title, and relies only upon such equitable claim, the title to real property is not thereby brought in question between the parties as contemplated in clause 12, § 50, ch. 50, W. Va. Code, 1899, and defendant's remedy, if any, is in a court of equity. *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 854.

XI. Evidence.

See generally, the title EVIDENCE, vol. 5, p. 295.

A. ADMISSIBILITY.

See Va. Code, § 2734a.

1. To Show Right of Possession.

General Statement.—"Upon such a charge to the jury, which in effect, stands in the place of an issue between the parties, the question, whether the plaintiff is or is not entitled to the possession, is fully open to all sorts of evidence." *Allen v. Gibson*, 4 Rand. 468, 474.

To Show Arrangement between Parties.—In unlawful detainer by corporation against its ex-treasurer for possession of house and lot allowed him as residence whilst in office as part of emoluments, the records of the corporation are admissible as evidence to show the arrangements made between

the parties. *Frazier v. Virginia Military Institute*, 81 Va. 59.

Necessity for Production of Lease.—Where the plaintiff in an action of forcible entry and detainer has made a prima facie case complete without the production of his written lease under which he claims to hold, it is not error to allow the plaintiff to proceed without producing such lease. *Zink v. Wilson*, 3 W. Va. 503.

2. To Show Extent of Possession.

A deed under which plaintiff claims, though it be voidable or even void, may be admitted in evidence to show the extent of plaintiff's claim in order to determine the extent of his possession. *Olinger v. Shepherd*, 12 Gratt. 462; *Cales v. Miller*, 8 Gratt. 6; *Hassler v. King*, 9 Gratt. 115, 120; *Harrison v. Middleton*, 11 Gratt. 527.

3. To Show Title in Premises.

It is well settled that title is not involved in either a criminal prosecution for, or a civil action of, forcible entry and detainer, and that, therefore, as a general rule, evidence thereof is inadmissible. 13 Am. & Eng. Ency. Law 753, quoted in *Bulkey v. Sims*, 48 W. Va. 104, 35 S. E. 971.

Summons in Another Court.—On the trial of an action of unlawful detainer in the circuit court of Ohio county it was not error for the court to refuse to permit a summons in an action of unlawful detainer in the municipal court of the city of Wheeling, claiming the same premises, to be read to the jury. *Zink v. Wilson*, 3 W. Va. 503.

As between Tenants in Common.—Where the question of unlawful detainer arises between several tenants in common, for the purpose of determining the question in issue, the title may be given in evidence. *Allen v. Gibson*, 4 Rand. 468.

As between Landlord and Tenant.

Presence of Fraud or Mistake.—Though as a general rule a tenant is not allowed to question his landlord's title, yet if a person in possession of

land claiming title to it, is by fraud or mistake induced to believe that another has a better right to it, and to take a lease from him; in an action of unlawful detainer by the landlord, the tenant may set up such fraud or mistake, and show that he has a good title to the property. *Alderson v. Miller*, 15 Gratt. 279; *Turpin v. Saunders*, 32 Gratt. 27, 33; *Locke v. Frasher*, 79 Va. 409, 411, 412; *Gale v. Oil, etc., Co.*, 6 W. Va. 200; *Jones v. Fox*, 20 W. Va. 370, 380; *Voss v. King*, 33 W. Va. 241, 242, 10 S. W. 402, 403.

In Absence of Fraud or Mistake.—In an action of unlawful detainer by a landlord against his tenant, where neither fraud nor mistake is shown in the procurement of the lease, no proof of title is required by the landlord, for in such a case the tenant is estopped from denying the title of his landlord. *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

Evidence of Title in Lessee.—T. leases land to E. by deed which is executed by D., and he thereby acknowledges that he is in possession under the lease, and covenants to restore the possession at the end of the term. E. holds over after the term expires for seven years; and whilst in possession executes a deed by which he conveys a part of the leased premises to A. in fee simple, with a covenant of warranty and puts A. in possession and disclaims to hold under T. T. then institutes a proceeding of unlawful detainer against E. and A. It was held, that E. and A. will not be permitted to introduce evidence of title to the land embraced in the lease, either in themselves or others; nor will they be permitted to introduce these title papers for the purpose of showing that they had not possession of the land claimed by T. *Emerick v. Tavener*, 9 Gratt. 220.

Evidence in Rebuttal.—On trial of a writ of unlawful detainer, if defendant sets up title in himself, plaintiff may show that defendant entered by virtue

of a parol lease from himself, although such lease was to continue more than one year. *Adams v. Martin*, 8 Gratt. 107.

4. Notice to Quit as Evidence.

In an action of unlawful detainer where the title to the property is admitted, on the trial, to be in the plaintiff, and a notice to quit the premises is offered in evidence, it is not error to permit such notice to be read in evidence to the jury. *Zink v. Wilson*, 3 W. Va. 503.

W. brought an action of unlawful detainer against Z., on the 6th day of November, 1867. On the trial of the cause, in March, 1868, the title to the premises was admitted to be in W., and he proved the service of a notice on Z., to quit the premises on the 1st day of April, 1867, served December 31st, 1866. Z. produced a written lease dated January 24th, 1864, for five years, in which it was stipulated that he was not to sublet the premises, and if he did so W. might re-enter after ten days' notice. To rebut this W. produced, and was permitted to read to the jury, a notice to Z., dated October 24th, 1867, stating a breach of the condition in relation to subletting, and requiring Z. to deliver possession on the 5th day of November, 1867. It was held, that it was not error to permit notice of October 24th, 1867, to be read, because the prima facie case of the plaintiff made on the admission of his title to the premises, and the proof of the notice served December 31st, 1866, has been rebutted. *Zink v. Wilson*, 3 W. Va. 503.

B. WITNESSES.

Husband and Wife.—In an action of unlawful detainer against a wife, her husband is incompetent to testify though it appeared that he was not withholding the premises. The common-law disability is unchanged here. *Farley v. Tillar*, 81 Va. 275.

Joint Tenants.—The defendant claiming title under a deed made to himself

and another as joint tenants, that other person is not a competent witness for him to sustain his right of possession. *Adams v. Martin*, 8 Gratt. 107.

XII. The Trial.

A. PRIORITY FOR TRIAL.

It is provided by ch. 89, § 2, W. Va. Code, that an action of forcible entry and detainer shall have precedence for trial over all other civil causes on the docket. *Gas Co. v. Wheeling*, 7 W. Va. 22.

B. THE ISSUE.

"The charge to the jury and the prescribed form of the verdict, preclude all other enquiries, but whether the defendant held against the consent of the plaintiff, when he exhibited his complaint; whether he had or had not so held for three years; and whether the plaintiff hath the right of possession." *Allen v. Gibson*, 4 Rand. 468, 475; *Mann v. Bryant*, 12 W. Va. 516. See W. Va. Code, ch. 89, §§ 1, 2.

"In the case of unlawful detainer the jury were to find that defendant did or did not hold possession of the tenement against the consent of the plaintiff for three years next before, etc., and that plaintiff hath or hath not a right of possession in the tenement aforesaid. Sections 12-15, p. 458, 1 Rev. Code, 1819." *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 552.

Where Possession Taken under Mistake.—Whatever may be the effect in ejectment or a writ or right, of the party in possession having taken that possession under a mistake as to the true boundary of his land; in a warrant or unlawful detainer, the question is whether on fact such entry had been made and possession taken, and how long before the institution of the suit; and the mistake of it existed, is wholly unimportant. *Kincheloe v. Tracewells*, 11 Gratt. 587.

As Embodied on the Prescribed Charge.—"The charge to be given to the jury (as provided by the act of 1814)

is: 'You shall well and truly try, whether the defendant, C. D., against the consent of the plaintiff, holds possession of the tenement mentioned in the complaint filed in this cause; whether the said defendant hath so held the possession thereof, against the consent of the plaintiff, for three years next before the exhibition of the said complaint; and, whether the plaintiff hath the right of possession in the tenement aforesaid.'" *Allen v. Gibson*, 4 Rand. 468, 474.

C. FORM OF OATH.

Statutory Provisions.—No form of oath is prescribed by the statute of West Virginia, for the jury in an action of forcible entry and detainer, but the statute shows clearly that the oath be to try the issue joined, or whether the defendant unlawfully withholds the premises in controversy. W. Va. Code, ch. 89, § 2. *Mann v. Bryant*, 12 W. Va. 516.

In *Supervisors v. Ellison*, 8 W. Va. 308, it is said that the proper oath to administer to the jury in an action of forcible entry and detainer is that prescribed by § 214, ch. 50, W. Va. Code.

"The oath to be taken by the jury (in an action of forcible entry and detainer) was prescribed by the Revised Code of Virginia, 1819, and was in these words: 'You shall well and truly try whether the defendant, C. D., against the consent of the plaintiff, holds possession of the tenement mentioned in the complaint filed in the cause; whether the said C. D. hath so held possession thereof, against the consent of the plaintiff, for three years next before the exhibition of said complaint; and whether the plaintiff hath the right of possession in the tenement aforesaid; and you shall find a true verdict thereupon according to the evidence, so help you God.' See Rev. Code, 1819, vol. 1, ch. 115, § 12, p. 458." *Mann v. Bryant*, 12 W. Va. 516, 521.

Where Jury Is Sworn to "Try the Issue Joined."—Where the case ap-

pears to have been decided on the merits, it is immaterial that the jury was sworn to "try the issue joined" instead of being sworn "to try whether the defendant unlawfully withholds the premises in controversy." *Chancey v. Smith*, 25 W. Va. 404; *Todd v. Gates*, 20 W. Va. 464; *Griffie v. McCoy*, 8 W. Va. 201; *Huffman v. Alderson*, 9 W. Va. 617; *Southside R. Co. v. Daniel*, 20 Gratt. 344.

D. THE VERDICT.

See the title VERDICT.

1. Form and Sufficiency.

In General.—"The verdict is that the defendant does or does not unlawfully withhold from the plaintiff the premises in question, and the judgment is rendered according to the verdict." *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 552.

Necessity for Finding of "Unlawful Withholding."—In *Mann v. Bryant*, 12 W. Va. 516, 522, the court said: "The first question which suggests itself with reference to the verdict to be rendered in such cases (unlawful detainer) under our law is, whether it is necessary that the jury should find in their verdict 'that the defendant hath not held against the consent of the plaintiff the premises in controversy for three years before the date of the summons.' Unless this be the fact, the jury, by the express terms of our law, as above quoted, can not find a verdict for the plaintiff. And the Revised Code of 1819 required that this fact should be expressly found by the verdict. Is it still necessary that it should be so found expressly? Under the act of 1819, no issue was made up, and the oath of the jury expressly required them to find whether this fact was true or not. But under our act, a formal issue is made up, and this issue is 'whether the defendant is in the possession, and unlawfully withhold from the plaintiff the premises in question.' See Code, W. Va., ch. 89, §§ 1, 2, p. 517; and if the verdict of the jury re-

sponds fully to this issue which they are sworn to try, it can not be necessary that the verdict should find expressly the nonexistence of any other fact. It may be said that though the jury find this issue for the plaintiff, that is, 'that the defendant is in possession of the premises named in the summons and unlawfully withholds the same from the plaintiff,' still the plaintiff is not entitled to a judgment if the defendant has thus retained possession of the premises for more than three years before the institution of the proceeding. The answer to this is that if he has so retained possession for more than three years, he is not liable to be ousted by this form of proceeding; and therefore when the jury find he unlawfully detains the possession, they find he has in this proceeding no right to the detention of the premises either by reason of any original right thereto or by reason of his having held possession thereof without the consent of the plaintiffs for more than three years before the issue of the summons. That this is the true construction of our law is shown by chapter 50 of the Code of West Virginia, § 215, which in a writ of unlawful entry when brought as it may be before a justice, provides, 'when the verdict of the jury, or finding of the justice when the case is tried without a jury, be that the defendant unlawfully withholds the premises from the plaintiff, judgment shall be rendered in favor of the plaintiff.' Both these acts in our Code have been amended by the acts of 1872-3, chapter 36, page 83, and chapter 226, page 658; but these amendments in no manner affect the above reasoning."

Under the Act of 1814.—The form of the verdict as prescribed by the act of 1814 is: "We the jury find that the defendant did (or did not) at the time of the exhibition of the complaint filed in this cause, hold possession of the tenement therein mentioned against the consent of the plaintiff; that the defendant hath (or hath not), so held

possession thereof against the consent of the plaintiff, for three years next before the exhibition of the said complaint; and that the plaintiff hath (or hath not), the right of possession in the tenement aforesaid." *Allen v. Gibson*, 4 Rand. 468, 474.

Under the Revised Code of 1810.—The verdict of the jury in an action of forcible entry and detainer was prescribed by the Revised Code of 1819, in these words: "'We the jury find that the defendant did (or did not) at the time of the exhibition of the complaint filed in this cause, hold possession of the tenement therein mentioned against the consent of the plaintiff; that the said defendant hath (or hath not), so held possession thereof against the consent of the plaintiff for three years next before the exhibition of said complaint; and that the plaintiff hath (or hath not), the right of possession in the tenement aforesaid.' See Rev. Code, 1819, vol. 1, ch. 115, § 14, p. 458." *Mann v. Bryant*, 12 W. Va. 516, 521.

Illustrative Cases.—In an action of unlawful or forcible entry and detainer, a verdict finding that the defendant unlawfully withholds from the plaintiff the land in the summons described, is sufficient, and a judgment may be properly entered upon it. *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168; *Gorman v. Steed*, 1 W. Va. 1; *Mann v. Bryant*, 12 W. Va. 516.

Gorman v. Steed, 1 W. Va. 1, 15, was a case of unlawful detainer in which there was a verdict for the plaintiff as follows: "We the jury find that the defendant unlawfully withholds from the plaintiff, the possession of the premises in the within summons mentioned; and that he has not so held the possession thereof for three years prior to the institution of this suit, and therefore we find for the plaintiff." Objection was made that the verdict was not responsive to the issues, because it failed to find that the defendant unlawfully withheld the premises

in question at the time of the institution of the suit. But the court said: "This objection is not well taken, because the verdict is substantially a general verdict, for the plaintiff below. And a general verdict, in effect, finds every essential fact necessary to authorize it, and withholding the possession at the date of the institution of the suit, is one of those facts. *Olinger v. Shepherd*, 12 Gratt. 462; *Kincheloe v. Tracewell*, 11 Gratt. 587.

In West Virginia a verdict, "We the jury find for the plaintiff the premises in the summons mentioned," is held to be sufficient. *Lawson v. Dalton*, 18 W. Va. 766; *Mann v. Bryant*, 12 W. Va. 516.

A verdict on a writ of unlawful detainer in these words: "We the jury find that the defendants are unlawfully in possession and withhold from the plaintiffs the premises in the summons mentioned," is not so defective that the court may not properly enter up a judgment thereon. *Mann v. Bryant*, 12 W. Va. 516.

2. Setting Aside Verdict.

In a case where a court on motion to exclude evidence, could properly infer that the acts of a party amounted to an unlawful detention of real estate and not a mere trespass, it is not error to refuse to set aside the verdict of the jury finding such unlawful detention. *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168.

In unlawful detainer before a justice, or on its appeal, a verdict, on full trial on the merits will not be set aside because there was no plea and issue. The statute puts in a plea of not guilty. *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361.

E. WHERE DEFENDANT FAILS TO PLEAD.

In an action of unlawful detainer defendant appears; but, though the case is continued for years, he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—

the jury are sworn to try the issue joined, and the defendant makes full defense. Defendant can not, in the appellate court, take advantage of his own failure to file a plea. *Bartley v. McKinney*, 28 Gratt. 750; *Frazier v. Virginia Military Institute*, 81 Va. 59; *Olinger v. Shepherd*, 12 Gratt. 462.

Upon the issue joined by a plea of "not guilty" in an action of forcible entry and detainer, or upon the return of the first or any subsequent summons executed, if the defendant fails to plead, a jury will be impaneled to try whether he unlawfully withholds the premises in controversy. Chapter 89, § 2, W. Va. Code. *Gas Co. v. Wheeling*, 7 W. Va. 22.

F. NEW TRIALS.

In proceedings under the act of assembly concerning forcible entries and detainers, if a verdict be rendered for the plaintiff, a new trial may be granted by the court to the defendant; and upon the dissolution of the court, the plaintiff must proceed *de novo*. *Hammock v. Wilson*, 2 Va. Cas. 321 (1822).

XIII. Judgment.

A. EXTENT OF AWARD.

Recovery of Lands and Costs.—The act of 1814 directed that if the jury should find that at the exhibition of the complaint, the defendant held possession of the tenement against the consent of the plaintiff, and that the defendant had not so held it against the plaintiff's consent, for three years next before the exhibition of the complaint, and that the plaintiff had the right of possession, the justices should render judgment in favor of the plaintiff, that he recover possession of the tenement aforesaid, with full costs, and should award a writ of *abere facias possessionem*. *Allen v. Gibson*, 4 Rand. 468, 474. See the title POSSESSION, WRIT OF.

Amount of Land of Which Judgment Enters.—T. leases land to E. by deed

which is executed by E. and he thereby acknowledges that he is in possession under the lease, and covenants to restore the possession at the end of the term. E. holds over after the term expires for seven years; and whilst in possession executes a deed by which he conveys a part of the leased premises to A. in fee simple, with a covenant of warranty, and puts A. in possession and disclaims to hold under T. T. then institutes a proceeding of unlawful detainer against E. and A. It was held, T.'s recovery is not to be confined to the land in the actual occupancy of E. and A., but he is entitled to recover all the land demised; and he may show by parol testimony what constituted the demised premises. *Emerick v. Tavener*, 9 Gratt. 220.

Proper Writ to Be Awarded.—"If the jury find these facts for the plaintiff, which they must do, if they appear, no matter under what circumstances the defendant entered, or when; and no matter how the plaintiff's right of possession arose, the statute peremptorily directs that judgment be given for the plaintiff, not to be restored to the possession of the tenement, but to recover the possession of it; and that a writ of possession, not of restitution, be awarded." *Allen v. Gibson*, 4 Rand. 468, 474.

As Including Crops Raised in Premises.—Webb died in the spring of 1873, and in consequence of a controversy about his will, Lacy was appointed curator of his estate. In the lifetime of Webb, he had rented his farm, "Northberry," to Wynne, under a verbal contract to pay an annual rental of one-fourth of the crops raised on the farm. In June, 1873, the curator caused a written notice to be served on Wynne that the possession of said farm would be demanded of him on the 1st of January, 1874. On the 1st of January, 1874, Wynne refused to surrender the possession of the farm, and went on to prepare the land for crops. The curator then instituted his action

of unlawful entry and detainer, to recover said possession, and at the June term, 1874, of the county court of New Kent, obtained a verdict and judgment for the possession of the farm "Northberry." To this judgment a writ of error was awarded. Pending these proceedings, Wynne had raised on the farm, the possession of which had been adjudged to belong to the curator, large crops of wheat and oats. In August, 1874, the curator filed his bill, in which he set forth the foregoing facts; charged that Wynne was about to ship the crops beyond the limits of the state; charged his insolvency, claimed the crops as the property of Webb's estate, because raised on the farm since the period when the possession had been adjudged to belong to him, the curator; prayed for an injunction to enjoin and restrain the removal of said crops, and that they might be placed in the hands of a receiver of the court. The injunction was granted, but was afterwards dissolved by an order in vacation, and from this order dissolving said injunction, an appeal was taken by the said curator. It was held, that the order of dissolution was plainly erroneous. If the curator was entitled to the possession of the premises after the 1st of January, 1874, then all the crops raised on the land went with it, and Wynne could not claim them. At the time of filing the bill, and when the injunction was dissolved, the curator had a judgment of a court of competent jurisdiction, holding that he was entitled to said possession, and until this judgment was reversed, it fixed the rights of the parties in this respect. Instead of dissolving the injunction, the circuit court should have directed an account to be taken of the amount and value of the crops, and the amount of the rent due from Wynne; and if, upon the final determination of the action of unlawful entry and detainer, the possession of the farm should be determined to belong to the curator, then the value of said crops

should be decreed to him; and if the action of unlawful entry and detainer should be determined in favor of Wynne, then out of said crops, should be decreed to be paid any balance of rent due by Wynne to the estate of Webb. *Webb v. Wynne*, 1 Va. Dec. 331, 332.

B. RESTITUTION WHERE TOO MUCH IS AWARDED.

In *Board of Education v. Crawford*, 14 W. Va. 790, it is said: "As the description of the premises, in the demise in the declaration, is also too general to serve as a direction to the sheriff, it is the practice for the lessor of the plaintiff, at his own peril, to point out to the sheriff the premises whereof he is to give him possession; and if the lessor take more than he has recovered in the action, the courts will interfere in a summary manner and compel him to make restitution." *Emerrick v. Tavener*, 9 Gratt. 220, 235.

C. CONCLUSIVENESS AND EFFECT.

Subject to General Rule.—"Judgments in actions of forcible entry and detainer and unlawful detainer are, to the same extent as judgments in other actions, conclusive upon the questions within the issues, and determined by the court or confessed by the parties." *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 555.

As Affecting Title or Right of Possession.—In an action of forcible entry and detainer the judgment has only the effect of placing the parties in statu quo; it settles nothing even between them in regard to the title or right of possession, it being declared by statute that "no such judgment shall bar any action of trespass or ejectment between the same parties, nor shall any such judgment or verdict be conclusive in such future action of the facts therein found." *Davis v. Mayo*, 82 Va. 97; *Olinger v. Shepherd*, 12 Gratt. 462.

Effect on Title to Land.—"The title

to the property is never in issue in these actions, and therefore the judgment, whether for plaintiff or defendant, can not affect the title." *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 555; *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 854.

As a Bar to Further Proceedings.—"Section 4 of chapter 89 of the Code of West Virginia reads: 'No such judgment shall bar any action of trespass or ejectment between the same parties, nor shall any such verdict be conclusive in any such future action of the facts therein found.'" *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 552.

A verdict and judgment in an action of unlawful entry and detainer does not conclude the plaintiff of the defendant as to his title, but either may subsequently test this in an action of ejectment. *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 854.

The only matter in issue in an action of unlawful detainer being the right of possession, the declaration by the county court in its judgment that the defendant had the fee simple title to the land can not prejudice the rights of the parties in any proceeding involving the title. *Morris v. Deane*, 94 Va. 572, 27 S. E. 432.

Effect on Right to Set Aside Deed.—A judgment against a defendant in an action of unlawful detainer is no bar to his right to institute a suit in chancery against the plaintiff to set aside, on the ground of fraud, the deed under which he claims the land in controversy. The doctrine of election of remedies has no application. *Harrison v. Manson*, 95 Va. 593, 29 S. E. 420.

As Affecting the Rights of Landlord and Tenant.—The court in *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, 555, in commenting upon the fact that the judgment in an action of forcible entry and detainer can not affect the title to property, said: "This is gen-

erally true, but, as we have already seen, it may affect the title to a term of years as between landlord and tenant, and those claiming under them, and determine the question of forfeiture of a lease and of an unlawful holding over, especially where it has been used as the substitute and equivalent of an action of ejectment under § 16, ch. 93, Code."

D. CORRECTION OF JUDGMENT.

In an action of unlawful detainer, the jury, by the verdict, awarded to the plaintiff the land in dispute and judgment was rendered thereon. The counsel for the plaintiff having released certain land, which did not belong to the plaintiff but which was included in the verdict; it was not error in the court to set aside the first judgment and enter a second judgment for the land rightfully included in the verdict, less the part released. *Bartley v. McKinney*, 28 Gratt. 750.

XIV. Review.

Jurisdictional Amount.—The constitutional provision that the court of appeals shall have jurisdiction of cases involving "the title or boundaries of land" without regard to the amount in controversy includes cases of unlawful detainer; for possession is an element necessary to make up complete title to land. *Pannill v. Coles*, 81 Va. 380; *Gorman v. Steed*, 1 W. Va. 1; *Rathbone Oil, etc., Co. v. Rauch*, 5 W. Va. 79; Const. Va., Art. VI, § 2. See the title APPEAL AND ERROR, vol. 1, p. 491.

The court of appeals has jurisdiction in cases of unlawful detainer where possession only is the cause of controversy; possession being such an element of title and boundary to land, as to come within the perview of the constitution, granting jurisdiction to the court. *Gorman v. Steed*, 1 W. Va. 1.

The action of unlawful detainer involves the title and boundary of land,

within the meaning of the 8th section of article 6 of the constitution; and the supreme court has jurisdiction over a final judgment of the credit court in such action, although the case may have been brought into the circuit court by appeal from a justice's judgment. W. Va. Code, ch. 135, p. 639. Rathbone Oil, etc., Co. v. Rauch, 5 W. Va. 79.

Foreclosure.

Of mortgages, see the titles CHATTEL MORTGAGES, vol. 3, p. 814; MORTGAGES AND DEEDS OF TRUST. Of liens, see the titles LIENS; MECHANICS' LIENS; VENDORS' LIEN.

FOREGOING WRITING.—A reference by the certificate of acknowledgment of or recordation, to the deed as "the foregoing writing," is sufficient to identify it as the deed which was acknowledged or recorded, as the case may be, without giving the date of the deed. Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. 178, 179.

Foreign Acknowledgment.

See the title ACKNOWLEDGMENTS, vol. 1, p. 104.

Foreign Administration.

See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

Foreign Assignment.

See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 842.

Foreign Attachment.

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

Foreign Banks.

See the title BANKS AND BANKING, vol. 2, p. 261.

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See the title BILLS, NOTES AND CHECKS, vol. 2, p. 448.

FOREIGN CORPORATIONS.

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I. Definitions and General Considerations.**A. DEFINITIONS.**

See post, "Effect on Domicile of Compliance with Terms," II, C, 2.

Corporations Existing When Constitution of West Virginia Adopted in 1860.—Under the 8th section, art. 11, of the constitution of West Virginia, providing that the common law and laws of Virginia at the time of the constitution, not repugnant thereto, shall be and continue the law of West Virginia until altered or repealed by the legislature, the charter of a bank in-

corporated in Virginia, having branches in West Virginia, is continued in full force, unless repugnant to the constitution, as a domestic corporation of West Virginia. It is liable to suit, and can not be proceeded against as a foreign corporation by attachment or otherwise. Nor is the case of *Parker v. Donnally*, 4 W. Va. 648, even impliedly in conflict with this doctrine. *Farmers' Bank v. Gettinger*, 4 W. Va. 305.

Section 1 as found in ch. 107, acts, 1901, says that every insurance, telegraph, telephone or express company having its principal place of business in this state, incorporated by Virginia

before June 20th, 1863, or by this state, shall be a domestic corporation; all others foreign. This provision is applicable to all insurance, telegraph, telephone and express companies. It distinguishes foreign from domestic corporations for general purposes of that chapter or any other, because there be certain provisions applicable to the one, and not to the other, and this section gives the test as to whether such a corporation is domestic or foreign for general legal purposes. *Accident Insurance Co. v. Dawson*, 53 W. Va. 619, 621, 46 S. E. 51.

But during the war all power of a Virginia corporation to do business in West Virginia was suspended and it was proper to proceed against it by attachment as a foreign corporation. *Hall v. Bank*, 14 W. Va. 584.

The fact that this and other banks similarly situated, may continue to be Virginia corporations, is wholly immaterial, and is no more repugnant to the fact that it and others so situated are also domestic corporations of this state, than that the Baltimore and Ohio railroad, and the Hempfield railroad are domestic corporations of this state by virtue of the laws of Virginia in force before the separation, notwithstanding both of said companies are also foreign corporations, the one of the state of Maryland, and the other of the state of Pennsylvania. *Farmers' Bank v. Gettinger*, 4 W. Va. 305, 309.

Effect of Legislative Declaration.—

One state can not, by a mere legislative declaration, make all corporations, created by charter or the laws of other states, domestic corporations of such state; at least it can not, by such declaration, deprive the foreign corporation of its right to resort to the federal courts, in cases where such right is conferred by the constitution and laws of the United States. *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 212. See the title REMOVAL OF CAUSES.

B. AS CITIZENS.

See the titles CONSTITUTIONAL LAW, vol. 3, p. 206; CORPORATIONS, vol. 3, pp. 525, 527.

Right to Privileges and Immunities as Citizens under United States Constitution.—The clause of the federal constitution, art. 4, § 2, declaring that the citizens of each state are entitled to all the privileges and immunities of citizens of the several states, does not apply to corporations. *Samuel, J.*, in *Slaughter v. Com.*, 13 Gratt. 767, said: "I have no doubt of the power of the general assembly of Virginia to forbid foreign corporations from engaging in any pursuit within the state; and, of consequence, to grant permission to engage therein only upon terms; and that a statute imposing a fine for doing business without a license. (Code Va. 1849, ch. 38, § 25), is clearly within the scope of their legitimate powers." Cited with approval in *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614, 624. And see *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 334, 38 S. E. 653.

Presumed Citizen of State of Creation.—"Where a corporation is created by the laws of a state, the legal presumption is that all its members are citizens of the state by which it was created; and in a suit by or against it, it is conclusively presumed to be a citizen of such state." *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 212, 214. See *Hall v. Bank*, 14 W. Va. 584, 621.

Corporations Created by Two or More States.—See the title CORPORATIONS, vol. 3, p. 527.

Lessee of Domestic Railroad.—The fact that a foreign corporation has leased and is operating the railroad of a corporation of this state, does not make it a citizen of this state, within the meaning of the constitution and laws of the United States. *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 212, 213.

Removal of Actions.—See the title REMOVAL OF CAUSES.

C. AS PERSONS OR INHABITANTS.

See post, "Extraterritorial Rights," II.

The fact that a foreign corporation owns property here no more converts it into a resident than it converts a nonresident natural person into a resident. It dwells—has its habitat or domicile—in New York, where it was chartered. *Humphreys v. Newport News, etc., V. Co.*, 33 W. Va. 135, 137, 10 S. E. 39; *Quesenberry v. Peoples' Bldg., etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73; *Savage v. People's Bldg., etc., Ass'n*, 45 W. Va. 275, 31 S. E. 991, 992.

Incorporation under Laws of Two States.—See the title CORPORATIONS, vol. 3, p. 527.

"A corporation endued with the capacities and faculties it possesses by the co-operating legislation of two states can not have one and the same legal being in both states. Neither state could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised." *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 212, 214.

"The chartering of a corporation by another state, after it has received its charter from the first, does not create a separate and independent corporation in the second state. It is the same corporation; but it can not get out of the state which gave it birth except by powers and privileges granted to it by other states; and when in this way it is permitted to extend its operations, in every state where it extends its road, quoad all litigation in that state, it is to be regarded as a domestic corporation, and liable to suit there, 'in all respects as if it had been an independent corporation' of such state. If it is liable to suit there, then it follows, as a matter of course, that as to such suit it must be regarded as a domestic corporation, otherwise it could not be

sued there, for consent in no case can give jurisdiction to a court. If it has not a residence in the state, where the suit is brought, the court has no jurisdiction, no matter what consent the corporation might give in the premises. If it is liable to suit in the state, it is because it is an inhabitant of the state, as decided by *Railroad Co. v. Harris* (12 Wall. 65), and if it is an inhabitant of the state, when it is sued by a citizen of the same state, the case can not be removed into the federal court. This has been expressly held in *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431, and *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394. These cases are the necessary result of the cases of *Baltimore, etc., R. Co. v. Gallaher*, 12 Gratt. 655." *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 875.

Admittance as Domestic Corporation.—See post, "Effect on Domicile of Compliance with Terms," II, C, 2.

Under a statute authorizing a foreign railroad company to construct its road across the territory of Virginia, such road is to be regarded as a Virginia corporation, and liable to suit on contracts made in the state. *Hall v. Bank*, 14 W. Va. 584, 624; *Goshorn v. Supervisors*, 1 W. Va. 307, 324, 325; *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336, 356, 359; *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319, 325; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 872, 876; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431; *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655.

Thus the Baltimore and Ohio railroad company is a corporation of the states of Virginia and West Virginia; and although its principal office is in Maryland, and its principal officer resides there, it may be sued in either state on contracts made here. *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 815.

For a railroad corporation may have an existence in more than one state, if chartered or licensed to build its road and do business in more than one. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 815.

"The company under this law is a Virginia corporation, and its powers within the territory of Virginia are derived from the grant contained in the Virginia law. The act of Maryland incorporated the subscribers to the capital stock, their successors and assigns, by the name designated; and the Virginia act in effect re-enacts the Maryland law in all essential particulars; thereby erecting the company into a Virginia corporation within her territory. If liable to be sued in Maryland, the same liability attaches to it in Virginia. *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655, 659.

"There can be no doubt but the act of the 14th of March, 1851, constituted the Hempfield railroad company a corporation. But if it were left at all in doubt, the cause of the *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655, is, I think, conclusive on the question. The acts authorizing the two companies to construct their respective roads through the territory of Virginia, it seems to me, are, in every essential respect, very similar." *Goshorn v. Supervisors*, 1 W. Va. 307, 324.

As Lessee of Domestic Road.—Whilst the *Baltimore & Ohio R. R. Co.*, as a corporation of the state of Maryland, can have no legal existence outside of that state, yet, as the lessee of a Virginia railroad company, exercising all the powers and functions of the latter, it may be subject to all its duties and obligations. So acting, it may be treated as a Virginia corporation quoad the line of railroad under its control in Virginia, so far, at least, as its liability to the citizens of Virginia is concerned. *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431.

A railroad company, incorporated in

another state, which leases a road lying in this state, and operates it as the owner of the same, is liable as such in the courts of Virginia for an injury which occurred on said road operated in this state. *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431.

When Residents within Meaning of Revenue Laws.—A foreign corporation, which has a place of business in Virginia where it sells its machines and has paid the required state tax, is a resident merchant in the meaning of the revenue laws of Virginia. *Webber v. Com.*, 33 Gratt. 898.

Under Fourteenth Amendment.—See post, "Terms of Admission," II, C.

II. Extraterritorial Rights.

A. GENERAL RULE OF COMITY.

"Except by the law of comity, no corporation created in one state has the power to do business in another. Its very life is the franchise granted by its parent state, and creation of its law, which has no extraterritorial force. It is not entitled under the constitution of the United States to the privileges and immunities of citizens." *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 333, 38 S. E. 653.

"Under the law of comity, existing in all states of the union and in all foreign countries, except where abrogated by positive law, West Virginia corporations might transact their business anywhere, and still remain West Virginia corporations. It is true, that in many states, by constitutional provision and legislation, the law of comity has been greatly qualified. Many of the states impose restrictions by taxation and otherwise upon corporations other than those created by themselves, seeking to do business within their limits, and make compliance with all their regulations and conditions precedent to the right of such foreign corporations to do business within the state." *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 544, 40 S. E. 514.

So far as it conflicts with the provisions of § 30, ch. 54, of the Code of 1899, the general law of comity, as affecting the rights of foreign corporations, has been repealed in this state. (pp. 332, 333.) *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 38 S. E. 653.

No Legal Existence Outside of State Creating It.—A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the state or sovereignty by which it is created. *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 214; *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614, 623. See the title CORPORATIONS, vol. 3, pp. 529, 530.

A foreign railroad corporation can not migrate from the state that gave it birth and do business in another state except by the charter or license of the state, into which it proposes to extend its road. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812; *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184, 193.

B. EFFECT OF FAILURE TO COMPLY WITH FOREIGN LAW.

Where the statute law of another state requires that, before one of its corporations can do any business, it shall record in a certain county the certificate of its incorporation, this is a condition precedent, and the corporation has no power to transact any business at home or abroad till such condition is complied with, and such corporation has really no existence till such certificate of incorporation is so recorded. *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362, 374.

This is true where the important question is when such corporation came into existence, although, if the question were merely as to the existence of such corporation at the time the suit was brought, or it was made a party, no failure on its part to comply with the

formalities prescribed by the laws of the foreign state could be taken advantage of collaterally. Its legal existence would be presumed. *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362, 374. And see *National Mut. Bldg., etc., Ass'n v. Ashworth*, 91 Va. 706, 709, 22 S. E. 521, 1 Va. Law Reg. 519.

It is said also: "Whenever this is required by statute, as it is in many states, it is properly held, that the filing of this original certificate with the clerk is an indispensable prerequisite to the creation of the corporation, and that, until this has been done, it has no existence; and that may be shown incidentally, and taken advantage of collaterally, whenever the fact of incorporation is in any form called into question." *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362, 375.

Estoppel to Deny Valid Incorporation.—Persons dealing with a body which professed itself to be a lawfully constituted corporation, are estopped afterwards to question the validity of such incorporation. *Bon Aqua, etc., Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764, 12 S. E. 771; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16. See the title CORPORATIONS, vol. 3, p. 542, et seq.

C. TERMS OF ADMISSION.

1. Discretion of Legislature.

The general assembly of Virginia or West Virginia has the authority to forbid foreign corporations engaging in any pursuit within the state, and therefore to grant permission to engage therein only upon terms. *Slaughter v. Com.*, 13 Gratt. 767; *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 334, 38 S. E. 653.

"In *Paul v. Virginia*, 8 Wall. R. 168, Mr. Justice Field, delivering the opinion of the supreme court, says: 'Having no absolute right of recognition in other states, but depending, for such recognition, and the enforcement of its contracts, upon their assent, it follows, as a matter of course, that such assent

may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614, 623.

"It has always been supposed that the state had the right to prescribe the terms, upon which any foreign corporation should do business within its borders." *Baltimore, etc., v. R. Co.* *Pittsburg, etc., v. R. Co.*, 17 W. Va. 812, 867.

Under Fourteenth Amendment.—A private corporation is included under the designation of "person" in the fourteenth amendment to the constitution, § 1. But the provision in the fourteenth amendment to the constitution, § 1, that "no state shall deny to any person within its jurisdiction the equal protection of the laws" does not prohibit a state from requiring for the admission within its limits of a corporation of another state, such conditions as it chooses. *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 334, 38 S. E. 653.

"The only exceptions to this rule are in the cases of corporations engaged in foreign commerce, corporations engaged in interstate commerce, and corporations employed in the business of the government of the United States." *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 334, 38 S. E. 653. See *Postal Tel. Cable Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207.

Jurisdiction of Corporation Commission in Virginia.—The Virginia corporation commission is the department specially charged with the duty of granting licenses to do business in this state to foreign corporations. *American Surety Co. v. Com.*, 102 Va. 841, 47 S. E. 994. See Va. Const., 1902, art. 12, § 156a.

And through it are to be carried out all the constitutional provisions, and laws in pursuance thereof, for the regulation and control of foreign corporations. *American Surety Co. v. Com.*, 102 Va. 841, 845, 47 S. E. 994.

Payment of Charter Fee.—The constitution and laws as they now stand, unmistakably place all corporations, foreign and domestic, upon a footing of equality, and all are required to pay a charter fee as the condition precedent to doing business in this state, with a proviso that this charter fee shall not be exacted of those corporations by which this fee has been at any time paid. *American Surety Co. v. Com.*, 102 Va. 841, 845, 47 S. E. 994. See the title CORPORATIONS, vol. 3, p. 537.

This means the charter fee as required by acts 1902, 1904, p. 178, and not the annual license tax, which must be paid every year. *American Surety Co. v. Com.*, 102 Va. 841, 47 S. E. 994.

West Virginia Provision.—The legislature of West Virginia has not been silent on this subject. It has prescribed certain requirements to be complied with as conditions precedent to the right of all foreign corporations to do business in the state, and inserted therewith the following clause: "Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this state, upon complying with the requirements of this section, and not otherwise." Section 30, ch. 54, W. Va. Code. *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 336, 38 S. E. 653.

"This is equivalent to saying that 'no corporation duly incorporated by the laws of any state or territory of the United States, or the District of Columbia, or of any foreign country unless it be otherwise expressly provided, shall hold property and transact business in this state, without having first complied

with the requirements of this section.' In one sense it is a prohibition against foreign corporations and repeals the general law of comity, but it admits all foreign corporations except those expressly forbidden to the right to hold property and transact business in the state upon compliance with the requirements." *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 336, 38 S. E. 653.

By virtue of the second clause of said section, providing that "such corporation so complying shall have the same rights, powers and privileges, and be subject to the same regulations, restrictions and liabilities, that are conferred and imposed by this and the 52d and 53d chapters of this Code, and of chapter 20 of the act of 1885, on corporations chartered under the laws of this state," foreign corporations, upon complying with the conditions required by said section, have the same rights, powers and privileges respecting their contracts and remedies, if not otherwise repugnant to the policy of the state, as domestic corporations of like character, whether, under the general law of comity, they would have had such rights, powers, and privileges or not, but they can exercise no greater powers in this state than its domestic corporations. *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 38 S. E. 653.

The purpose of the law was to put foreign and domestic corporations on an equality in so far as they each transacted business in this state. Foreign corporations legally doing business in this state have the same rights, powers and privileges, and are subject to the same regulations, restrictions and liabilities, as domestic ones. *Archer v. Baltimore Bldg., etc., Ass'n*, 45 W. Va. 37, 30 S. E. 241.

2. Effect on Domicile of Compliance with Terms.

See ante. "As Persons or Inhabitants," I, C.

In *Continental Ins. Co. v. Kasey*, 27 Gratt. 216, 227, it was said that a foreign insurance company, when it commences business in this state, and complies with the statute by making the necessary deposit and appointing an agent to accept process, becomes, as to all contracts with citizens of Virginia, domiciled here. In the language of Judge Christian "these corporations are placed by our statute on primarily the same footing, quoad hoc, as the home corporations." But in *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445, 451, this language is limited and explained as having reference only to the removal of causes to the federal courts, saying that it was never intended to declare that such a company, doing business in this state, has its residence and habitancy in this state.

"Neither the statute law, nor the decisions of this court construing those statutes, changes the status of foreign insurance companies with respect to their residence and habitat. Under the law, well established by the authorities

* * * a foreign insurance company can not change its residence or its citizenship. In the language of Chief Justice Waite, in *ex parte Schollenberber*, 6 Otto 377, 'it can have its legal home only at the place where it is located by or under the authority of its charter.'" *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445, 452.

"The foreign character of a corporation is not to be determined by the place where its business is transacted, or (even) where the corporators reside, but by the place where its charter was granted. With reference to inhabitancy, it is considered as an inhabitant of the state in which it was incorporated." *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445, 448.

Enabling Statute.—A statute merely enabling a foreign corporation to hold property or do business in this state and have the same powers, rights and privileges and be subject to the same regulations, restrictions and liabilities,

as domestic corporations, West Virginia Code, ch. 54, § 30, does not make it a domestic corporation, and it may be proceeded against by attachment as a foreign corporation. *Savage v. People's Bldg., etc., Ass'n*, 45 W. Va. 275, 31 S. E. 991; *Quesenberry v. People's Bldg., etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73.

Appointment of Attorney.—"The section requiring the appointment of an attorney to accept service (§ 24, ch. 54) simply imposes a penalty for disobedience, and confers no citizenship or residence on foreign corporations, if it applies to them. Section 30, in terms, applies to them, saying that, if they comply with that section, they may hold property and do business in this state, and have the same powers, rights and privileges, and be subject to the same regulations, restrictions, and liabilities, as domestic corporations. Now, though a state may refuse a foreign corporation right to do business in it, or impose terms, this § 30, does only this, and does not transform a foreign corporation into a domestic one. That is not the intention. *Bart. Ch. Prac.* 580." *Quesenberry v. People's Bldg., etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73. See *Savage v. People's Bldg., etc., Ass'n*, 45 W. Va. 275, 31 S. E. 991.

"The provisions of § 30 are simply conditions precedent to the right of foreign corporations to do business in this state, and do not convert such corporations into domestic corporations, as has been frequently held by this court (*Quesenberry v. People's Bldg., etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73), and cases therein cited; and, being foreign corporations, they are liable, under chapter 106, Code, to attachment." *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004.

Liability to Give Security for Costs.

—A foreign corporation which has complied with the requirements of § 24, ch. 54, W. Va. Code, as to appointing a resident agent, is not to

be considered a nonresident, so as to be required to give security for costs as plaintiff. *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299.

As Residents for the Purpose of Being Sued.—But by compliance with the terms of such statute a foreign corporation is to be considered, for the purpose of being sued, as domiciled in Virginia and is entitled to rely on the statute of limitations just as if it had been chartered by the legislature of Virginia. *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630; *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445, approved in *Hall v. Bank*, 14 W. Va. 584; *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909; *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184, 193. But where afterwards such corporation ceases to do business in the state, and neglects to appoint an agent and otherwise fulfill the requirements of the statute, this is a withdrawal from the state and an obstruction of the plaintiff, and such period is not to be counted in the running of the statute of limitations, in accordance with § 18, ch. 104, W. Va. Code. *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400.

Liability to Attachment or Garnishment.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, pp. 77, 122, 130.

Certificate of Compliance with Law.—Under § 30, ch. 54, W. Va. Code which says: "Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this state upon complying with the requirements of this section, and not otherwise," the requirement is only that it file with the secretary of state a copy of its articles of association and of the law or authority under which it is incorporated. Then the secretary issues

a certificate of the fact of filing such documents, and this certificate operates by law to allow it do its corporate business in this state. If, however, the corporation is a railroad or other corporation doing business in this state as lessee of the works, franchise or property of another corporation, or person or otherwise, it must, in addition to the document just mentioned, file a paper sealed with the corporate seal accepting the provisions of § 30, and agreeing to be governed thereby. This is not required of any but such lessee corporation. The object of this provision is to prevent such lessee from escaping the liability imposed by that section on the plea that it is only a lessee. The section makes railroad corporations doing business in this state, as to property, works and operations, domestic corporations. *Accident Insurance Co. v. Dawson*, 53 W. Va. 619, 626, 46 S. E. 51.

Presumptive Acceptance of Amendments.—A foreign corporation is bound by amendments of the law prescribing the terms of its admission to do business, subsequently enacted and retroactive in terms, where it continued to operate thereunder. Acceptance of their provisions is presumed. *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630.

Foreign Accident Insurance Company.—See the title ACCIDENT INSURANCE, vol. 1, p. 74.

3. Effect of Noncompliance with Terms.

Contracts Not Usually Void.—A contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business in another state, will not on that account be held absolutely void, unless the statute expressly so declares, as it does not do in West Virginia; and, if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others.

Toledo, etc., Lumber Co. v. Thomas, 33 W. Va. 566, 11 S. E. 37.

For the statute is penal in character and must be construed strictly. *Toledo, etc., Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37.

Although the statute says that the corporation shall not transact business otherwise. *Toledo, etc., Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37.

And although an act of assembly makes it a misdemeanor for any agent, officer, or employee of certain foreign corporations to do business in this state, without complying with the provisions of the act, contracts made with such corporations in violation of such act will not be declared void, but will be enforced, in the absence of any other evidence of intention on the part of the legislature that such contracts should be void. *Eastern Bldg., etc., Ass'n v. Snyder*, 98 Va. 710, 37 S. E. 298.

"The courts of Indiana, Illinois, Wisconsin, and perhaps some other states hold a different doctrine. In Vermont and Oregon it has been held, that a noncompliance with the precedent conditions of the statutes of those states by foreign corporations rendered their contracts void. But it will be observed that these statutes imposed no penalty for the failure to comply with their provisions; and it is principally upon this ground that the contracts are held void, because otherwise the statute might be evaded with impunity." *Toledo, etc., Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 38.

Noncompliance with Section 1104 of the Code—Allegations and Proof.—A bill which charges that a foreign corporation had not complied with the provisions of § 1104 of the Virginia Code, must also allege in what particulars it has failed to do so. The investigation will be confined to particulars charged. *National Mut. Bldg., etc., Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521.

And in an action for breach of contract, if the defendant relies upon the fact that the plaintiff is a foreign corporation and has not complied with the provisions of § 1104 of the Virginia Code, relating to such companies, the defense (plea or statement) is fatally defective if it does not specify the particular in which it has failed to comply with the statute. *Worrell v. Kinnear Co.*, 103 Va. 719, 49 S. E. 988, citing *National Mut. Bldg., etc., Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521. In both these cases the question of the effect of failure to comply, was raised by the parties, but not decided.

Meaning of "Doing Business in This State."—Making a contract out of this state by a foreign corporation, by which title to a tract of land within the state is acquired by such corporation, is not doing business in the state, within the meaning of § 1104 of the Virginia Code, so as to render a director of the company liable for its debts under the provisions of § 1105, although the object of the purchase be to engage in mining in the state at a subsequent time. *Goldsberry v. Carter*, 100 Va. 438, 41 S. E. 858.

"The courts of this country have generally, it seems, in construing statutes similar to ours, held, that the object of such statutes is to forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without having complied with the provisions of the statute." *Goldsberry v. Carter*, 100 Va. 438, 440, 41 S. E. 858.

"The prohibition in the statute is against doing business here, and not against doing business abroad which relates to property in this state. If the contract by which the title to the land was acquired had been made in this state whilst the appellant was a director in the company, for the purpose of mining coal, which purpose was carried out, but not until the day after the appellant had ceased to be a director, a different question would be

presented, and one upon which we do not wish to be understood as intimating any opinion by anything that we have said." *Goldsberry v. Carter*, 100 Va. 438, 441, 41 S. E. 858.

III. Powers.

See the title CORPORATIONS, vol. 3, p. 530.

A. IN GENERAL.

See ante, "Terms of Admission," II, C.

A foreign corporation has no power to make contracts or to do business in Virginia, but by the permission of the state. *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614, 623.

"A corporation created by one state can do and perform in any other state any act or transact any business which it can legally perform in the state of its creation, providing it be such an act as an individual might legally perform, unless prohibited by, or repugnant to, the laws of such other state." *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 547, 40 S. E. 514.

"In harmony with the general law of comity obtaining among the states composing the union, the presumption should be indulged that the corporation of one state, not forbidden by the laws of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy, to be deducted from the general course of legislation, or from the settled adjudications of its highest court." *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 334, 38 S. E. 653. See *Humphreys v. Newport News, etc., V. Co.*, 33 W. Va. 135, 10 S. E. 39; *Nimick v. Iron Works Co.*, 23 W. Va. 184, 198; *Bockover v. Life Ass'n*, 77 Va. 85, 89; *Toledo, etc., Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37.

It may do such acts in the state as are permitted by its laws to individ-

uals generally, and no others. But such prohibition or repugnancy will not be implied from the mere silence of the state. *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 336, 38 S. E. 653.

"Any state, however, may forbid and prevent a foreign corporation from carrying on its business within its limits, and also from doing certain acts or making certain contracts within its jurisdiction." *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 334, 38 S. E. 653.

B. CONFLICT OF LAWS.

Provisions of Charter Apply.—If a state allows a foreign corporation to do business within her limits, the corporation comes, as it is created, and brings its charter as the law of its existence. *Bockover v. Life Ass'n*, 77 Va. 85.

Every one dealing with it everywhere must notice the provisions of its charter for managing and controlling its affairs, both in life and after dissolution. *Bockover v. Life Ass'n*, 77 Va. 85.

Compensation of Officers Governed by Foreign Law.—In determining the validity of a claim made by the officers of a foreign corporation, with its habitat and chief office abroad, to compensation for services rendered the corporation without any contract to pay therefor, the law of the home state governs. *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 460. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Contracts—Usury Laws.—But a foreign corporation, coming into this state to transact business, must conform to the law of this state, if there be any, regulating similar corporations organized under the laws of this state; and its contract, although in terms solvable in the foreign state in which such corporation has its domicile, must be such a contract as a similar domestic corporation is authorized to make, or

the courts of this state can not enforce, or permit the enforcement of, its performance. *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 38 S. E. 653.

"The law of comity only permits corporations to do in a foreign state such acts as individuals are permitted to do, and it may well be doubted whether a corporation exempted from the usury laws of its own state could carry that exemption into and assert it in the courts of another state, a thing that is permitted to no individual in any country, and may be deemed, therefore, to be against public policy everywhere." *Floyd v. Loan and Investment Co.*, 49 W. Va. 327, 344, 38 S. E. 653.

Disposition of Assets on Insolvency.—See post, "Insolvency Winding Up, and Dissolution," V.

C. POWER TO ACQUIRE AND HOLD PROPERTY.

In General.—"In the absence of any statute limiting the right of a corporation to do so, it may, unless contrary to the public policy of the state, hold property and do business without as well as within the state or country by which it was created." *Toledo, etc., Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37.

And a foreign corporation may take and hold real or personal property in another state than that of its incorporation, for its general objects and purposes as authorized by the terms of its charter. *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302; *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318. See *Goldsberry v. Carter*, 100 Va. 438, 41 S. E. 853.

To Take by Devise or Bequest Generally.—There can be no doubt but that generally a testator, domiciled in this state, may, by his will, duly executed and admitted to probate, according to the laws of this state, make a valid devise or bequest to a corporation chartered by another state, and authorized by its charter to take and hold

property. *Roy v. Rowzie*, 25 Gratt. 599, 606; *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302.

But certainly it is competent for the legislature of this state to prohibit altogether a bequest to a corporation of another state, and a fortiori to prohibit such a bequest in a particular or special case. *Roy v. Rowzie*, 25 Gratt. 599, 600.

A devise or bequest to an incorporated theological seminary, whether located within or out of the state, is not void as against either public policy or any statute. *Roy v. Rowzie*, 25 Gratt. 599.

To Take Bequests of Charities.—Foreign corporations may take bequests of charities under a will made in this state, when and to the extent authorized by their charters. *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302; *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

To Operate Railroad.—Without a charter or license from the state no corporation can legally operate a railroad in such state, as licensee or otherwise. If it had such charter or license then, as to all property in the state, it would be a domestic corporation. *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184, 193.

D. EFFECT OF WAR ON EXTRA-TERRITORIAL POWERS.

See the title CORPORATIONS, vol. 3, p. 530.

E. POWER OF EMINENT DOMAIN.

See the title EMINENT DOMAIN, vol. 5, p. 71.

IV. Suits by and against.

A. POWER OF A FOREIGN CORPORATION TO SUE IN STATE COURTS.

A foreign corporation may sue in the state courts upon a contract with it, valid according to the laws of the country in which the contract was

made, unless contrary to the policy of the laws of such state. *Rees v. Conococheague Bank*, 5 Rand. 326; *Bank of Marietta v. Pindall*, 2 Rand. 465; *Taylor v. Bank of Alexandria*, 5 Leigh 471; *Freeman's Bank v. Ruckman*, 16 Gratt. 126; *Goshorn v. Supervisors*, 1 W. Va. 307, 325.

And the making a note in Virginia, to be negotiated at a foreign bank, is not liable to this objection. *Rees v. Conococheague Bank*, 5 Rand. 326, 329; *Bank of Marietta v. Pindall*, 2 Rand. 465.

A corporation of the District of Columbia, or of any state of the union, and even a foreign corporation, may maintain suits in the courts of Virginia, in its corporate name and character. *Taylor v. Bank of Alexandria*, 5 Leigh 471; *Freeman's Bank v. Ruckman*, 16 Gratt. 126, 131.

But no foreign bank can sue on a primary contract made in Virginia by discounting notes or otherwise. *Bank of Marietta v. Pindall*, 2 Rand. 465.

B. AFTER DISSOLUTION.

By virtue of §§ 58, 59, ch. 53, W. Va. Code, suits may be brought in the name of dissolved corporations, foreign and domestic, so far as necessary or proper "for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto." These sections superseded the decision in *Nimick v. Iron Works Co.*, 25 W. Va. 184. *Swing v. Bentley, etc., Furniture Co.*, 45 W. Va. 283, 31 S. E. 925.

The decision in *Nimick v. Iron Works Co.*, 25 W. Va. 184, was to the effect that a general suit to settle up the affairs of a foreign corporation and assess liabilities against the stockholders must be brought in the state of its domicile or origin, as such settlement must be had in accordance with the

law of its creation and charter, which could not be enforced in this state. This decision, which was rendered November 29, 1884, was superseded by ch. 39, acts, 1885, which gave the circuit courts of this state jurisdiction to appoint receivers for and wind up the affairs, in proper cases therein set forth, of foreign corporations who have done business, acquired property, and contracted debts in this state. *Swing v. Bentley, etc., Furniture Co.*, 45 W. Va. 283, 31 S. E. 925.

Receiver or Trustee of Dissolved Corporation.—A receiver, trustee, or assignee of a dissolved foreign corporation, appointed in the state of its domicile, may institute in the courts of this state suits in his own or in the corporate name for debts or claims due such corporation. *Swing v. Bentley, etc., Furniture Co.*, 45 W. Va. 283, 31 S. E. 925; *Swing v. Parkersburg Veneer, etc., Co.*, 45 W. Va. 288, 31 S. E. 926.

But before a receiver or trustee of a dissolved foreign corporation can recover on a premium note a quasi ex parte assessment, he must show that the conditions precedent to such recovery, contained in such note, have been fully satisfied. *Swing v. Bentley, etc., Furniture Co.*, 45 W. Va. 283, 31 S. E. 925; *Swing v. Parkersburg Veneer, etc., Co.*, 45 W. Va. 288, 31 S. E. 926.

C. JURISDICTION OF SUITS AGAINST FOREIGN CORPORATION.

1. How Jurisdiction of Foreign Corporation May Be Acquired.

Jurisdiction over a foreign corporation by the domestic courts can only be acquired in one of three ways. By the cause of action or part thereof having arisen in the state, Va. Code, § 3215; by being sued with another who is a resident thereof, § 3214, par. 1, or by having estate or debts owing to it within the state, § 3214, par. 4. Guar-

antee Co. v. First Nat. Bank, 95 Va. 480, 28 S. E. 909.

Under the act, 1 Rev. Va. Code, 1819, p. 474, ch. 123, directing the method of proceeding in courts of equity against absent debtors, a creditor of a corporation created by another state may maintain a suit in equity against such corporation, as a defendant out of this commonwealth, where there are persons within the same who have in their hands effects of, or are indebted to, such absent defendant; or may maintain a suit in equity against such corporation as an absent defendant, where it has lands or tenements within the commonwealth. *Bank of U. S. v. Merchants' Bank*, 1 Rob. 573.

Although a foreign corporation, in some cases, might institute and prosecute suits in a state other than that of its incorporation, yet it is certain that it could not be sued therein. *Goshorn v. Supervisors*, 1 W. Va. 307, 325.

Where Corporation Has Estate or Debts Due It.—A suit against a foreign corporation may be brought in any county wherein it has estate or debts due. It is a nonresident under clause 3, § 1, ch. 123, W. Va. Code. *Quesenberry v. People's Bldg., etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73.

"It has been supposed that a foreign corporation can not be sued, because, by the common law, process against it must be served upon its head within the jurisdiction where this artificial body exists. The difficulty is rather technical than substantial, and this court held, in the case of *The Bank of U. S. v. The Merchants' Bank of Baltimore*, 1 Rob. 573, that under our law directing the method of proceeding against absent debtors in courts of equity, a suit might be maintained even against a foreign corporation where it has lands or tenements within the commonwealth; the proceeding being by publication instead of actual service of process." *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655, 660.

Where the Corporation Does Business.—A foreign corporation is liable to suit or garnishment in any county of West Virginia wherein it does business and has an agent upon whom process may be legally served according to § 7, ch. 124, W. Va. Code, 1891, although the cause of action arose without the state. W. Va. Code, ch. 123, § 1; *Mahany v. Kephart*, 15 W. Va. 609; *Humphreys v. Newport News, etc., V. Co.*, 33 W. Va. 135, 10 S. E. 39; *Empire Coal, etc., Co. v. Hull Coal, etc., Co.*, 51 W. Va. 474, 14 S. E. 917.

An insurance company chartered by another state, but which is doing business in this state under our statute law or under the Virginia law of 1855, 1856, is to be considered for the purposes of being sued as domiciled in this state. *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400.

But a suit against a nonresident corporation by a citizen of Virginia on a contract made outside this state, is not a suit against a foreign corporation doing business in Virginia, under Va. Code, 1873, ch. 166, § 7, but under ch. 148, §§ 1, 20. *Smith v. Life Ass'n of America*, 76 Va. 380.

Can Not Contract as to Jurisdiction of Suits.—A provision endorsed on the certificates of stock issued by a foreign corporation, that any action brought against said corporation by its stockholders shall be brought in a certain county of the state of its domicile, is void, as jurisdiction can not be taken away by consent. *Savage v. People's Bldg., etc., Ass'n*, 45 W. Va. 275, 31 S. E. 991.

Suit to Settle the Affairs of a Foreign Corporation.—The doctrine of *Nimick v. Iron Works Co.*, 25 W. Va. 184, that a general suit to settle the affairs of a foreign corporation must be brought in the state of its domicile, has been superseded by §§ 58, 59, ch. 53, W. Va. Code, which gives the circuit court jurisdiction of such suits. *Swing v. Bentley, etc., Furniture Co.*,

45 W. Va. 283, 31 S. E. 925; *Swing v. Parkersburg, Veneer, etc., Co.*, 45 W. Va. 288, 31 S. E. 926.

Foreign Corporation Leasing Railroad in Virginia.—Where a railroad which was incorporated in another state leases a railroad lying in Virginia and operates the same as owner thereof and an injury occurs on said railroad, the person having the right of action for such injury may sue the railroad in the courts of Virginia, and such company has no right to remove the suit to the federal courts. *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394. So, also, where a corporation is rechartered in West Virginia or receives a license to extend its system into West Virginia. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

2. Jurisdiction over Internal Affairs.

Domestic courts will not undertake to control or overhaul, or otherwise interfere with, the management of the internal affairs of a foreign corporation. *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 33 S. E. 385.

For courts other than those of the state creating it, in which it has its habitat, have no visitatorial powers over such corporation, have no authority to remove its officers, or to punish them for misconduct committed in the state which created it, nor to enforce a forfeiture of its charter. Neither have they the power to compel obedience to their orders, nor to enforce their decrees. *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 67, 33 S. E. 385.

"There is nothing in the act of assembly approved May 18, 1887, entitled 'An act in relation to insurance companies and associations upon the assessment plan' (acts of extra session, 1887, ch. 271, p. 348, etc.), which changes the general rule upon the subject and gives the courts of this state the right to control or interfere with the management of the internal affairs

of a foreign corporation doing business here." *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 67, 33 S. E. 385.

Thus, a Virginia court will not enjoin a foreign corporation from forfeiting the policy of insurance of a citizen of Virginia nor require it to exhibit its books, papers, etc., since it has no means of enforcing such decrees. Nor can a court under such circumstances proceed to construe the contract and thus render the matter *res judicata*, since it has no jurisdiction of it. *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 33 S. E. 385.

3. Protection of Stockholder's Individual Rights.

In a suit against a foreign corporation, if the act complained of affects the complainant solely in his capacity as a member of the corporation, whether as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholder's meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and our courts will not take jurisdiction of it. But if the act of the foreign corporation complained of affects the complainant's individual rights only, and the cause of action arises here, our courts will take jurisdiction. In the case in judgment, the acts complained of affect the complainant in his capacity as a member of a foreign corporation, and the relief prayed is such as the trial court could not adequately afford, and hence the demurrer to the bill was properly sustained. *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 33 S. E. 385.

But rights which rest upon a contract of insurance with a foreign corporation, and not upon the contract of membership in the corporation, may be enforced in the courts of this state. *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 33 S. E. 385.

4. Jurisdiction in Personam and in Rem.

Suit "In Personam" if Legally Served.—It is within the power of a state legislature to authorize a suit against a foreign corporation in personam as well as in rem. Hence a foreign corporation doing business in West Virginia may be sued in any particular county of said state by clause 2, § 1, ch. 123, W. Va. Code, 1891, provided service of process can be lawfully had by § 7, ch. 124. *Humphreys v. Newport News, etc., V. Co.*, 33 W. Va. 135, 10 S. E. 39.

And it has been held, that when a foreign corporation, by its officers, comes within the jurisdiction of another state, and there engages in business, it becomes subject to the process of its courts and its laws, although the accidental, temporary presence of its officers in the foreign state does not give jurisdiction there. *Humphreys v. Newport News, etc., V. Co.*, 33 W. Va. 135, 10 S. E. 39, 40. See the title **VENUE**.

Actual Service of Process or Appearance Necessary.—A personal decree for specific performance may be rendered against a foreign corporation when actual service of process has been made within the state under the provisions of the W. Va. Code, ch. 124, § 7. *Shafer v. O'Brien*, 31 W. Va. 601, 8 S. E. 298; *Crumlish v. Railroad Co.*, 28 W. Va. 623.

In *Gilchrist v. Land Co.*, 21 W. Va. 115, the court was forced to follow the construction of the New York courts in holding that no personal decree could be rendered against foreign corporations unless it had appeared, but the doctrine of *Shafer v. O'Brien*, 31 W. Va. 601, 8 S. E. 298, is that of the West Virginia courts.

Not Necessary for a Decree in Rem.—It is not denied that a corporation, like an individual, can not be bound personally, unless it appears or is, by proper summons within its jurisdiction,

brought before the court; but it can not be questioned, that a court may, without personal service, take jurisdiction of the property of a nonresident person or foreign corporation, and its decree, to the extent that it takes possession and disposes of the property within its jurisdiction, will be binding upon all parties affected or interested whether resident or nonresident. *Crumlish v. Railroad Co.*, 28 W. Va. 623; *Dillard v. Central Va. Iron Co.*, 82 Va. 734, 1 S. E. 124; *Hall v. Hall*, 12 W. Va. 1.

5. Not Compellable to Answer—Effect of Failure on Injunction.

A foreign corporation can not be compelled to file an answer in a suit to which it is a party defendant, hence, such answer not being required for discovery, the failure to so file same is not ground for refusing to dissolve an injunction in the cause, properly granted. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. 40, 61. See the title **INJUNCTIONS**.

6. Withdrawal from State—Effect.

The withdrawal by a foreign insurance company of its agent from this state, or the failure of such a company to appoint an agent in this state, when for any reason there ceases to be one resident in the state, is a departure from the state by the insurance company within the meaning of § 18, ch. 104, of the Code of West Virginia. *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400, 401.

Revocation of Agency—Effect.

Though a foreign insurance company doing business in Virginia prior to the war by a regular agent, designated to accept service, and appointed under a statute which forbade revocation without new appointment as long as any of its obligations in the state were in force, had after the war expressly revoked the powers of the resident agent it had before the war, and had never afterwards appointed another in his place, service of process on such agent

will nevertheless be effectual under the statutes in that behalf to give jurisdiction of an action against such company. *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630. See the title **SERVICE OF PROCESS**.

D. ALLEGATION AND PROOF OF INCORPORATION.

Need Not Be Set Out in Declaration.

—It is not necessary for a foreign corporation to show in its declaration how it was incorporated; it may prove that it is incorporated under the general issue. *Taylor v. Bank of Alexandria*, 5 Leigh 471.

Necessity for Proof.—Where the fact of incorporation of a foreign corporation suing in the courts of another state is not admitted by the pleadings, it must be proven. *Jackson v. Bank*, 9 Leigh 240.

And the plea of nonassumpsit imposes upon the plaintiff corporation the burden of producing such proof. *Jackson v. Bank*, 9 Leigh 240. See the title **CORPORATIONS**, vol. 3, p. 579, et seq.

Evidence of Incorporation.—An exemplified copy of the charter of a foreign corporation duly certified by the secretary of state, with the certificate of the state of West Virginia attached, that such corporation had filed in his office a duly certified copy of its charter, with a copy of the laws of its own state under which it was incorporated, both certificates being under the state seals, and the certificate of the clerk of the county court certifying the admission to record of the articles of incorporation, duly attested, are competent evidence of the incorporation of such foreign company. *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299.

And a corporation created under the laws of the state of New York is sufficiently proved in this state, by the production of a copy of the certificate of its incorporation, attested by the secretary of state of the state of New

York under the seal of his office, authenticated by the governor of New York under the great seal thereof, or by a copy of such certificate of incorporation made by the clerk of the county, in which the business of the corporation shall be carried on, under the seal of his office, and certified by the presiding justice of the supreme court of said county, and further authenticated by the clerk of such court under the seal of said court in the manner prescribed by § 20, ch. 130, of the West Virginia Code. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16, 17.

E. AVERMENT OF COMPLIANCE WITH LAW AS TO ADMISSION.

It is not necessary for a foreign corporation, in order to sustain an action in this state, to set forth in its complaint a compliance with the laws of the state which entitle it to do business in the state. This defense, if available, is a matter to be pleaded and proved by the defendant. It does not arise on demurrer. *Nickels v. People's Bldg., etc., Ass'n*, 93 Va. 380, 25 S. E. 8.

And if the fact relied on by the appellee is that the appellant corporation has not complied with the requirements of the law, requiring a foreign corporation to have an office in the state, Va. Code, 1887, § 1104, it is essential that the appellee alleges in his bill in what particular the appellant has failed. *National Mut. Bldg., etc., Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521, 1 Va. Law Reg. 519.

F. VENUE OF ACTION AGAINST FOREIGN CORPORATION.

See ante, "How Jurisdiction of Foreign Corporation May Be Acquired," IV, C, 1. See the title VENUE.

G. DECREE FOR SPECIFIC PERFORMANCE AGAINST.

See the title SPECIFIC PERFORMANCE.

H. FOREIGN JUDGMENTS AGAINST FOREIGN CORPORATIONS.

See the title FOREIGN JUDGMENTS.

I. ATTACHMENT AND GARNISHMENT OF FOREIGN CORPORATIONS.

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

V. Insolvency, Winding Up and Dissolution.

Constitutionality of Statute Providing for It.—A statute providing mode for winding up insolvent foreign corporations and distributing their assets equitably among those thereto entitled, impairs no contract, and is valid. Such is the Missouri statute of 1879. *Bockover v. Life Ass'n*, 77 Va. 85.

Appointment of Receiver.—Circuit courts of West Virginia are authorized by §§ 58, 59, ch. 53, W. Va. Code, in proper cases therein set forth, to appoint receivers for, and wind up the affairs of foreign corporations who have done business, acquired property, and contracted debts in this state. The law on this subject, as propounded in the case of *Nimick v. Iron Works Co.*, 25 W. Va. 184, has been superseded by ch. 53, §§ 58, 59, of the Code. *Swing v. Bentley, etc., Furniture Co.*, 45 W. Va. 283, 31 S. E. 925; *Swing v. Parkersburg Veneer, etc., Co.*, 45 W. Va. 288, 31 S. E. 926. See the title RECEIVERS.

Suit by Stockholder of Dissolved Foreign Corporation.—See the title STOCK AND STOCKHOLDERS.

A suit is brought by a stockholder of a foreign corporation on behalf of himself and the other stockholders against a domestic corporation having property in this state belonging to said foreign corporation owing debts to it; and the bill shows that the foreign corporation had ceased to use its franchise, and been dissolved by virtue of the laws of the state of its creation, and

had no property or assets except those in the hands of the said domestic corporation and within the jurisdiction of the court. The courts of this state have jurisdiction of such suit, notwithstanding the fact that said foreign corporation can not be brought within the jurisdiction of such courts. *Crumlish v. Railroad Co.*, 28 W. Va. 623.

The said foreign corporation is not an indispensable party to such suit. *Crumlish v. Railroad Co.*, 28 W. Va. 623.

Where such suit is brought within less than four years from the time the cause of action arose, and it does not appear that any of the parties have died, or that the rights of third persons have intervened, or that there has been any loss of evidence, the doctrine of laches has no application. *Crumlish v. Railroad Co.*, 28 W. Va. 623, 624.

Disposition of Assets.—A foreign corporation brings with it into another state all of its charter rights and

powers, and amongst them the right, in the event of insolvency, to transfer all of its assets in the manner provided by the laws of the state of its creation, for the purpose of paying its debts and distributing any surplus equitably among its members. This provision will be operative abroad, and creditors residing in the states in which it does business can not obtain priorities by attachment or otherwise in the distribution of its assets in such states, particularly where such creditors are members of the corporation. *Bockover v. Life Ass'n*, 77 Va. 85.

Suits in Name of Dissolved Foreign Corporation.—See ante, "After Dissolution," IV, B.

Stockholder's Liability.—See the title STOCK AND STOCKHOLDERS.

VI. Taxation of Foreign Corporations.

See the title TAXATION.

Foreign Countries.

See the title FOREIGN JUDGMENTS.

Foreign Deeds.

See the title DOCUMENTARY EVIDENCE, vol. 4, p. 763.

Foreign Executors and Administrators.

See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

Foreign Guardian.

See the title GUARDIAN AND WARD.

Foreign Insurance Companies.

See the titles INSURANCE; SERVICE OF PROCESS.

FOREIGN JUDGMENTS.

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See the title JUDGMENTS AND DECREES.

As to effect of another suit in foreign state. see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 19.

I. Definitions.

A. MEANING OF "FULL FAITH AND CREDIT."

"What is the true meaning and interpretation of the first section of this clause? 'Full faith and credit shall be given: "What is meant by 'full faith and credit?'" Does it import no more than, that the same faith and credit are to be given them, which by the comity of nations is ordinarily conceded to all foreign judgments? or is it intended to give them a more conclusive efficiency approaching to, if not identical with, that of domestic judgments; so that, if the jurisdiction of the court be established, the judgment shall be conclusive as to the merits? The latter seems to be the true object of the clause; and indeed it seems difficult to assign any other adequate motive for the insertion of the clause, both in the confederation and in the constitution.' 3 Story on the Const., § 1303, p. 178." *Black v. Smith*, 13 W. Va. 780.

B. WHAT JUDGMENTS CONSIDERED FOREIGN.

Judgments of Courts of Sister States.

—Under the constitution of the United States (U. S. Const., art. 4, § 1), which provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and authorizes congress to prescribe the manner in which such acts, etc., shall be proved and the effect thereof, judgments of another state of the union are not to be regarded here as foreign judgments, but are to have the same effect as judgments of our own courts. *Clarke v. Day*, 2 Leigh 172.

"The judgments, or decrees of the United States courts, held within the state, have never, so far as I am advised, been treated and held by our state courts as foreign judgments. Our state courts recognize and enforce the liens of the judgments of these courts,

when asked to do so." *Dickinson v. Railroad Co.*, 7 W. Va. 390.

District of Columbia.—A judgment of the circuit court of the District of Columbia is to be considered a foreign judgment in Virginia. *Draper v. Gorman*, 8 Leigh 628.

II. Conclusiveness and Effect.

A. OF JUDGMENTS OF SISTER STATES.

1. Statement of General Rule.

"The constitution of the United States (art. 4, § 1) requires that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.' The act of congress of May 26, 1790, after providing the mode by which they shall be authenticated, declares that 'said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken.'" Under the construction given to this act of congress, and the constitutional provision aforesaid, the judgment of a sister state must be accorded in the home state the same faith and credit which it has in the state where rendered. *Piedmont, etc., Life Ins. Co. v. Ray*, 75 Va. 821, citing *Bowler v. Huston*, 30 Gratt. 266, 274, 32 Am. St. Rep. 673; *Com. v. Levy*, 23 Gratt. 38; *Wells-Stone Mercantile Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1005; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872; *Gilchrist v. West Virginia, etc., Co.*, 21 W. Va. 115, 45 Am. Rep. 555; *Stewart v. Stewart*, 27 W. Va. 167; *DeEnde v. Wilkinson*, 2 Pat. & H. 663, citing *Clarke v. Day*, 2 Leigh 172; *Com. v. Levy*, 23 Gratt. 38; *Coleman v.*

Waters, 13 W. Va. 278; *Black v. Smith*, 13 W. Va. 780.

The record of a judgment or decree of a court of common pleas of a county in another state, in the absence of evidence to the contrary, is to be regarded as the evidence of a judgment of a court of general jurisdiction, and is entitled to every presumption in favor of its validity and regularity. *Stewart v. Stewart*, 27 W. Va. 167.

In *Coleman v. Waters*, 13 W. Va. 278, it is said: "Numerous decisions of state courts, holding a judgment fairly and regularly obtained in another state, as full and conclusive evidence of the matter adjudicated, have been made by numerous state courts. *Evans v. Totem*, 9 Serg. & R. 259; *Benton v. Burgot*, 10 Serg. & R. 240; *Kean v. Rice*, 12 Serg. & R. 203; *Baxley v. Lynch*, 4 Harr. (N. J.) 241; *Wemmag v. Pawling*, 5 Gill & J. (Md.) 507; *Clarke v. Day*, 2 Leigh 172; *Kemp v. Mundell*, etc., 9 Leigh 12; *Rogers v. Coleman*, Hard. (Ky.) 413; *Litt. (Ky.)* 273, 417; *Williams v. Purton*, 3 Mar. J. J. (Ky.) 604; *Fletcher v. Ferrell*, 9 Dana (Ky.) 377; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 165. See Robinson's (new) Practice, vol. 1, chs. 45, 46 and authorities there cited."

There has been some fluctuation of opinion in the English and American courts, upon the subject of the degree of respect which ought to be paid to foreign judgments. Sometimes it has been held, that they were not even prima facie evidence, the plaintiff being bound to prove his original demand, and the defendant being at liberty to go at large into the merits, as if no court had passed upon them. 2 Kent's Com. 118, et seq., where the cases are collected. At other times it has been held, that the judgment is prima facie evidence of the debt or demand, and conclusive until impeached by the other party as unjust, or shown to be irregularly or unduly obtained. *Sinclair v. Fraser*, in the house of lords, reported in a note to *Walker v. Witter*, 1 Doug.

4, and cited by Buller, J., in *Galbraith v. Nenille*, also reported in a note in 1 Doug. 6, a. From the remarks of Justice Buller it would seem that the doctrine maintained in these cases was, that the foreign judgment should have the same force as the judgments of a domestic court not of record. At length, however, an English court, in the case of *Martin v. Nicolls*, 3 Simon's Rep. 458, has decided that a foreign judgment is conclusive evidence and not re-examinable; and the vice-chancellor states this to be the true result of the old cases." *Draper v. Gorman*, 8 Leigh 628, 657.

"On the other hand, in the American state courts, the unbroken current of decision has been that foreign judgments, as contradistinguished from the judgments of the courts of a sister state, are not conclusive; and in general the defendant has been permitted to make the same defense to any action brought upon them, as he might have done to the original suit. That they were not conclusive, seems to have been taken for granted by the framers of the constitution, or the clause giving to congress the power to declare their effect would probably not have been inserted. But that a point once decided between the same parties should be regarded as a mere nullity, seems to be contrary to every principle of sound policy, and to the comity due to foreign states; whilst it would certainly be productive of much inconvenience and injustice, from the loss of evidence, by accident, or the lapse of time." *Draper v. Gorman*, 8 Leigh 628, 657.

The reason why we would enforce a decree, rendered by a court of competent jurisdiction in another state, is the fact that the constitution of the United States requires us to do so. For the wisest purposes the states when they formed and adopted the constitution of the United States provided in § 1, art. 4: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other

state." If this clause had not been inserted in the constitution and rigidly enforced by the judiciary in all the states, our relations as states to each other would have been anything but harmonious. Citizens by passing from one state to another could escape the effect of their contracts and obligations. It is not a question of state policy, whether we will or will not give effect to the judgments of courts of competent jurisdiction of other states. It is a question, whether we will in good faith live up to the constitutional obligations, which we have assumed. *Stewart v. Stewart*, 27 W. Va. 167.

2. Rule Applied to Particular Judgments.

Effect of Judgment of Another State upon Question of Assets.—In a suit pending in the court of probate of New Orleans, against the executors of a Louisiana testator, a certified copy of the record of a suit in Virginia against the administrator of the deceased, appointed by a court of competent jurisdiction in Virginia, was offered in evidence, and was held, by the supreme court of Louisiana, to be proper and sufficient evidence of a debt due from the estate. Held, the court here can not question the propriety of that decision, but it must give effect to the judgment rendered in accordance with it; and the judgment recovered against the executors of Louisiana, not having been satisfied by them, it is competent to pursue the assets in the hands of heirs and legatees in Virginia, and the court here will look only at the Louisiana judgment, and not go behind it into the merits of the case. *DeEnde v. Wilkinson*, 2 Pat. & H. 663.

A judgment entered and rendered as confessed, in pursuance of the law of the state of New Jersey, by virtue of and in pursuance of a warrant of attorney, being valid in the state of New Jersey, by virtue of the laws thereof, is entitled to "full faith and credit" in

this state, within the meaning of § 1, of article 4, of the constitution of the United States. *Coleman v. Waters*, 13 W. Va. 278.

A decree for alimony not in a divorce suit, rendered by an Ohio court having jurisdiction, will, at the suit of the wife against the husband, be enforced in this state. *Stewart v. Stewart*, 27 W. Va. 167.

Death by Wrongful Act.—A recovery in Virginia for negligently killing the plaintiff's intestate in West Virginia would be a complete bar to another action, here or elsewhere, for the same wrong; for it is not to be presumed that the rule of comity upon which a statute of one state is enforced in another, would be so far disregarded by the courts of the former state as not to give full force and effect to the proceedings in the latter state wherein a recovery is obtained. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 973, 14 S. E. 838.

3. Validity of Foreign Judgment.

a. Want of Jurisdiction.

(1) In General.

In order that the judgment of one state may have in another the effect provided for by the constitution of the United States, art. 4, § 1, and the act of congress made in May 26, 1790, the court in which the judgment was rendered must have had jurisdiction of the case when it pronounced the judgment. *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673.

Inquiry as to Jurisdiction.—Where the judgment of a sister state is sought to be enforced in the home courts, the jurisdiction of the court rendering the judgment may be inquired into, and if it appear that the court had not jurisdiction, the judgment will be void. *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872; *Gilchrist v. West Virginia, etc., Co.*, 21 W. Va. 115; *Stewart v. Stewart*, 27 W. Va. 167; *Johnson v. Anderson*, 76 Va. 766.

When a judgment or decree of the court of another state is sought to be enforced in a court in this state, the court in this state may inquire into the jurisdiction of the court, which rendered the judgment or decree, and if it appears that such court had no jurisdiction, the judgment or decree is void, but if it had jurisdiction, the judgment or decree is valid and binding in this state. *Stewart v. Stewart*, 27 W. Va. 167, citing *Gilchrist v. West Virginia, etc., Co.*, 21 W. Va. 115.

"By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. * * * While the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. * * * So, the writ of garnishment or attachment or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court." *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 32 S. E. 218.

(2) Particular Judgments and Decrees Considered.

Divorce Decree.—If, in answer to plaintiff's claim, a married woman sets up a plea of freedom from coverture by reason of a decree of divorce by a foreign court, the plaintiff may impeach such decree for want of jurisdiction whenever it is offered in evidence. *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. 639.

"In support thereof the defendant

offered the record of county court of Arapahoe County, Colorado. Plaintiffs then proved that at the time that such alleged divorce was granted, the defendants were both residents of the state of West Virginia, and claimed the divorce to be void. The defendants insist that this evidence was inadmissible under the general replication. The decree of divorce was void. This was the state of their residence, and here alone could they be freed from the bonds of matrimony. A decree obtained elsewhere is invalid and will be wholly disregarded. 2 Black on Judgments, § 927. Such a judgment or decree may be impeached for want of jurisdiction whenever offered in evidence against a stranger thereto who would be prejudiced thereby. Being neither a party to the divorce suit or entitled to manage the same, nor appeal from the judgment or decree, such stranger is allowed by law to impeach it whenever it is attempted to be enforced against him. 2 Freeman on Judgments, §§ 334, 335. The decree of divorce was properly impeached under the general replication, and the filing of the special replication in no manner injured the defendants. *Dower v. Seeds*, 28 W. Va. 113; *Chalfants v. Martin*, 25 W. Va. 394." *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. 639.

Enticement into Jurisdiction of Court.—In a bill for equitable relief against a foreign judgment, the first ground alleged by complainant is that he was improperly enticed to go to St. Louis for the purpose of giving the courts of that city jurisdiction. A sufficient answer to this claim is the allegation of the bill that before the court was called upon to decide this question the plaintiff here unconditionally appeared to the action, and on his motion had the same removed to the federal court. If, therefore, we concede that he was improperly sued in the state court in Missouri, we could not hold that the federal court to which he had voluntarily removed the case had not

jurisdiction. By his own action he selected the court by which the final judgment against him was pronounced. *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

Attachments in Equity.—Where the owner of a foreign judgment brought a suit in equity, and issued an attachment, and had it levied on lands on which there existed a deed of trust, the trustee in that trust was justified in resorting to a court of equity to have the trust enforced under its supervision, although the court, at the time, had no jurisdiction of attachments in equity for demands purely legal; and although, when these two suits were heard together, it was the duty of the court to have dismissed the bill in the attachment suit, yet the plaintiff in the attachment suit, having answered the bill in the other suit, attacking the trust deed as fraudulent as to the foreign judgment, said answer may be treated as a cross bill, and the latter suit retained, and the whole matter be there litigated and settled. *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451.

Decree to Foreclose Mortgage.—Against A., in Ohio, J. obtained a final decree to foreclose a mortgage securing two notes, and received all of first and part of second note. Twelve years later, without notice to A., a decree was entered for balance of second note. In the interval, J. filed his bill in this state, to attach A.'s land for the balance. A. answered that the cause of action arose July, 1868, and the suit was not brought within five years thereafter. J. then filed his supplemental bill, exhibiting a transcript of and setting up that last Ohio decree as a defense against the plea of the statute of limitations. To this A. demurred and plead nul tiel record. Held, the Ohio court having no jurisdiction of the cause when its last decree was entered, the decree is void, and the plea of nul tiel record must be sustained. *Johnson v. Anderson*, 76 Va. 766.

(3) Lack of Service or Appearance.

See the titles APPEARANCES, vol. 1, p. 667; SERVICE OF PROCESS.

(a) In General.

That the judgment of one state may have in another state the effect provided for by the constitution of the United States and the act of congress of May, 1790 (see §§ 4, 5), the court in which the judgment was rendered must have had jurisdiction of the case when it pronounced the judgment; and whether or not a defendant resides in the state in which the action is brought, he must be summoned, or appear in person or by attorney, in the suit, in order to give the court jurisdiction of the case, so as to give its judgment the effect in another state provided for by the constitution and act of congress. *Bowler v. Huston*, 30 Gratt. 266, 274, 32 Am. Rep. 673.

A judgment or decree in a court of a sister state, without service of process in any manner, and without appearance, is void in the home state. *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872; *Johnson v. Anderson*, 76 Va. 766; *Wilcher v. Robertson*, 78 Va. 602.

The following language was used by Tucker, P., in delivering the opinion of the court in *Wilson v. Bank of Mt. Pleasants*, 6 Leigh 574: "It seems to be agreed, on all hands, that the doctrine of the conclusiveness of the judgments of the respective states, is to be taken with the qualification that where the court has no jurisdiction over the subject matter or the person, or where the defendant has no notice of the suit, or was never served with process and never appeared to the action, the judgment will be esteemed of no validity."

In *D'Arcy v. Ketchum*, 11 How. 163, it was held, that "congress did not intend by the act of 1790 to declare that a judgment rendered in one state against the person of a citizen of another, who had not been served with

process or voluntarily made defense, should have such faith and credit in every other state as it had in the courts of the state in which it was rendered." *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 32 S. E. 218.

"It was admitted in the argument, that the cases of *Mills v. Duryee* and *Hampton v. M'Connel* have correctly decided, that the constitution of the United States, and the act of congress of 1790, have placed the judgments of the courts of the other states of the union, when sued on in this state, on the same ground, and to have the same effect, as they would have if sued on in the domestic tribunals of the state where such judgments were obtained. According to those decisions, a judgment of one state of the union is to be considered in the nature of a domestic judgment in every other state; the tribunals of which are to allow to it the same force and efficacy, which it has in the state where it is pronounced. Whether this broad proposition is subject to any exception, as where the party against whom the judgment has been obtained, has had no notice of the suit, though the judgment may be binding where it is pronounced, is a question, which I wish not at present to decide, or to intimate any opinion concerning, inasmuch as it does not arise in this case." *Clarke v. Day*, 2 Leigh 172, 175.

Whether or not a defendant resides in the state in which the action is brought, he must be summoned, or appear in person or by attorney, in the suit, in order to give the court jurisdiction of the case, so as to give its judgment the effect in another state provided for by the constitution and act of congress. *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673.

Manner of Entering Appearance.—To enforce a foreign judgment under the constitution of the United States, art. 4, § 1, and the act of May 26th, 1790, passed in pursuance thereof, "If the debtor will not appear

and defend himself, in person or by attorney, the creditor will go on to establish his claim in the mode prescribed by law; and if he does so, will obtain a judgment, which will have such effect in the state in which it is rendered as may be given to it by the law of that state; but it will have no effect in another state as a personal judgment against the debtor. The debtor, however, may appear and defend himself in person or by attorney; and if he does, then the case is tried, as if the creditor and debtor were the only parties to the suit, and as if the recovery of a personal judgment for the debt were the only object of the suit; and the judgment which may be recovered in such a proceeding will have the same force and effect everywhere as a judgment recovered in an ordinary suit between creditor and debtor. The record may show upon its face whether the debtor did or did not appear, and if it does, then the judgment will have effect accordingly. But it may not show upon its face whether the debtor did or did not appear. In that case the presumption would be in favor of the validity of the judgment. But the defendant would have a right in such case, by his pleading and evidence, to aver and prove the contrary; and he would have such right, even though the record should state upon its face that the defendant did appear. Of course we are now speaking of the effect of the judgment elsewhere than in the state in which it is rendered. Its effect there depends upon the law of that state." *Fisher v. March*, 26 Gratt. 765.

Appearance by Attorney.—In an attachment suit by F. against M., there is no service of process on M., or order of publication; but there is a declaration in assumpsit with a special and general count, and counsel appears for him and pleads, and the cause is tried by a jury and judgment for F. The record affords at least *prima facie* evidence that the counsel was authorized

to appear for M., and defend the action. *Fisher v. March*, 26 Gratt. 765.

"It is now settled, both in the federal and state courts with respect to foreign judgments, that a judgment debtor in an action against him on the judgment of another state may successfully defend by showing that the attorney who entered the appearance for him had no authority to do so. It has been held, otherwise as to domestic judgments, but the soundness of the ruling is doubted." *Wandling v. Straw*, 25 W. Va. 692.

Service by Order of Publication.—

Where the subject matter of the controversy was situated in the foreign state, but the defendants were not residents of that state, and were not personally served with process, but were notified by order of publication, and the statutes of the foreign state conferred authority to thus proceed against absent defendants, a plea of want of jurisdiction in the foreign court will be rejected. *Burtner v. Keran*, 24 Gratt. 42; *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

Affidavit to Order of Publication.—

A judgment or decree rendered in one state, authorizing the sale of decedent's lands there to pay his debts, but which is void as to his heirs, is not admissible against them in a suit in another state to subject the lands of the decedent situated there to the payment of the same debts. "Another point made against the decree is that the most important parties, the heirs of Hull, whose lands were to be sold, were not before the court, because the affidavit on which rested the order of publication against them as nonresidents was made before a notary in Virginia, and the certificate is simply signed by him, and is without notarial seal, and also wants a certificate of a clerk or other officer of a court of record of Virginia under official seal, verifying the genuineness of the signature of the notary, and his authority to administer oaths, as required

by W. Va. Code, ch. 130, § 31. This objection is well taken. A party must be served with process, and thus brought before the court, unless he be one against whom publication may be made, and the fact justifying such order must be made to appear as the law points out. The law requires an affidavit to establish that fact as a prerequisite or foundation for the order, and that affidavit, if made out of the state, must be certified as required by statute, to be admissible to show the fact of nonresidence." *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

(b) Particular Judgments and Decrees Considered.

Proceedings against Foreign Corporations.—

By the construction which the New York courts put upon the New York statutes authorizing proceedings against foreign corporations, no judgment in personam can be rendered in that state against a foreign corporation, unless it has appeared to the action. *Gilchrist v. West Virginia, et al., Co.*, 21 W. Va. 115, 45 Am. Rep. 555.

A judgment in New York under the code of procedure of that state against the members of a dissolved partnership, one of whom was not served with process and did not appear in person or by attorney in the suit, is not such a judgment as is contemplated by the constitution and act of congress, as to such person. *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673.

In *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 32 S. E. 218, the court distinguishes *Bowler v. Huston*, as follows: "The appellee cites the case of *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673, where it is claimed the question is thoroughly discussed; but it can not be said to cover the question raised in the case at bar. That was an action to enforce a personal judgment rendered by a New York court against *Bowler*, wherein there had been neither service of process

nor appearance in person or by attorney. So, there was nothing upon which to found a judgment, and the record was an absolute nullity, and no question was raised of a judgment in rem, or involving a garnishee or substituted service in the case; and yet, under the statutes of New York, the judgment was a valid personal judgment as far as Bowler's interest was concerned in the firm with which he was surety."

Judgment on Void Contract.—While the judgment of a competent court of any state that has jurisdiction over the person or subject matter is conclusive upon the merits of the controversy in every state, a court of another state has not the power, without service of process or voluntary appearance, to render a judgment on a contract which is absolutely void under the statute of the state where it is made. If such a void contract is sued on in a foreign jurisdiction, the garnishee must make defense to the action, or notify, if practicable, his absent creditor of the pendency of the attachment proceedings, that such creditor may make such defense; otherwise, a judgment rendered by default will not protect the garnishee when sued by his creditor. *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101; Brannon, P., dissenting.

Judicial Sales.—"Jurisdiction of the cause and parties is essential to the conclusiveness of the judgment or decree. To acquire jurisdiction of the defendant,* it is necessary that in some appropriate way he be notified of the pendency of the suit. If upon inspection of the record, it appears that no such notice had been given, the judgment or decree is void. On the other hand, if it be a judgment or decree of a domestic court of general jurisdiction, and the record declares that notice has been given, such declaration can not be contradicted by extraneous proof. * * * The record is conclusively presumed to speak the truth, and can be tried only by inspection. * * *

And especially is this so in respect to decrees under which sales are made to bona fide purchasers." *Wilcher v. Robertson*, 78 Va. 602.

Confession of Judgment.—In debt on a judgment rendered in the state of Ohio, upon confession, under a power of attorney made before the action brought, defendants plead that they never executed such power of attorney, and had no notice of the commencement or pendency of the suit in Ohio. On general demurrer to the plea, held, it was well pleaded, and a good bar. *Wilson v. Bank of Mount Pleasants*, 6 Leigh 570.

In a suit to enforce a judgment recovered in a foreign attachment proceeding, a plea "that the judgment now sued on was obtained under foreign attachment proceedings, by virtue of the location within the jurisdiction of the court rendering the said judgment of certain effects of said defendant, to protect which said effects, John C. Bullett, an attorney practicing in said court, appeared; and that the said judgment was obtained by virtue of and against those effects only; and that therefore no action thereupon can be entered in this court against said defendant," is bad. *Fisher v. March*, 26 Gratt. 765.

In a suit by attachment, if the plaintiff recovers judgment against the defendant without his appearance, such judgment will have no effect in another state as a personal judgment against the debtor. But if the defendant appears and defends himself in person or by attorney, then the judgment will have the same force and effect everywhere, as a judgment recovered in an ordinary suit. *Fisher v. March*, 26 Gratt. 765.

Service on Codefendant.—A judgment rendered in another state against all the members of a partnership, after the dissolution of the partnership, does not personally bind a member of said partnership not served with process and not appearing in the case, although

the other members were served, or appeared and caused an appearance to be entered for all. *Wilson v. Bank of Mount Pleasants*, 6 Leigh 570, 574.

(c) Contradiction of Foreign Record.

It is perfectly competent for a defendant in an action in one state, on a judgment rendered in another, to plead and show in his defense that he was not summoned, and did not appear, in person or by attorney, in the suit in such other court; and, that too, even though it be expressly stated in the record of the suit in that court that he was actually summoned and did so appear. *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673.

"While a judgment of a sister state, if valid, is given here the same effect it has there, yet, consistently with this rule, we can look into its record to see whether it had jurisdiction of the defendant; and, looking into the record of this judgment, we find no service whatever of the scire facias, personal or by return of nihil, or any appearance, and therefore the judgment is void, as would be a judgment here, for that cause. *Gilchrist v. West Virginia, etc., Co.*, 21 W. Va. 115; *Stewart v. Stewart*, 27 W. Va. 167." *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872.

"In regard to the construction and effect of the provisions of the constitution of the United States and the act of congress aforesaid, it has been repeatedly held, and is firmly established by decisions of the supreme court of the United States, and of many, if not most of the several states, that the effect thus given in an action in one state upon a judgment obtained in another, is based upon the assumption that the court in which the judgment was obtained had jurisdiction of the case when it pronounced such judgment. It is not necessary, of course, that a defendant against whom a judgment is obtained should reside in the state in which the judgment is rendered, in or-

der to give the court rendering the judgment jurisdiction of the case. It will have such jurisdiction, though the defendant be a nonresident of the state, if he be summoned therein, or appear in person, or by attorney, to the suit. But whether he reside therein or not, he must be so summoned, or appear, in order to give the court jurisdiction of the case, so as to give its judgment the effect in another state provided for by the constitution and act of congress aforesaid. And it is perfectly competent for a defendant in an action in one state, on a judgment rendered in another, to plead and show in his defense that he was not summoned and did not appear in person or by attorney in the suit in such other court; and that, too, even though it be expressly stated in the record of the suit in that court that he was actually summoned or did so appear. The judgment is not conclusive on either of those points, though it may be conclusive on the merits if the court have jurisdiction of the case." *Bowler v. Huston*, 30 Gratt. 266, 274, 32 Am. Rep. 673.

Parol Evidence.—"The proof of service contained in a record from a sister state of the American Union is only prima facie correct, and may be contradicted by parol evidence, notwithstanding the fact that the constitution of the United States requires that full faith and credit be given them." *Wells-Stone Mercantile Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006.

In an action of debt on a foreign judgment, to which the defendant puts in a plea of "no such record," and that no service was ever made on him, he may show by parol testimony that he was not served with process and that there was, in fact, no judgment binding him, or in any way enforceable against him. *Wells-Stone Mercantile Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006.

Foreign Partnership.—A judgment rendered in another state, against all

the former members of a dissolved partnership, will not personally bind one of the partners who was not served with process and did not appear, although by the law of that state such judgment is enforceable against the joint partners; and in an action on such judgment in Virginia, such partner may show that he was not served and did not appear, although the record states that he was summoned and appeared. *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673.

In a suit by foreign attachment, if the plaintiff recovers judgment against the defendant, without his appearance, the record may show upon its face that the debtor did or did not appear; and if it does, the judgment will have effect accordingly. If the record does not show whether he did or did not appear, the presumption is in favor of the validity of the judgment. But in such case, if the record does not state that the debtor did or did not appear, or even if it states that he did appear, in a suit upon this judgment in another state, the defendant may, by his pleading and evidence, aver and prove the contrary. *Fisher v. March*, 26 Gratt. 765.

Sufficiency of Order of Publication.—It was held, in a West Virginia case, that although the decree of a Virginia court sought to be enforced there, states that the nonresidents had been "regularly proceeded against by order of publication, as the law provides," it is competent to show that the "affidavit on which rested the order of publication against them as nonresidents was made before a notary in Virginia, and the certificate is simply signed by him, and is without notarial seal, and also wants a certificate of a clerk or other officer of a court of record of Virginia under official seal, verifying the genuineness of the signature of the notary, and his authority to administer oaths, as required by Code, ch. 130, § 31. This objection is well taken. A party must be served with process, and

thus brought before the court, unless he be one against whom publication may be made, and the fact justifying such order must be made to appear as the law points out. The law requires an affidavit to establish that fact as a prerequisite or foundation for the order, and that affidavit, if made out of the state, must be certified as required by statute, to be admissible to show the fact of "nonresidence." *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

(4) Presumption as to Jurisdiction.

If the court of another state, which rendered a judgment sought to be enforced in the home state, is a court of general jurisdiction, the presumption is that it had jurisdiction of the particular case, and to render the judgment void, this presumption must be overcome by proof. *Gilchrist v. West Virginia, etc., Co.*, 21 W. Va. 115; *Stewart v. Stewart*, 27 W. Va. 167.

If the record of the foreign state does not show whether the defendant did or did not appear, the presumption is in favor of the validity of the judgment. *Fisher v. March*, 26 Gratt. 765.

K. conveys land in Illinois to B., with general warranty. B. conveys this land to his two infant children, C. and M., with general warranty. B. afterwards removes to Virginia, and here conveys the same land to K. with general warranty; and K. then obtains a conveyance of the land from L., the prior owner. K. files a bill in equity in the proper court in Illinois, which has both common-law and equity jurisdiction, against B. and C. and M., to establish his claim to the land. A formal answer is filed by a guardian ad litem for the infants, and B. is proceeded against by publication, according to the laws of Illinois. Upon the hearing, the court decides in favor of the infant children, C. and M., and dismisses K.'s bill. K. then sues B. in Virginia in covenant on the general warranty of title in the deed from B. to him. The

issues were upon the pleas of covenants performed, covenants not broken, and a general plea of non est factum. On the trial K. offers in evidence the record of the suit in Illinois. Held, the fact that B. had no notice of the suit, is not a valid objection to the record as evidence in the cause; it having been proceeded in according to the laws of Illinois. The Illinois court being a court of general jurisdiction, this court must presume that it had jurisdiction to try the cause in equity; and the record can not be objected to on that ground. *Burtners v. Keran*, 24 Gratt. 42.

b. Judgment Obtained upon Void Contract.

It could never have been contemplated by the framers of the constitution of the United States to include among judgments entitled to "full faith and credit," under § 1, art. 4, a judgment obtained upon a contract absolutely void under the laws of the state where it was made, and upon substituted process. *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 32 S. E. 218, Brannon, P., dissenting. Compare *Vaught v. Meador*, 99 Va. 569, 576, 39 S. E. 225, 86 Am. St. Rep. 908.

c. Fraud and Collusion.

That the judgment was obtained by fraud, is a defense which may be made to a foreign judgment. *Draper v. Gorman*, 8 Leigh 628, 657; *Com. v. Levy*, 23 Gratt. 38, 41.

A record, legally authenticated, of the proceedings of a court of competent authority, in any other of the United States, is conclusive evidence in the courts of this state, to show that a judgment was rendered, and that the party was compellable to pay the amount recovered against him; but it may be opposed by proof of fraud or collusion. For this proposition, *Buford v. Buford*, 4 Munf. 421, was cited with approval in *Ray v. Clemens*, 6 Leigh 602; *Wilkinson v. Jett*, 7 Leigh

115; *Draper v. Gorman*, 8 Leigh 636, 639, 654. In *Ray v. Clemens*, 6 Leigh 602; *Buford v. Buford*, is distinguished from the case at bar.

If a nonresident complainant, seeking to enforce a foreign judgment in this state, has obtained property of the defendant by fraud, so that he could be treated as trustee for the defendant, the parties should be restored to the positions they occupied before the fraud was committed, or the value of the property should be set off against the judgment, and, if there be an excess, a decree should be rendered therefor in favor of the defendant against the complainant. *Vaught v. Meador*, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908.

In *Buford v. Buford*, 4 Munf. 241, this court, a few months after the decision of *Mills v. Duryee*, 7 Cranch. 481, and probably without knowing of its existence, admitted the records of two judgments obtained in Kentucky, as conclusive evidence between the parties in the suit here, for the purpose of proving what they were calculated to prove; taking care, however, not to prohibit evidence on the part of the defendant, showing that they were fraudulently or collusively obtained. That was not an action upon the judgments. *Draper v. Gorman*, 8 Leigh 628, 657.

d. Mistake.

That the judgment is founded in mistake, is a defense which may be made to a foreign judgment. *Draper v. Gorman*, 8 Leigh 628, 657.

But Mr. Robinson in the sixth volume of his Practice, at page 438, says: "If the defendant was duly served with process, or appeared and made defense, and thus the court, which gave the judgment, had jurisdiction, the validity of the judgment can not be questioned in another state, because of mistake of the court, which gave it, or on any other ground." *Black v. Smith*, 13 W. Va. 780. Compare *Piedmont Coal*, etc.,

Co. v. Green, 3 W. Va. 54, 98 Am. Dec. 799.

e. Validity by Local Law.

That the judgment is irregular and void by the local law, is a defense which may be made to a foreign judgment. *Draper v. Gorman*, 8 Leigh 628, 657.

4. Construction of Statute of Foreign State.

If the validity of a foreign judgment depends upon the construction of the statutes of the state in which the foreign court rendered the judgment, the home courts will adopt the construction put upon the statutes by the courts of the state which enacted them. *Gilchrist v. West Virginia, etc., Co.*, 21 W. Va. 115.

5. Validity of Contract on Which Judgment Rendered.

It seems beyond controversy that the validity of the contract upon which a judgment is rendered by a court of competent jurisdiction in a foreign state, is established by the judgment, and the judgment must be given the same credit and effect in this state, in which it is sought to be enforced, as it had in the state where rendered. *Vaught v. Meador*, 99 Va. 569, 576, 39 S. E. 225, 86 Am. St. Rep. 908, citing *Clarke v. Day*, 2 Leigh 172, to the same effect. See *Clarke v. Day*, 2 Leigh 172, cited in *DeEnde v. Wilkinson*, 2 Pat. & H. 663, 665; *Coleman v. Waters*, 13 W. Va. 278, 313; *Black v. Smith*, 13 W. Va. 780; *Draper v. Gorman*, 8 Leigh 628, 630, 657. But see *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 33 S. E. 218.

Execution of Contract.—In a suit upon a foreign judgment, the question whether the agent who made the contract was authorized to make it, is concluded by the judgment. *Fisher v. March*, 26 Gratt. 765.

Legality of Contract.—In a suit upon a foreign judgment, the question whether it was an illegal contract on which the judgment was recovered, is

concluded by the judgment. *Fisher v. March*, 26 Gratt. 765.

6. Operation as Res Adjudicata.

See the title FORMER ADJUDICATION OR RES ADJUDICATA.

a. In General.

It is well settled that an adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially connected with the subject matter coming within the legitimate purview of the original action, both in respect to the matters of claim and defense. It is not even essential that the matters should have been formally or distinctly put in issue in a former suit. It is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits, if they had introduced all their evidence, and the court had properly understood the facts, and correctly applied the law to the facts. If either party fails to present all his evidence, or mismanages his case, or afterwards discovers additional evidence, or if the court itself decides erroneously, nevertheless the judgment or decree, until vacated or corrected by appeal, or in some other appropriate manner, is as conclusive upon the parties as though all such legitimate and incidental matters had been litigated, and the controversy settled in accordance with the principles of abstract justice. The mere fact that abstract justice has been defeated by reason of the negligence of the injured party, or the erroneous rulings of the court, will not impair the validity and conclusiveness of the judgment or decree. All such matters will be held to be res adjudicata in any subsequent litigation between the same parties or their privies. *Corrothers v. Sargent*, 20 W. Va. 351; *Tracey v. Shumate*, 22 W. Va. 474; *McCoy v. McCoy*, 29 W. Va.

794, 2 S. E. 809. The rule above announced applies not only to judgments and decrees pronounced in the courts of the same state, but, under the provisions of the federal constitution, it is extended and applies to the judgments and decrees rendered by the courts of any state of this union, whenever questioned or assailed in a sister state, provided there was personal service upon, or an appearance by, the party complaining to the action in the sister state. *Black v. Smith*, 13 W. Va. 780; *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

Issues to Be Determined.—In a suit brought in the state of Maryland to enforce the vendor's lien, on a contract for the sale of real estate, lying partly in Maryland and partly in Virginia, a decree of the Maryland court, directing a sale of the Maryland lands only, and when neither the court nor the parties to the suit contemplated a sale of the Virginia lands, such decree neither determines nor concludes anything respecting the title to the lands in Virginia, nor does the Maryland decree operate as an estoppel to inquiry in a subsequent suit by a Virginia court into the question of title to the lands in Virginia. *Piedmont Coal, etc., Co. v. Green*, 3 W. Va. 54, 98 Am. Dec. 799.

Persons Concluded.—A foreign judgment has no effect against any party except the defendant and those claiming under him, posterior to the judgment. *Kitty v. Fitzhugh*, 4 Rand. 600.

Parties by Representation.—"Now, that decree of the court of last resort in New York must be final and conclusive, not only as to the property in New York, but also as to the property in Virginia; unless it be true that the United States did not legally represent the trust or that the courts in New York had no jurisdiction of the subject, so far as the real estate in Virginia is concerned." *Com. v. Levy*, 23 Gratt. 38, 41.

L., a citizen of New York, dies, leav-

ing a will, which is duly admitted to record there. He owned an estate, real and personal, in New York, the residuum of which was valued at \$306,000, and he owned the farm, called Monticello, in Virginia, valued at not more than \$10,000. By his will he gave the residue of his estate, including Monticello, to the people of the United States, in trust, for the establishment and maintenance, at Monticello, of an agricultural school, for the purpose of educating as practical farmers, the children of warrant officers of the navy of the United States, etc. If the United States declined to accept the trust, he gave the property, on the same trusts, to the state of Virginia. The executors of L. instituted a suit in equity, in New York, asking the instructions of the court in the administration of the estate; and in that suit the United States was a party, and appeared to maintain the devise and bequest. In this suit the court held the trust void. In a suit in Virginia, by the heirs of L., for the partition of Monticello, Virginia is made a party. Held, the United States represented the trust in the New York suit; and the decree in that suit is conclusive upon Virginia, though she was not a party. *Com. v. Levy*, 23 Gratt. 38, 41.

Action for Death by Representative.—Where the plaintiff's intestate is killed, through the defendant's negligence, in West Virginia, and the plaintiff institutes his action in Virginia to recover damages therefor where the defendant is found, a judgment of the Virginia court would be a bar to an action by an administrator appointed in West Virginia, brought in that state against the defendant, the rights of the parties being determinable by the laws of that state, which do not provide that suit shall be brought only by a personal representative appointed there. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

Heirs.—A record of a judgment against heirs in one state, authorizing

the sale of decedent's lands situated there for the payment of his debts, is not admissible as against such heirs in an action in another state to subject lands of decedent situated therein to the payment of the same debts, either for the purpose of establishing them or fixing their amounts. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

As to What Conclusive.—A record, legally authenticated, of the proceedings of a court of competent authority, in any other of the United States, is conclusive evidence in the courts of this state, to show that a judgment was rendered, and that the party was compellable to pay the amount recovered against him. *Buford v. Buford*, 4 Munf. 241, 6 Am. Dec. 511.

Suit to Enforce Vendor's Lien.—In a suit brought in the state of Maryland to enforce the vendor's lien on a contract for the sale of real estate, lying partly in Maryland and partly in Virginia, a decree of the Maryland court, directing a sale of the Maryland lands only, and when neither the court nor the parties to the suit contemplated a sale of the Virginia lands, such decree neither determines nor concludes anything respecting the title to the lands in Virginia, nor does the Maryland decree operate as an estoppel to inquiry in a subsequent suit by a Virginia court into the question of title to the lands in Virginia. *Piedmont Coal, etc., Co. v. Green*, 3 W. Va. 54, 98 Am. Dec. 799.

A party files his bill in the county court of Alleghany county, Maryland, to enforce vendor's lien and for a sale of real estate, lying partly in the state of Maryland and partly in the state of Virginia, to satisfy unpaid purchase money. The Maryland court decreed the payment of the purchase money, and in default a sale of the lands in Maryland, and that the proceeds of sale be applied pro tanto to the payment of the purchase money; the court first seeing that the title to the Maryland lands was perfected before sale,

and the dower right of the vendor's wife relinquished. Held, that the Maryland court might have decreed a sale of the lands in Virginia also, and applied the proceeds to the payment of the purchase money, and as incidental thereto it might have compelled the parties before it to unite in conveying the Virginia lands to its commissioner, and had them sold and conveyed to him under its order, and it might upon having proper case made requiring an investigation of the validity of the vendor's title to the Virginia lands, have instituted an inquiry in that behalf, and tested the title to the same by the laws of Virginia. And however inconvenient, and perhaps unsatisfactory, such an investigation might have proved in foreign court, and however appropriate and preferable it might be supposed to have had the question of title to the Virginia lands investigated and determined under the laws of Virginia by a Virginia court, yet the decree of the Maryland court is conclusive upon the parties in such case of everything so considered and in fact determined, unless perhaps the Virginia court should plainly see that the Maryland court had clearly mistaken the law of Virginia applicable to the case. *Piedmont Coal, etc., Co. v. Green*, 3 W. Va. 54, 98 Am. Dec. 799.

Settlement of Partnership Transactions.—If a chancery suit be brought in a court of competent jurisdiction in another state, by some members of a copartnership lately doing business therein, against all the other partners, some of whom were residents of this state, to settle all the transactions of the partnership, and to compel the several partners to account with each other, and such defendants appear and file their answers in said case, adopting the allegations of the bill, and joining with the plaintiffs in the prayer for relief in the bill, and a final decree is rendered therein, decreeing to the several members of said copartnership

the amounts due to each of them respectively, the rights of the said parties in regard to the matters embraced in said suit, are concluded by such decree. If one of said resident defendants collect the amount decreed to his codefendant, and he be sued by such codefendant in this state to recover the same, such defendant will not be permitted to set off against said demand any debt or claim held by him before such final decree arising out of such partnership, which was, or might have been settled thereby, and he will be estopped by such decree from alleging or proving that less was due to such codefendant when such decree was rendered, than the sum thereby decreed to him. *Hunter v. Stewart*, 23 W. Va. 549.

b. Another Suit Pending in Foreign State.

It seems to be well settled that the pendency of a suit for a matter in a foreign state or territory is no bar to an action for the same matter in another state, either at law or in equity. The states in a jurisdictional sense are foreign to one another. The judgment of the court of another state does not merge the original cause of action in the home state. *Davis v. Morriss*, 76 Va. 21; *Beall v. Taylor*, 2 Gratt. 532.

Judgment of Another State Does Not Merge Specialty on Which It Is Founded.—A judgment was recovered in the state of Maryland against a debtor, upon his covenant binding his heirs; the debtor then died leaving no estate in Maryland, but leaving real estate in Virginia. Held, the judgment does not merge the specialty on which it is founded, so as to exonerate the heirs from liability thereon, in respect to real estate descended in Virginia. *Beall v. Taylor*, 2 Gratt. 532.

It will be observed that this case was decided prior to the enactment of the statute (Va. Code, 1887, § 2665), making the real estate of a decedent assets for the payment of his debts in the same order as personal estate.

7. Lien of Judgment.

See the title JUDGMENTS AND DECREES.

The judgments of foreign courts do not constitute liens upon lands within this state. A judgment rendered by a court in the state of Ohio is not a lien upon lands in this state. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

8. Extraterritorial Force and Effect.
a. Judgments in Rem.

"No court, which is but a creature of the state, can, by its judgments or decrees, directly bind or affect property beyond the limits of that state; and hence it is axiomatic that no writ of sequestration, or execution, or order, judgment or decree of a foreign court, can be directly enforced against real estate situate without the limits of the foreign state." *Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536. See also, *Dickinson v. Hoomes*, 8 Gratt. 353, 410; *Vanmeter v. Vanmeters*, 3 Gratt. 148.

It is true that if a court of one state or foreign country has a person before it, subject to its jurisdiction, it may, by action direct upon him, affect property in another state or country by operating on the person by compelling him to make a personal conveyance of the land there, or do any act which, of itself, without regard to the decree, would affect the land according to the *lex rei sitae*; but the cases so holding admit that the decree, in and of itself, does not affect the foreign property, but affects it only indirectly by operating in personam to compel a transfer according to the decree, and that the court of the state where the land is located may disregard the decree. If the conveyance is made pursuant to the decree, it is that, not the decree, which passes title. *Massie v. Watts*, 6 Cranch 160; *Farley v. Shippen*, Wythe 254; *Guarrant v. Fowler*, 1 Hen. & M. 5; *Dickinson v. Hoomes*, 8 Gratt. 353, 410; *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367.

A judgment or decree of a court of another state has no effect to pass title

to or affect land in this state, nor can a sale or conveyance under it by a trustee or commissioner appointed by it do so. *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367, citing *Dickinson v. Hoomes*, 8 Gratt. 353, 410.

b. Judgments in Personam.

But it is settled law that equity will compel a party within the jurisdiction of the court, who has a legal title to land in a foreign jurisdiction, to convey the land to another party before the court, who is entitled to such conveyance. *Chapman v. Pittsburg, etc.*, R. Co., 26 W. Va. 299, citing *Dickinson v. Hoomes*, 8 Gratt. 353, 410.

Decrees of the courts of this state will not operate to transfer title to land in another state, but with respect to all matters and things properly adjudicated and determined by the court, they are binding upon the consciences of the parties thereto; and when a decree finds and determines the equities of the parties in respect to land in another state, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action or ground of defense in the courts of the state where the land is situate, and is there entitled to the force and effect of record evidence of the equities therein determined, unless impeached for fraud. *Vaught v. Meador*, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908, citing *Poindexter v. Burwell*, 82 Va. 507; *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36. See *Burtner v. Keran*, 24 Gratt. 42; *Piedmont Coal, etc., Co. v. Green*, 3 W. Va. 54, 98 Am. Dec. 799.

Rights growing out of trust or contract, or founded upon a fraudulent violation of the principles of equity, as between man and man, are purely personal, and will consequently be upheld and enforced both by law and equity whenever jurisdiction has been acquired over the parties, without regard to the nature or situation of the prop-

erty in which the controversy has its origin, and even when the relief sought consists in a decree for the conveyance of land which lies beyond the control of the court, and can only be reached through the exercise of its power over the person. *Chapman v. Pittsburg, etc.*, R. Co., 26 W. Va. 299.

It has also been held, that a court of equity, having jurisdiction of the parties, has the power to compel the defendant to release and discharge an apparent cloud upon the title to land situated in another state. On the same principle, if a title or power affecting lands in another state was obtained by duress or fraud, a personal decree may be had, upon proper averments, vacating such title or power. Or if such lands have been converted into money, or money has been realized from them, by one acting under a fraudulent title or power, he can be compelled to account, either in law or equity, as the nature of the accounts or the character of the relief may require. *Vaught v. Meador*, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908.

A final judgment or decree of the court of appeals of New York, in a suit to enforce a trust arising ex contractu, is res adjudicata in the courts of Virginia in the absence of fraud, though concerning real estate in this state. *Com. v. Levy*, 23 Gratt. 38.

"When the object of the suit is to enforce a trust arising ex contractu, or from any other source, the situation of the land will be immaterial, and a remedy may be given by a decree in personam, establishing the trust, or for a conveyance of the land in question; and the jurisdiction arising under these circumstances will not fail because it is incidentally necessary to decide on title. See also, *Dickinson v. Hoomes*, 8 Gratt. 353." *Com. v. Levy*, 23 Gratt. 38.

Foreclosure of Mortgage.—Where real estate conveyed to a foreign railroad company is attached in this state

for the debts of said company, and a defendant claims the property under deed, ordered to be made under proceedings in a foreign court to foreclose a mortgage on the "railroad," and the pleadings in said cause do not assert that the mortgage covers the said property in this state, but the court without passing on the question orders the trustee to sell "all the right, title and interest of the railroad in West Virginia, which passed under said mortgage," and a deed was ordered to be made for such interest, the courts of this state without reference to any conflict of jurisdiction, are left free to decide whether any thing passed under said mortgage. *Chapman v. Pittsburg, etc.*, R. Co., 26 W. Va. 299.

When a mortgage was executed by a Pennsylvania railroad company authorized under its charter to build a road "from near Pittsburg, Pennsylvania, in the direction of Steubenville, Ohio, to the Pennsylvania state line," and the said mortgage grants the whole of their railroad; and other property "situated between and at the terminus of their railway at the city of Pittsburg and the boundary line of the state of Virginia in the counties of Alleghany and Washington in the state of Pennsylvania," it conveyed no property whatever in the state of Virginia. *Chapman v. Pittsburg, etc.*, R. Co., 26 W. Va. 299.

Laches.—A decree of a court of another state, for the conveyance of land in Virginia, will not be enforced in equity against bona fide purchasers without notice, or even against the heirs of a party against whom the decree was rendered, after the lapse of thirty years from the date of the decree before the institution of the suit. *Masie v. Greenhow*, 2 Pat. & H. 255.

B. OF JUDGMENTS OF TRIBUNALS OF FOREIGN COUNTRIES.

Judgment of Foreign Court of Admiralty.—"The general result of the

above cases is, that, in Great Britain, the sentence of a foreign court of admiralty seems to be regarded as conclusive to all purposes. The decision in the supreme court of the United States is to the same effect. In New York and Pennsylvania, the law is now established, that such a sentence (though it binds the property) is not conclusive evidence in any other respect, 'except of acts and doings' of the tribunal by which it is pronounced." Note in original edition. *Hadfield v. Jameson*, 2 Munf. 53.

Quære, how far is the sentence of a foreign court of admiralty, or other foreign tribunal, to be regarded as evidence by the courts of Virginia. *Hadfield v. Jameson*, 2 Munf. 53. See also, *Bourke v. Granberry*, Gilm. 16, 9 Am. Dec. 589.

The sentence of condemnation of a foreign court of admiralty is not conclusive of the facts that the property and owner were enemies, in a suit between the underwriter and the insured on a policy. *Bourke v. Granberry*, Gilm. 16, 9 Am. Dec. 589.

Authentication.—See post, "Authentication and Proof," IV.

What is sufficient evidence to authenticate, in the courts of this country, the sentence, or act, of a foreign tribunal, or government; after a destruction of such government by revolution or conquest. (*St. Domingo*.) *Hadfield v. Jameson*, 2 Munf. 53.

C. OF JUDGMENTS OF FEDERAL COURTS.

The district court of the United States, and also the circuit court thereof, held within this state, are in many respects domestic courts. These courts administer the laws of the United States in the several states; but they administer also the laws of each state, and follow, to a very great extent, the system of judicature of each, in their respective districts; pursuing, in most cases, the practice, and deferring to their decisions; binding lands

by their judgments, and issuing process to every part of their jurisdiction, without pretention, generally, of power to act upon the people of the territory, of another state. And in the execution of these duties, some are engaged in untangling the complicated system of land laws, altogether peculiar to one state; some look for the lights of legal science to the common law, while others draw their principles from the fountain of the institutes, or the pages of the Code Civie. Opinion of Tucker, judge, in *Draper v. Gorman*, 8 Leigh 628, 657. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

The 19th section of ch. 130 of the West Virginia Code of 1868, providing that "the records and judicial proceedings of any court of the United States, or of any state, attested by the clerk thereof, with the seal of the record annexed, if there be a seal, and certified by the judge, chief justice, or presiding magistrate of such court, to be attested in due form, shall have such faith and credit given to them in every court within this state, as they have in the courts of the state, territory, or district whence the said records come," does not apply to the records and judicial proceedings of the district court of the United States, held within this state. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Bankruptcy.—The record of the proceedings of a district court of the United States showing that a commission in bankruptcy issued in 1801 was vacated in 1830, must be read as one entire and connected suit, and is admissible in evidence in the courts of this state to show that the adjudication in bankruptcy should be disregarded. The judgment of that court can not be attacked collaterally. *Harman v. Stearns*, 95 Va. 58, 27 S. E. 601.

Want of Jurisdiction.—To render a judgment binding, the court must have jurisdiction of parties as well as of subject matter. Jurisdiction of courts of general powers will be presumed,

until contrary is shown. Jurisdiction of courts of limited powers must be affirmatively shown. And the former stand upon same footing with the latter, when not acting within scope of their powers, but under special statutory authority. In this case it appears affirmatively that the United States district court sitting in bankruptcy upon the application of P., had no jurisdiction over the lands of R., which had not been surrendered, and against which P., the bankrupt, had no claim. It, however, entered a decree fixing and attaching liens upon the lands of R. Held, the decree is void, and wherever and whenever called in question, may be so treated. *Richardson v. Seevers*, 84 Va. 259, 4 S. E. 712.

D. OF JUDGMENTS OF COURT OF DISTRICT OF COLUMBIA.

To an action of debt brought in Virginia against executors, upon the judgment of the circuit court of the District of Columbia, which had been recovered against their testator, the defendants tendered the plea of nil debet, and a special plea alleging that the judgment of the circuit court was recovered on a bill of exchange drawn by their testator, while in a state of intoxication, for money won at gaming. Held, the constitution and act (see § 4, and 2 Story's Laws, U. S., page 948), apply to the states and territories of the union, and not to the District of Columbia: and the judgments of the District of Columbia are upon the same footing as foreign judgments; and that the plea of nil debet ought to have been received, but the second plea was properly rejected. *Draper v. Gorman*, 8 Leigh 628, 657.

III. Actions on Foreign Judgments.

A. JUDGMENT AS CAUSE OF ACTION.

Suit to Avoid Fraudulent or Voluntary Conveyance.—A foreign judgment is a debt; and a suit in equity can be

maintained on it to avoid a fraudulent or voluntary conveyance without first obtaining a judgment at law in this state under § 2, ch. 133, of the West Virginia Code of 1868. "A foreign judgment is a debt, for the recovery of which the creditor is entitled to all the remedies applicable to other debts. It is not necessary to bring an action at law upon such a judgment before instituting a chancery suit to avoid a fraudulent conveyance by the debtor. The second section of chapter 133 of the Code of 1868 provides: 'A creditor before obtaining judgment or decree for his claim may institute any suit to avoid a gift, conveyance, assignment or transfer of or charge upon the estate of his debtor, which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate, which he would be entitled to after obtaining a judgment or decree for the claim, which he may be entitled to recover.'" *Watkins v. Wortman*, 19 W. Va. 78.

"In *Watkins v. Wortman*, 19 W. Va. 78, it was held, that a foreign judgment is a debt, and a suit in equity can be maintained on it to avoid a fraudulent or voluntary conveyance, without first having obtained a judgment at law in this state, under § 2, ch. 133 of the Code of 1868." *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451.

W. filed his bill in chancery against Wortman and his wife and Workman alleging the recovery by him of a judgment in Ohio against Wortman; that execution issued thereon and was returned unsatisfied; that Wortman had removed to this state and purchased two tracts of land, and paid for them; that one of the tracts he had caused to be conveyed to his wife with intent to defraud his creditors; that the other tract had been conveyed to Workman; that whether this was accidentally so done or was designedly done, it was equally fraudulent as to creditors; that there was no personal property out of

which the debt could be made; that unless those two tracts were subjected to the payment of his debt, it would be lost. Held, a demurrer to this bill was properly overruled. Whether the allegation of the bill as to the second tract of land was sufficient or not, the allegation as to the first tract being sufficient to give a court of equity jurisdiction, it was proper to include any other property of the debtor, so that it could be first made liable in protection of the alleged voluntary or fraudulent vendee. *Watkins v. Wortman*, 19 W. Va. 78.

B. FORM OF ACTION.

See the title DEBT, THE ACTION OF, vol. 4, p. 283.

C. DECLARATION.

A Maryland judgment is rendered for the debt, the damages and costs, with a memorandum at foot that the plaintiff shall release the damages on payment of the interest due on the debt; in debt on this judgment in Virginia, a declaration which demands the debt and the interest, not the damages, is good. *Kemp v. Mundell*, 9 Leigh 12.

D. PLEAS AND DEFENSES.

1. In General.

In *Clarke v. Day*, 2 Leigh 172, the court was of opinion that the question as to what effect the judgment would have if sued on it the domestic tribunals of the state where such judgments were pronounced, could not be tried by the plea of nil debet, and not satisfactorily by a plea of nul tiel record. But said that as "the constitution and act of congress, then, having made the states domestic to each other, in regard to this matter, the court of the state must try this issue in the usual way, by informing itself of the law of the state of Kentucky, as the federal courts must do, should there be any doubt about it."

2. Nil Debet.

See the title DEBT, THE ACTION OF, vol. 4, p. 302

3. Nul Tiel Record.

See the title DEBT, THE ACTION OF, vol. 4, p. 307.

4. Payment, Discounts and Set-Off.

A foreign judgment may be opposed by proof of subsequent payments or discounts. *Buford v. Buford*, 4 Munf. 241, 6 Am. Dec. 511.

In a bill for equitable relief against a foreign judgment, the only other ground alleged in the bill is that both of the defendants, Julia A. and E. C. Harpold, are nonresidents of this state, and that they are insolvent. "It seems to me very clear that the non-residence of the plaintiffs in the judgment at law will not entitle the plaintiff to relief in equity. The law makes no distinction in respect to the legal rights of parties properly before the courts. The question then arises, does the fact that the plaintiffs in the judgment at law are insolvent entitle the plaintiff here to relief which he would not be entitled to if they were solvent? If the claim had been a payment instead of a set-off, the solvency or insolvency of the plaintiff in the judgment would be wholly immaterial, because it would be lost, in either event. If that is true in regard to a payment, it is equally true in respect to a set-off, for the cases make no distinction between payments and set-offs. The default of the party complaining, and not the circumstances of the plaintiff in the judgment, is the criterion upon which equity refuses relief. While the authorities in other states may be conflicting as to whether the insolvency of a judgment creditor will, of itself, justify an injunction against the enforcement of a judgment at law upon the ground of a set-off which might have been pleaded at law, I think the decisions of the courts of Virginia and this state indicate very distinctly that they would not entertain an injunction upon that ground alone. The rule in these states, as before shown, limits and restricts the relief in equity to

cases in which the defendant has been prevented from using his set-off at law by fraud, accident, surprise, or some adventitious circumstance beyond his control. None of them, so far as I have been able to find, hold, or even mention, the insolvency of the judgment creditor as a ground for relief in equity; and most of the cases are those in which the plaintiff in the judgment was insolvent. If he had not been insolvent, he could be sued at law on the set-off, and there would be no good reason for coming into equity." *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

5. Want of Jurisdiction.

Right to Plead.—As has already been shown, the jurisdiction of the court of the foreign state to render the judgment is always open to inquiry. See ante, "Want of Jurisdiction," II, A, 3, a.

How Pleased.—"This is an action upon a judgment of the state of Ohio, which, it is contended, is conclusive in the courts of Virginia, upon the principles of the constitution of the United States. It is unnecessary in this case, to go into the question of the construction of that clause of the federal compact, which relates to the effect of the judicial proceedings of the several states in other states; for it seems to be agreed, on all hands, that the doctrine of the conclusiveness of the judgments of the respective states, is to be taken with the qualification, that where the court has no jurisdiction over the subject matter or the person, or where the defendant has no notice of the suit, or was never served with process, and never appeared to the action, the judgment will be esteemed of no validity. 1 Kent's Com. 243, 4, and the cases here cited: *Phelps v. Holker*, 1 Dall. 261; *Benton v. Burgot*, 10 Serg. & Rawle 240; *Green v. Sarmiento*, 3 Wash. C. C. R. 17; *Starbuck v. Murray*, 5 Wend. 148, in which all the cases are collected. In what manner, then, are the defendants to avail themselves of the objection that they never appeared, or were

served with process, or had notice of the suit? The answer is, that they must plead it. In those states, where the plea of nil debet is held to be a good plea to an action of debt on the judgment of a sister state, the defendant may impeach the justice of it under the plea of nil debet, upon the ground that he never had notice of the proceeding. But the party may also plead the matter specially, even in those states. And in those states in which nil debet is not a good plea, it is obvious, that the defendant is compelled to plead the special matter." *Wilson v. Bank of Mount Pleasants*, 6 Leigh 574.

"I can not see under what form of pleading, known to the common law, this matter of law, that is, the efficacy of this judgment as matter of evidence, can be tried as a matter of fact by a jury. The plea of nil debet will not try it. That assumes the matter in dispute, that the judgment is not conclusive; and if issue were taken on that plea, the plaintiff would waive the conclusive effect of his judgment; this he can only assert by a demurrer to the plea, which is an issue of law, and must be tried by that court. If the plea of nul tiel record would try it (of which I am not satisfied) still that tenders no issue to the country. And if the defendant should plead, that the court pronouncing the judgment was not a court of record, and that the judgment is not conclusive evidence, that would be no bar to the action; for debt lies on a judgment which is not conclusive evidence. Suffice it, however, to say, that in his case the plea is nil debet, which assumes that the judgment is not conclusive evidence; and the plaintiff, who contends that it is, had no course left for him but to demur. This he has done; and the law arising on this issue must be tried by the court, not by the jury; for it is an issue of law." *Clarke v. Day*, 2 Leigh 172, 176.

Special Plea.—In an action on a foreign judgment, the defense of want

of jurisdiction ought to be made by special plea; it can not be made under the plea of nul tiel record. *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673; *Wilson v. Bank of Mount Pleasants*, 6 Leigh 570.

"I will here remark, that according to the language used by the court in *Mills v. Duryee*, the judgment could not be conclusive on the parties in the state where it was rendered, unless the defendant had full notice of the suit; a special plea, therefore, in the court of another state, averring that the defendant had no notice of the suit, as appeared by the record, would be a good bar to the action." *Draper v. Gorman*, 8 Leigh 628, 657.

Writ of Error or Appeal.—While it is universally held, that an order or judgment entered by a court having no jurisdiction to enter it is absolutely void, and may anywhere be attacked collaterally, yet it is also held, that a writ of error or appeal will lie to reverse said order. *Ambler v. Leach*, 15 W. Va. 677; *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451.

6. Gaming and Drunkenness.

See the titles DRUNKENNESS, vol. 4, p. 834; GAMBLING CONTRACTS.

To an action of debt brought in Virginia upon a judgment of the circuit court of the District of Columbia, a special plea, alleging that the judgment of the circuit court was recovered on a bill of exchange drawn by their testator, while in a state of intoxication, for money won at gaming, was properly rejected. *Draper v. Gorman*, 8 Leigh 628.

7. Fraud.

See ante, "Validity of Foreign Judgment," II, A, 3.

There can be no doubt that a plea alleging that the judgment was obtained by fraud or collusion, would be admissible. *Draper v. Gorman*, 8 Leigh 628; *Buford v. Buford*, 4 Munf. 241, 6 Am. Dec. 511; *Vaught v. Meador*,

99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908.

8. Effect of Pending Appeal.

Writ of Error Not Operating as Supersedeas.—Under article 4, § 1, of the constitution of the United States, and the act of Congress, May 26, 1790, a writ of error, not operating as a supersedeas, from the supreme appellate court of Texas to a judgment of a district court of that state, will be regarded as having the same effect in Virginia as in Texas. In such a case, an action may be maintained upon the judgment in Virginia, notwithstanding the pendency of appellate proceedings in Texas, but the Virginia court may order that no execution shall be issued on a judgment obtained in such action, provided the defendant give bond and security conditioned to satisfy the judgment and pay all damages, costs and fees, etc., in case the writ of error pending in Texas should be determined adversely to the defendant. *Piedmont, etc., Life Ins. Co. v. Ray*, 75 Va. 821.

Trial De Novo in Foreign State.—An action will not lie on a foreign judgment, where, according to the practice prevailing in the state where the judgment was rendered, the appeal transfers the case to the appellate court to be tried de novo, irrespective of the judgment below. *Evans v. Taylor*, 28 W. Va. 184.

The action, which he seeks to enjoin in this suit, he alleges, is founded upon the judgment of a justice of the state of Ohio, which has been appealed from and stands upon an appeal in the court of common pleas of Belmont county in said state. According to the laws of the state of Ohio the effect of an appeal from the judgment of a justice is to stay all further proceedings on the judgment before the justice. No execution can be issued on the judgment, and the whole case is transferred to the court of common pleas, where it is to be tried de novo and in the same manner as though the action had been

originally instituted in that court. (2 Rev. Stat., Ohio, §§ 6585, 6587.) In such case, where the effect of the appeal is to transfer the action to an appellate court in which the case is to be tried de novo, and the controversy is to be settled by a judgment in such court regardless of the judgment appealed from, the appeal operates not only to suspend the judgment of the justice or inferior tribunal, but vacates and sets it aside, so that it can not be used as evidence or as the foundation of an action in any court. An appeal in such case is very different in its effect from a proceeding which seeks to review a judgment by writ of error. In the latter case the judgment is merely suspended, but in the former the judgment is vacated and made ineffectual for any purpose, the judgment in legal construction no longer remains in force and can not be the foundation of a new action. (*Campbell v. Howard*, 5 Mass. 376; *Paine v. Cowdin*, 17 Pick. 142; *Freem. on Judgments*, §§ 328, 433.) The appeal from the Ohio judgment made that judgment ineffectual as a foundation for the action in this state, which the plaintiff by his bill seeks to enjoin, and therefore his bill shows, that he had a valid defense to said action at law. *Evans v. Taylor*, 28 W. Va. 184.

If, however, no appeal had been taken from the Ohio judgment, and the plaintiff, *Evans*, has a valid defense to the claims on which said judgment was recovered, he would still not be entitled to relief in equity, because, by the statutes of the state of Ohio, he could have taken such an appeal as a matter of right, which would have given him an adequate legal remedy, and if he, by his negligence, failed to avail himself of such remedy, he is for that reason without remedy in a court of equity. *Evans v. Taylor*, 28 W. Va. 184.

9. Statute of Limitations.

See the title LIMITATION OF ACTIONS.

Former Rule.—In an early Virginia case, prior to present statutes in Virginia and West Virginia, it was held, that in an action brought in Virginia, on a judgment obtained in North Carolina, the act of limitations of North Carolina can not be pleaded in bar; but the law of the former must prevail; the act of limitations affecting the remedy, and not the right. "I consider the law as clearly settled, that whatever relates to the essence of the contract, is to be governed by the law of the place where the contract was formed; but that which relates to the remedy for enforcing the contract is to be governed by the law of the place where the contract is sought to be enforced." *Jones v. Hook*, 2 Rand. 303, 14 Am. Dec. 783. See in accord *Urton v. Hunter*, 2 W. Va. 83.

Against A., in Ohio, J. obtained a final decree to foreclose a mortgage securing two notes, and received all of first and part of second note. Twelve years later, without notice to A., a decree was entered for balance of second note. In the interval, J. filed his bill in this state to attach A.'s land for the balance. A. answered that the cause of action arose July, 1868, and the suit was not brought within five years thereafter. J. then filed his supplemental bill, exhibiting a transcript of and setting up the last Ohio decree as a defense against the plea of the statute of limitations. To this A. demurred and plead nul tiel record. Held, the *lex fori* governs, and the limitation is five years from rise of cause of action. The action was barred when brought, and the original bill must be dismissed. The supplemental bill makes no valid defense against the plea of the statute of limitations. The transcript of the Ohio record referred to and filed with that bill, on demurrer, is considered as much a part thereof as if set out in *haec verba*. *Johnson v. Anderson*, 76 Va. 766.

Present Rule.—But the statutes in

Virginia and West Virginia have changed this rule. By express enactment, provision is now made for the recognition of the statutes of limitations of other jurisdictions in which the cause of action arose.

In Virginia, the statute provides that every action upon a judgment or decree, rendered in any other state or country, shall be barred, if by the laws of such state or country such action would there be barred, and the judgment or decree be incapable of being otherwise enforced there; and whether so barred or not, no action against a person who shall have resided in this state during the ten years next preceding such action, shall be brought upon any such judgment or decree, rendered more than ten years before the commencement of such action. (Code, 1849, p. 593, ch. 149, § 12.) Va. Code, § 2928.

In West Virginia, the statute provides that every action or suit upon a judgment or decree, rendered in any other state or country, shall be barred, if by the laws of such state or country such action or suit would there be barred, and the judgment or decree be incapable of being otherwise enforced there. And whether so barred or not, no action against a person who shall have resided in this state during the ten years next preceding such action, shall be brought upon any such judgment or decree rendered more than ten years before the commencement of such action. W. Va. Code, p. 778, ch. 104, § 13.

A judgment obtained in Ohio, if not barred there, is not barred in West Virginia under § 13, ch. 104, of the Code of 1868, subject to the exception in said section contained. Sections 22 and 23 of chapter 130 of the Code of 1868 do not alter the common-law rule of evidence, that husband and wife are not competent witnesses for or against each other except in an action or suit between themselves. "As to the statute of limitations it does not apply in

this case. Section 13 of chapter 104 of the Code of 1868 provides: 'Every action upon a judgment or decree rendered in any other state or country shall be barred, if by the laws of such state or country such action would there be barred, and the judgment or decree be incapable of being otherwise enforced there.' By the law of the state of Ohio there is no bar to an action on a judgment under twenty-one years. Ohio Revised Statutes, 1860, pp. 947, 948, 1067, Ed. 1880, §§ 5367, 5368, 5370; *Tyler v. Winslow*, 15 O. St. 364. This judgment was rendered on the 29th day of April, 1856, and this suit was brought on the 17th day of June, 1869, a little more than thirteen years after." *Watkins v. Wortman*, 19 W. Va. 78, 83.

Sale of Decedent's Lands.—A judgment or decree against heirs in a suit in one state, authorizing the sale of decedent's lands situated there to pay his debts, will not prevent the running of the statute of limitations against the suit in another state to subject the land situated therein to the payment of the same debts. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

10. Failure to Plead Defense in Original Action.

"There are defenses which may be made to foreign judgments without trenching upon any rule of sound policy; such as a want of jurisdiction, or that the defendant had no notice of the suit or that the judgment was obtained by fraud or founded in mistake, or was irregular and void by the local law; and there ought to be some general issue to let in these defenses, without driving the defendant to a special plea. Therefore I think the plea of nil debet ought to have been received. But I do not think the defendant has the right to go behind the judgment, to retry its merits and set up a defense which has been or might have been relied on in the original case, or

which has been waived, as in this case; and therefore I am of opinion that the second plea was properly rejected." *Draper v. Gorman*, 8 Leigh 628.

E. EQUITABLE RELIEF.

See the title JUDGMENTS AND DECREES.

There is a general qualification to the doctrine as to conclusiveness of foreign judgments (see ante, "Operation as Res Adjudicata," II, A, 6), which permits a defendant in a judgment at law to obtain relief in equity against such judgment for equitable causes. But this qualification is very restricted, and, according to the uniform decisions of the courts of Virginia and this state, a party will not be entitled to relief against such judgment in a court of equity, unless he clearly shows that he was prevented from availing himself of a legal defense at law by reason of some fraud, accident, or surprise, or some adventitious circumstance beyond his control. If the failure to make the defense at law is chargeable to his mistake, fault, or negligence, he will not be entertained in equity. *Shields v. McClung*, 6 W. Va. 79; *Knapp v. Snyder*, 15 W. Va. 434; *Alford v. Moore*, 15 W. Va. 597; *Meem v. Rucker*, 10 Gratt. 505; *Slack v. Wood*, 9 Gratt. 40; *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

"The court having jurisdiction of the cause, the validity of the judgment rendered by said court can not be questioned in the courts of this state; nor will the courts of this state under the authorities cited look into the transaction, upon which the Maryland judgment is founded, in order to ascertain if the judgment ought not to have been rendered by the court. But, while this is true generally, I apprehend, that a judgment of a court of law in this state, based upon a judgment of a court of law of another state, may be enjoined by injunction by a court of equity for equitable causes and equities, and, if not for all,

for most of the causes, which would authorize an injunction in equity to a judgment of our own courts of law. *Wilson v. Robertson*, 9 Tenn. 266." *Black v. Smith*, 13 W. Va. 780.

Where a court of law in the state of Maryland, having jurisdiction of the subject and person of the citizen, renders judgment in the cause, therein pending against such citizen, for money, the validity of such judgment, rendered by such court, can not be questioned in the courts of West Virginia; nor will the courts of that state look into the transaction upon which the Maryland judgment is founded, in order to ascertain if that judgment ought not to have been rendered by that court. But while this is true generally, a judgment of the court of law rendered in West Virginia based upon a judgment of the court of law of Maryland, may be inquired into for equitable causes and equities, and, if not for all, for most of the causes, which would authorize an injunction in equity to a judgment of a court of law of West Virginia. *Black v. Smith*, 13 W. Va. 780.

It was held in *Black v. Smith*, 13 W. Va. 780, that the defendant to a Maryland judgment, to whom a day and opportunity has been allowed to make his defense in the court of law in Maryland, which rendered the last-named judgment, against the demand, for which such judgment was rendered, but who has wholly failed to avail himself of them, will not be entertained in the court of equity of West Virginia on a bill seeking relief against a judgment rendered by a court of law, based upon said Maryland judgment, rendered in consequence of his default, upon the ground, which might have been successfully taken in the Maryland court of law, unless some reason founded in fraud, accident or surprise, or some adventitious circumstances beyond the control of such defendant, be shown why the defense was not made in the Maryland court.

Secondary Evidence.—In a bill for equitable relief against a foreign judgment, based upon a negotiable note, it was held, that the fact that the foreign court erred in ruling as to the admissibility of secondary evidence of the contents of the note, did not entitle the injured party to relief in a court of equity. *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

Failure of Consideration.—"From the foregoing authorities I am satisfied, that failure of consideration attempted to be set up in the bill (of injunction to enforce a foreign judgment based on a contract) if such it is, or can be considered, in any aspect under the allegations of the bill, was available and open to plaintiff in the said action at law in Maryland; and that in fact it was embraced and covered by the issues in that cause, upon which trial and judgment were had; and if the plaintiff failed to get the benefit of his said alleged defense of failure of consideration, if it amounts to such, in law, it was not the fault of the court, or the law, so far as appears by the record, but owing to the laches and negligence of the plaintiff; under such circumstances the plaintiff would not be entitled to enjoin the said judgment as the case now stands, as he has had a day in court." *Black v. Smith*, 13 W. Va. 780.

"It seems to me, that the plaintiff failed to avail himself of his alleged defense of failure of consideration in the court of law in Maryland, when he might have done so, if the facts alleged in the bill amount to a failure of consideration; and he has failed to show sufficiently any satisfactory reason founded in fraud, accident, surprise, or some adventitious circumstances beyond his control, why the alleged defense of failure of consideration was not made in said cause at law in the said circuit court of Frederick county, Maryland. I infer from what appears in the record, that the plaintiff was a citizen of Frederick county,

Maryland, at the time said action at law was brought against him, and at the date of the judgment rendered against him by the circuit court of Frederick county aforesaid. This perhaps I should have stated earlier in this opinion. The mere averments by a plaintiff, in his bill of asking for an injunction to a judgment at law, are not sufficient; he must prove them. *Meem v. Rucker*, 10 Gratt. 506." *Black v. Smith*, 13 W. Va. 780.

Adequate Remedy at Law.—A sues B before a justice in this state, and a final judgment is rendered by such justice for the defendant; while said judgment remains in full force, A assigns the claim, on which said action was brought, to C, who sues B on it before a justice in the state of Ohio and obtains a judgment thereon; C then assigns said Ohio judgment to E, who institutes an action on the same in this state before the justice who rendered the said first-mentioned judgment for the defendant. Held, a court of equity has no jurisdiction to enjoin the prosecution of said last-mentioned action, because by the statutes of the state of Ohio the defendant in said Ohio judgment had a plain and adequate legal defense both before the justice who tried the action, and by appeal as of right to the court of common pleas, where the case would be tried *de novo*. *Evans v. Taylor*, 28 W. Va. 190.

IV. Authentication and Proof.

As to authentication and proof of documents generally, see the title EXECUTION AND PROOF OF DOCUMENTS, vol. 5, p. 414. As to authentication and proof of foreign laws, see the title FOREIGN LAWS. As to authentication and proof of foreign wills, see the title WILLS. As to authentication and proof of foreign deeds, see the title DOCUMENTARY EVIDENCE, vol. 4, p. 763.

A. IN GENERAL.

Greenleaf on Ev., vol. 1, p. 638, §

501 says: "As to proof of records, this is done either by the production of the records, without more, or by a copy. Copies of records are, (1) exemplifications; (2) copies made by an authorized officer; (3) sworn copies. Exemplifications, are either first, under the great seal; or second, under the seal of the particular court where the record remains. When a record is the gist of the issue, if it is not in the same court, it should be proved by an exemplification. * * * But, in the United States, the great seal being usually, if not always, kept by the secretary of state, a different course prevails; an exemplified copy, under the seal of the court, is usually admitted, even upon an issue of nul tiel record, as sufficient evidence. When the record is not the gist of the issue, the last-mentioned kind of exemplification is always sufficient proof of the record at common law." An exemplification is a perfect copy of a record or office book, so far as relates to the matter in question. A copy is a true transcript of an original writing. 1 Bouvier's Law Dict. 363. An abstract of a judgment or title is not the same as a copy of a judgment or title. An "abstract of a title" is a brief account of all the deeds upon which the title rests. A synopsis of the distinctive portions of the various instruments which constitute the muniments of title. Quoted in *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Another distinguished writer on the law of evidence says that at common law the records of foreign courts could be proved by exemplified copies under seal of the foreign state, by sworn and examined copies, or by copies duly certified by an official authorized by the foreign court, *Underhill on Ev.*, 149 citing, among other cases, *Petermans v. Laws*, 6 Leigh 523.

B. OF JUDGMENTS OF TRIBUNALS OF FOREIGN COUNTRIES.

Depositions.—Transactions respect-

ing civil suits in foreign countries, may be proved by depositions, etc. *Young v. Gregorie*, 3 Call 446, 2 Am. Dec. 556, cited and approved in *Hadfield v. Jameson*, 2 Munf. 53, 87.

In *Young v. Gregorie*, 3 Call 446, the court said: "Proceedings in a foreign country often times can be proved in no other way, than by depositions and testimony de hors the proceedings; of which it is not always in the power of the party to procure copies."

Necessity of Copy of Record.—In an action for malicious prosecution in a foreign country, it is not indispensably necessary to produce a copy of the record of the proceedings there, but the plaintiff may prove them by other evidence. *Young v. Gregorie*, 3 Call 446.

A certificate of the British governor and commander in chief, in the usual form adopted by the British governor, although certified only under the governor's seal at arms, instead of a colonial or public seal, is sufficient evidence to authenticate in the courts of this country, the sentence or act of a foreign tribunal or government, after the destruction of such government by revolution or conquest. *Hadfield v. Jameson*, 2 Munf. 53.

C. OF JUDGMENTS OF STATES, TERRITORIES AND DISTRICTS OF UNITED STATES.

The Virginia Code provides that the records and judicial proceedings of any court of the United States, or of any state, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice, or presiding magistrate of such court, to be attested in due form, shall have such faith and credit given to them in every court within this state, as they have in the courts of the state, territory, or district whence the said records come. (Code, 1849, p. 662, ch. 176, § 14.) Va. Code, 1904, § 3342.

A record, legally authenticated, of the proceedings of a court of com-

petent authority, in any other of the United States, is conclusive evidence in the courts of this state, to show that a judgment was rendered, and that the party was compellable to pay the amount recovered against him; but it may be opposed by proof of fraud or collusion, or of subsequent payments or discounts. *Buford v. Buford*, 4 Munf. 241, 6 Am. Dec. 511.

The W. Va. Code provides that the records and judicial proceedings of any court of the United States, or of any state, territory or district, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice or presiding magistrate of such court, to be attested in due form, shall have such faith and credit given to them in every court within this state, as they have in the courts of the state, territory or district whence the said records came. W. Va. Code, p. 874, ch. 130, § 19.

Federal Courts.—This section does not apply to the records and judicial proceedings of the district court of the United States, held within West Virginia. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Copies of Judgments in Lieu of Original.—Section 5, ch. 130, W. Va. Code, 1868, admitting copies of records in lieu of the original, applies only to the records of courts held within the state. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Code of West Virginia, 1868, ch. 130, § 5, applies as well to the record of the district court of the United States, held within the state, as to the records of the courts of the state; and the copy of the judgment rendered in a district court of the United States, in the state of West Virginia attested by the clerk of that court according to the statute above mentioned, will ordinarily be received as evidence of the existence of such judgments. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

"The fifth section of chapter one hundred and thirty-nine of the Code of this state provides that 'every judgment for money, rendered in this state, heretofore or hereafter, against any person, shall be a lien on all the real estate of, or to, which such person shall be possessed or entitled, at, or after, the date of such judgment, or if it was rendered in court, at, or after, the commencement of the terms at which it was so rendered, etc.' And the eighth section of the same chapter provides that 'the lien of a judgment may always be enforced in a court of equity.' Do not these sections apply as well to judgments of the United States Courts held within this state, as to judgments of our state courts? I apprehend they do, and I think there is no difference of opinion upon this subject among members of the legal profession. And so of the fourth section of the same chapter, in relation to the docketing of judgments and the preservation of judgment liens. If these sections apply to judgments of the circuit and district courts of the United States, why may not the fifth section of chapter one hundred and thirty apply to the

records and judicial proceedings of these courts? The language is equally broad. It is 'a copy of any record or paper in the clerk's office of any court, may be admitted as evidence in lieu of the original, etc.' My present conviction is that said fifth section does embrace the records and judicial proceedings of these courts. And that to entitle them to be received as evidence in our state courts it is only necessary that they should be authenticated in the same manner as said section requires the records and judicial proceedings of our own courts to be certified to entitle them to be received as evidence. Such, according to my understanding, has, heretofore, been the universal practice of our state courts, and that practice so far as I have learned has been sanctioned by the legal profession of the state." *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Certificate.—When a judge is ex officio clerk of a court, then both certificates specified in § 19, ch. 130, are not required, his certificate as judge being sufficient. *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

FOREIGN LAWS.

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CROSS REFERENCES.

See generally, the titles CONFLICT OF LAWS, vol. 3, p. 100; EVIDENCE, vol. 5, p. 295; FOREIGN JUDGMENTS, ante, p. 208; JUDICIAL NOTICE; STATUTES.

I. What Are Foreign Laws.

Municipal Laws of the Respective States.—The municipal laws of the respective states of the United States are foreign in respect to the sister states. *Warder v. Arell*, 2 Wash. 282; *Stevens v. Brown*, 20 W. Va. 450.

Laws of the District of Columbia.—The laws of the District of Columbia are not foreign laws, but must be judicially noticed by the state courts. *Bird v. Com.*, 21 Gratt. 800.

II. Proof of Foreign Laws.

A. PRINTED VOLUME.

A printed volume purporting on the face of it to contain the laws of a sister state is admissible as prima facie evidence, to prove the statute laws of that state. *Dickinson v. Hoomes*, 8 Gratt. 353; *Taylor v. Bank*, 5 Leigh 471.

The printed copies of the acts of congress, distributed to the executives of the several states to be distributed among the people, are proper evidence of the statutes therein contained without other authentication. *Taylor v. Bank*, 5 Leigh 471.

B. AUTHENTICATED COPY.

Proof of Foreign Statutes.—The usual and better, if not the only manner of proving the laws of a foreign state, when they are statutory, is by introducing in evidence a properly authenticated copy of the statute, or so much of it as is necessary to show what the foreign law is on the point in controversy. *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

Sufficient Authentication.—A law of another state is sufficiently authenticated under the act of congress, if it has the seal of the state affixed thereto; and the particular officer entitled to affix the seal depends upon the regulations of the several states, respectively. *Hunter v. Fulcher*, 5 Rand. 126.

A certificate of the secretary of state of Ohio under the great seal of the state, that the statute certified is correctly copied from the original rolls

now on file in his office, is a due authentication of the statute, according to the act of congress. *Wilson v. Lazier*, 11 Gratt. 477.

Evidence for the Jury.—A transcript of a statute of another state, authenticated by the certificate of the secretary of the commonwealth, under his hand and seal, accompanied by a declaration of the governor, under the great seal of the commonwealth, that he is secretary, and that full faith and credit ought to be given to his official acts accordingly, is proper evidence to be submitted to the jury, that such copy of the act is the law of the said state. *Warner v. Com.*, 2 Va. Cas. 93.

Copy of Section Only.—Where a party in a suit in Virginia relies on the law of another state, to support his claim, he may produce an authenticated copy of the section only on which he relies, without a copy of the whole law. *Hunter v. Fulcher*, 5 Rand. 126; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

C. BY WITNESSES.

Priest or Clergyman Competent Witness.—A priest or clergyman is a proper person to prove the laws of a foreign state or country upon subject of marriage. *Bird v. Com.*, 21 Gratt. 800.

"When a witness testifies to a marriage in a foreign state, solemnized in the manner usual and customary in such state, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as can be expected or desired; and in such case it is not necessary to prove the laws of such state, or to offer further evidence of a compliance with its provisions." *Bird v. Com.*, 21 Gratt. 800.

Proof by an Expert.—A foreign law, whether written or unwritten, may be proved by a person who is learned in that law, without laying any foundation for the introduction of secondary evi-

dence, for the reason that you do not ask the witness what the law states but what the law is—that is, the construction of the foreign law. *Dickinson v. Hoomes*, 8 Gratt. 353.

III. Pleading.

Necessity of.—*Quære*, if it is necessary in any case to plead foreign statutes. *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

What Plea Must State.—A plea of usury of a foreign state, must state what the law of usury is in that state. *Fant v. Miller*, 17 Gratt. 47.

P. and K. were citizens of New York. P. owned lands in this state, and employed K. as an agent to come to this state and endeavor to sell the same. K. failed to make sale, and learning from P. that he was in straitened circumstances for money, proposed to loan him money, at rates that were exorbitant and usurious, if he would execute him a deed for the lands as security. P. executed a deed that was absolute and in fee simple on its face, and K. executed on the same day, an agreement to P., stipulating that he might elect to repurchase the lands for a certain sum in three months, and certain other and greater sums in six and twelve months respectively, if he would so elect at the expiration of six months from the date of the agreement, which sums were largely in excess of the consideration expressed in the deed, and six per cent. interest thereon. K. refused to permit P. to repurchase after failure to elect at the expiration of six months, claiming that the sale and deed were absolute. P. filed his bill to cancel the deed, alleging that the transaction was only for the security of money, and was usurious in its character. The proofs in the cause tended to show that the transaction was a loan of money and the land was held as security. Held, that as the contract was made in the state of New York, and as to its nature, construction and validity, must be governed by the law

of that state, and the law of that state on usury was not pleaded, the courts of this state could not judicially know what it was, and therefore, it did not appear that the transaction was usurious. *Klinck v. Price*, 4 W. Va. 4. See generally, the title USURY.

IV. Judicial Notice.

See ante, "Pleading," III.

A. COMMON-LAW RULE.

Laws Not Judicially Noticed.—The courts of one state do not take judicial notice of the laws of another state, but they must be proved according to the provisions of the laws of the United States. *Warner v. Com.*, 2 Va. Cas. 93; *Bayly v. Chubb*, 16 Gratt. 284; *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Klinck v. Price*, 4 W. Va. 4; *Bowers v. Bristol Gas Co.*, 100 Va. 533, 42 S. E. 296.

Facts to Be Proved.—Courts do not take judicial notice of the laws of other states. Such laws are facts to be proved as other facts. *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

B. STATUTORY RULE.

Provision Stated.—"Whenever it becomes material to ascertain what the law statutory or otherwise of another state or country or of the United States is or was at any time, the court, judge or magistrate shall take judicial notice thereof and may consult any printed books purporting to contain, state or explain the same and consider any testimony, information or argument that is offered on the subject." (Code, ch. 18, § 4, p. 22.) *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

"Under this provision we may without hesitation recognize the act of the general assembly of Virginia, passed in 1866, the pertinent provisions of which, if any be material here, have been recited." *Farmers' Bank v. Willis*, 7 W. Va. 31.

Under § 4, ch. 13, W. Va. Code,

courts take judicial notice, without proof of the law of another state, and in so doing may consult any book purporting to contain, state or explain the same, and considers any testimony, information, or argument offered on the subject. *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S. E. 1035.

V. Presumptions.

A. COMMON LAW IN FOREIGN STATE.

See the title COMMON LAW, vol. 3, p. 29.

Liability of Land for the Payment of Debts.—In the absence of all evidence on the subject, it will be presumed, that in Kentucky land is liable for the payment of debts, at least to the extent to which it is liable at the common law; especially if that liability sought to be enforced by the bill should not be denied by the answer. *Dickinson v. Hoomes*, 8 Gratt. 353.

B. CONSTRUCTION OF FOREIGN STATUTE.

When the construction of a foreign statute has been settled by a number of decisions, and the legislature enacts that statute in the same words, it must be presumed that the construction placed upon the statute was adopted along with the statute. *Norfolk, etc., R. Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 37 S. E. 784; *Danville v. Pace*, 25 Gratt. 1; *Doswell v. Buchanan*,

3 Leigh 365. See the title STATUTES.

VI. Interpretation.

See the title STATUTES.

By Whom Construed.—When the evidence of the laws of another state is shown by a copy of a statute, or a part of it; as was done in this case, the question of its interpretation and effect is for the court alone, as in the case of other evidence, which consists entirely of writings or documents. *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

Quære, whether on a trial at law the construction and effect of the law of a foreign state are to be determined by the jury or by the court. *Fant v. Miller*, 17 Gratt. 47.

In an action at law upon a note executed in a foreign state, the defendant moves to exclude the note as evidence, because by the law of the state where it was made, it was not competent evidence; and he offers the statute of that state in evidence upon that motion, which is rejected; the court being of opinion that the note might be read in evidence, notwithstanding the provisions of the statute. If the court gave the correct construction to the statute, the rejection is not ground for reversing the judgment, though it were held, that it was for the jury to construe the statute. *Fant v. Miller*, 17 Gratt. 47.

Foreign Records.

See generally, the title RECORDS.

Foreign Wills.

See the title WILLS.

Foreman.

See the title FELLOW SERVANTS, ante, p. 1.

FOREVER.—In *Hughes v. Hughes*, 2 Munf. 209, 225, it is said: "Applying these rules to the present case, it is to be observed that the conveyance is of all the estate to the trustees, their heirs and assigns (not during the life of Ann Hughes, but) **forever**; to be held by them **forever**; and she warrants to them **forever**. This important word **forever** has not been noticed by the counsel for the appellee. It is three times repeated, is stubborn and inflexible, and its empire over the deed can not be destroyed but by a violence reaching to the heart of that instrument."

FORFEIT.—Section 3799 of the Code provides that "if a person, on a Sabbath day, be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall **forfeit** two dollars for each offense," every day any servant or apprentice is so employed constituting a distinct offense. The court said: "The word **forfeit** here used is synonymous with fine. Sec. 745." Ex parte Marx, 86 Va. 40, 41, 42, 9 S. E. 475. See also, the title SUNDAYS AND HOLIDAYS.

Forfeited.—In *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4, 7, it is said: "Again, in the case of *Adler v. Green*, 18 W. Va. 201, this court held, that a forthcoming bond, which provides for the delivery of the property on a day different from the day of sale fixed in the bond, is not a good statutory bond; and the sheriff's or other officer's return of **forfeited** on such bond is not even prima facie evidence of the truth thereof; and that 'such a bond, though not good as a statutory bond, is good as a common-law bond, if there is no other objection to it.'"

Forfeited Lands.—In *Waggoner v. Wolf*, 28 W. Va. 820, 1 S. E. 31, it is said: "The provision of the constitution just quoted expressly authorizes and commands the legislature to 'provide by general laws for * * * releasing the title to **forfeited lands**;' that is, the legislature shall provide for releasing the title to lands which have, by operation of the constitution and laws, become absolutely vested in the state. No language could have been employed to make the meaning plainer."

Forfeitures.

See the title PENALTIES AND FORFEITURES.

Forfeited and Delinquent Lands.

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FORGERY AND COUNTERFEITING.

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CROSS REFERENCES.

See the titles AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 191; COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1; CRIMINAL LAW, vol. 4, p. 1; EXPERT AND OPINION EVIDENCE, vol. 5, p. 774; PLEADING; PRESUMPTIONS AND BURDEN OF PROOF.

As to conviction on a count of forgery as constituting an acquittal on a count charging the uttering of the forged instrument where both counts are contained in a single indictment, see the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 188. As to the defense of forgery as being available against the

holder of a negotiable instrument, see the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 438. As to the effect of a variance between a commitment and the indictment, see the title **COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED**, vol. 3, p. 5. As to the offense of procuring the goods of another by means of counterfeit notes, see the title **FALSE PRETENSES AND CHEATS**, vol. 5, p. 825. As to payments of debts by counterfeit money, see the title **PAYMENT**.

I. Forgery.

A. DEFINITION.

"Forgery at common law is defined by Blackstone as the fraudulent making or altering of a writing, to the prejudice of another's rights. (4 Bl. Com. 246). And that definition is substantially embodied in § 3737 of the Code." *Gordon v. Com.*, 100 Va. 825, 829, 41 S. E. 746.

"Forgery is the fraudulent making of a false writing, which if genuine, would be apparently of legal efficacy. *Bishop on Crim. Law* (3d Ed.), §§ 495, 499." Quoted in *Terry v. Com.*, 87 Va. 672, 674, 13 S. E. 104. *Gordon v. Com.*, 100 Va. 825, 829, 41 S. E. 746.

"The false making and forging any instrument, whereby another may be injured, constitutes the offense of forgery, even though the writing be of such a character, that it would not, if genuine, be effectual to its purpose, provided the defect in its frame or character, be not open and palpable, so that no one could be deceived by it, without the grossest negligence." *Com. v. Linton*, 2 Va. Cas. 476, 478.

B. ELEMENTS.

At common law the elements of forgery are writing an evil intent, and a false making of such writing. To this the statute adds uttering, or attempting to employ as true, a forged writing, knowing it to be forged. *State v. Cotts*, 49 W. Va. 615, 617, 39 S. E. 605.

Must Be a Writing "to the Prejudice of Another's Rights."—"An indictment was founded on § 3737 of the Code of Virginia, 1887: 'If any person forge any writing * * * to the prejudice of another's right, or utter, or attempt to employ as true, such forged writing,

knowing it to be forged, he shall be confined in the penitentiary not less than two nor more than ten years.' This statute predicates the offense of forgery only of such writings, as are, or may be, to the prejudice of another's right, or by which another may be defrauded. It must sufficiently appear, from the description given of the writing alleged to have been forged, that it is a writing to the prejudice of another's right; if it be not such, it is not within the statute, and the forgery of it can not be punished as felony. *Powell v. Com.*, 11 Gratt. 822." *Terry v. Com.*, 87 Va. 672, 13 S. E. 104; *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605.

C. PERSONS LIABLE.

Forgery of a paper may be by performing the act in person, or by being present, procuring and assisting in the forgery. *Chahoon v. Com.*, 20 Gratt. 733. See generally, the title **ACCOMPLICES AND ACCESSORIES**, vol. 1, p. 74.

D. SUBJECTS OF FORGERY.

Instrument Prima Facie Regular and Valid.—"The instrument must appear on its face to be, or be in fact, one which, if true, would be valid or legally capable of effecting a fraud. Writings invalid on their face are not subjects of forgery. If incomplete or uncertain on their face, so that their legal efficacy is dependant on extrinsic circumstances, then such extrinsic matters must be averred in the indictment. (*Bishop's Crim. Law* (3d Ed.), 2d vol., §§ 503, 506, 511, 505, 512.)" Quoted in *Terry v. Com.*, 87 Va. 672, 674, 13 S. E. 104.

Validity of Instrument.—An instrument is one of legal efficacy, within the

rules relating to forgery, where, by any possibility, it may operate to the injury of another. *Gordon v. Com.*, 100 Va. 825, 41 S. E. 746.

Validity of Instrument—Extraneous Evidence.—A forged paper was a check in the following form: "Staunton, Va., October 17, 1899. Farmers and Merchants Bank of Staunton, Pay to the order of . . . Ten . . . W. E. Hughes . . . Dollars, \$10.00. (Signed) J. W. Gordon." Endorsed by W. E. Hughes and others, and stamped paid by the drawee. The forgery charged was the insertion of the words "In full of account to date" by J. W. Gordon after the check had been paid by the bank and surrendered to him. Held: The instrument forged is not void, nor does its validity depend upon extraneous circumstances which are necessary to be averred in order to give it efficacy. The court can perceive judicially that it might be made the vehicle of fraud and prejudice. *Gordon v. Com.*, 100 Va. 825, 41 S. E. 746.

Check.—In *Com. v. Swinney*, 1 Va. Cas. 146, it was held, that upon an indictment for forging a check upon the bank of Virginia, and obtaining a note of the said bank therefore (under the act of November 18th, 1789, passed before the existence of the said bank), and a verdict of guilty was held that the judgment must be arrested; the following reasons being given in his motion for arrest of judgment: 1st. The statute which was passed on the 18th of November, 1789 (See Rev. Code, vol. 1, p. 45), was intended to punish a pre-existing evil, which is represented as having become common, and which is minutely described in the preamble to the statute, to wit, "the falsely and deceitfully contriving, devising, and imagining, privy tokens and counterfeit letters, in other men's names, unto divers persons, their particular friends and acquaintances," whereas banks were not introduced into this commonwealth, until many years after the said 18th of November, 1789, and therefore

could not have been within the contemplation, any more than they are within the language of the statute. In like manner the 33 Henry 8, ch. 1 (of which our statute is a copy), was enacted more than a century and a half before the existence of a bank in England. 2d. The phraseology of the statute precludes the possibility of its application to banks; the terms "divers persons, their particular friends and acquaintances," can relate only to private individuals, not to a body corporate, an ideal body. The bank of Virginia is no more a person, than the commonwealth of Virginia; much less is it the particular friend and acquaintance of any one. 3d. The statute requires that the person who shall be punished under it, shall have gotten into his possession the money, or goods of another; whereas, the defendant is charged with having gotten possession of a note of the bank of Virginia, which is neither the money nor goods of the said George Wythe, because having been delivered under a check not drawn by him, the bank hath no right to charge it to his account; neither is it the money, or goods of the bank; but simply the promissory note of the bank for the future payment of money, and as to all legal purposes, merely on a footing with the promissory note of an individual. The question arising from these reasons in arrest, was adjourned to the general court.

But in *Second Case v. Swinney*, 1 Va. Cas., 150, upon an indictment for forging a check upon the bank of Virginia, and obtaining therefor money current in the commonwealth of Virginia, and verdict of guilty, it was held, that the motion in arrest of judgment should be overruled. The following note is appended to this case. "The two cases, taken together, show that the first reasons were overruled by the court; the third reason was deemed sufficient to arrest the judgment in the first-mentioned case, on the ground (it is presumed) that the obtaining of

a bank note, as charged in the indictment, is not the obtaining of 'money' in the sense in which it is used in the act; on the contrary, it was deemed insufficient to arrest the second judgment, because it did not apply, the defendant having been charged in the indictment with obtaining 'fifty dollars in money current, etc.,' which could not be intended to mean a bank note of that amount."

Note on Fictitious Bank.—The false passing as a true note, a false and forged note purporting to be a note on the bank of the Ohio Exporting and Importing Company, and procuring goods and other property for the said false and forged note, when no such bank or company ever existed, either chartered, or unchartered, is not such an offense as can be prosecuted under the act entitled, "An act against those who counterfeit letters or privy tokens, to receive money, or goods in other men's names," passed November 18th, 1789. *Com. v. Speer*, 2 Va. Cas. 65.

Indorsement on Negotiable Instruments.—In *Powell v. Com.*, 11 Gratt. 822, the maker of a negotiable note, having endorsed the name of a third person on the back thereof, passed it to the payee. Held, this constitutes the offense of forgery.

As the statute make it an offense to forge any writing to the prejudice of another's right, or, knowing the writing to be forged, utter or attempt to employ it as true, it seems to be clear that such writing may be an indorsement in blank on the back of a promissory note as well as any other, although the name thus forged, without the writing on the face of the note, could not prejudice any one. *State v. Cotts*, 49 W. Va. 615, 617, 39 S. E. 605.

Power of Attorney to Recover Money.—In *Com. v. Proctor*, 1 Va. Cas. 4, it was held, that the forgery of a power of attorney to recover money for military services, is not a crime

within the "act against forgery," passed November 25, 1789, ch. 19.

Letters.—Indictment for forging, with intent to defraud W. & W., a letter in the following terms: "Nottoway, April 24, 1841. Gent., Agreeable to Mr. Wm. I. Watkins' request, I take pleasure in making you acquainted with his name, and would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation). You may be assured that whatever he engages to do he will certainly perform. He says it is probable he will want \$1,000 by the 1st of May, to meet his engagements, and if he apply for the amount, I have no doubt but you will accommodate him. The roads are in such a condition that it is impossible to get any produce to market. Write me a few lines by Mr. Watkins, and say what the chance is for a rise in tobacco. Your compliance with the above will very much oblige your obedient servant, Joseph M. Foulkes.—P. S. Mr. Watkins prefers giving a negotiable note payable in Petersburg Exchange bank, where he can always have an opportunity to send at the shortest notice and draw. He is not a gentleman of a low mean degree, but one that is a perfect gentleman in every sense of the term. I am confident, as I have observed to him, that you will either let him have the money, or endorse for him. J. M. F." Held, this is not a writing in respect whereof forgery can be committed, either at common law or under the statute. *Foulkes v. Com.*, 2 Rob. 837.

Bail Bond.—A bail bond taken by a sheriff which has been altered in a material part, may be the subject of a prosecution for forgery, although some doubts may be raised respecting the validity of the bond, arising from the recitals in the condition. *Com. v. Linton*, 2 Va. Cas. 476.

Public Records.—A public record

may be the subject of forgery. *Coleman v. Com.*, 25 Gratt. 865. See the title RECORDS.

The warrant book of the sinking fund, kept by the second auditor in his office, of the transactions of the commissioners of the sinking fund of the state, is such a public record that it may be the subject of forgery. *Coleman v. Com.*, 25 Gratt. 865, 866.

E. UTTERING AND PUBLISHING FORGED WRITINGS.

As Constituting a Separate Offense.

—The forging of an instrument and the uttering of such forged instrument are distinct and substantive offenses, in *Mowbray's Case*, 11 Leigh 643, 645; *Dowdy v. Com.*, 9 Gratt. 727, 732. *Page v. Com.*, 9 Leigh 683; *Johnson v. Com.*, 102 Va. 927, 46 S. E. 489.

Persons Liable.—To convict a prisoner of uttering, or attempting to employ as true, a forged writing, it must be shown, that the accused, himself uttered or attempted to employ as true the said forged writing, or was present at the time such forged writing was uttered or attempted to be employed as true, by some other person, aiding and assisting such person to utter or employ the same as true. *Sands v. Com.*, 20 Gratt. 800.

Intent to Defraud.—To convict a prisoner of uttering, or attempting to employ as true, a forged writing, it must be shown, that such uttering or attempting to employ as true, was made or done by him with the intent to defraud. *Sands v. Com.*, 20 Gratt. 800; *Chahoon v. Com.*, 20 Gratt. 733.

Knowledge of Forgery.—To convict a prisoner of uttering, or attempting to employ as true, a forged writing, it must be shown that the accused knew at the time that the said writing was in fact forged. *Sands v. Com.*, 20 Gratt. 800; *Chahoon v. Com.*, 20 Gratt. 733.

Declaration as to Validity of Instrument.—Any assertion or declaration, by word or act, directly or indirectly, that

the forged writing is good, with such knowledge and intent, is an uttering or attempting to employ as true the said writing; provided that such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in the said writing. *Sands v. Com.*, 20 Gratt. 800; *Chahoon v. Com.*, 20 Gratt. 733.

Necessity for Payee's Indorsement.

—In *Hendrick v. Com.*, 5 Leigh 707, it was held, that in a prosecution for the uttering of a false or counterfeit note payable to order, it is immaterial that the note was not indorsed by the payee.

Suit on Forged Note.—The bringing of a suit at law, as counsel, upon a forged note, and recovering judgment thereon, with the knowledge that the note was a forgery, is held to be an attempt to employ the said note as true, and an uttering thereof, within the meaning of the statute. *Chahoon v. Com.*, 20 Gratt. 733; *Sands v. Com.*, 20 Gratt. 800.

F. INDICTMENTS—FORM AND SUFFICIENCY.

1. General Statement as to Form.

The form of indictment for forgery and uttering forged instruments, found in *Mayo's Guide* (Ed. 1860), p. 537, is good as to both counts. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935. See the title INDICTMENTS, INFORMATION AND PRESENTMENTS.

In *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, the court said: "It is not necessary to set out in what particular acts the forgery consisted, but all the ingredients of the offense must be set out with certainty and precision."

2. Formal Words.

The words, "to the prejudice of another's rights," in the Virginia Code, ch. 193, § 5, p. 733, in relation to forgeries, are descriptive not of the offense, but of the writings of which forgery may be committed; and it is not therefore necessary that they shall be inserted in the indictment in de-

scribing the offense charged. *Powell v. Com.*, 11 Gratt. 822. *Hendrick v. Com.*, 5 Leigh 707.

3. Offense Charged in Words of the Statute.

A general description in the words of the statute is sufficient. *Huffman v. Com.*, 6 Rand. 685.

4. Separate Counts.

Forging and uttering a forged paper knowing it to be forged, being separate and distinct offenses, may be charged in separate counts in the same indictment. *Johnson v. Com.*, 102 Va. 927, 46 S. E. 489.

In *Murry v. Com.*, 5 Leigh 720, it is said: "As to the objection, that the indictment does not charge the act to have been committed 'to the prejudice of another's right we are of opinion, that these words relate, not to the different writings particularly mentioned in the previous part of the section the counterfeiting of most of which had, long before, been made felony; but only to the words immediately connected with them; 'any other writing, to the prejudice of another's right.' So too, in the last part of the section, the words 'for his own benefit, or for the benefit of another,' are not properly connected with the offense of uttering and publishing as true, any of the forged writings and papers therein stated; but only with that of attempting to use or employ them for his own benefit, or for the benefit of another. These terms were probably intended to apply to the various warrants, certificates and writings of public officers, which a person might attempt so to use or employ."

5. Duplicity or Misjoinder of Counts.

An indictment charging in one count the forgery of a check and of the endorsement thereon, is not liable to the objection of duplicity or misjoinder. *Sprouse v. Com.*, 81 Va. 374.

6. Name of Person Intended to Be Defrauded.

Neither in an indictment for utter-

ing or attempting to employ as true a forged instrument, nor one for forgery, is it necessary to name the person intended to be defrauded, as § 8, ch. 158, W. Va. Code, 1887, dispenses with that in both such cases. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935.

7. Description of Instrument.

See the title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 185.

a. General Statement.

In a prosecution for forging, or attempting to employ as true any forged instrument, it is sufficient to describe the same in the indictment in such manner as would sustain an indictment for the larceny of such instrument. *State v. Duffield*, 49 W. Va. 274, 38 S. E. 577; *Coleman v. Com.*, 25 Gratt. 866.

An indictment for uttering, and attempting to employ as true, a forged writing, need not set out the whole writing, but it is sufficient to give its purport and effect. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

b. Necessity for Setting Out Indorsement.

On the trial when the note was offered in evidence, it was objected to on the ground of variance. Held, it was not necessary to set out in the indictment the indorsements upon the note, or any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of that instrument. *Perkins v. Com.*, 7 Gratt. 651, 56 Am. Dec. 123.

c. Variance.

Clerical Errors.—In *State v. Poin Dexter*, 23 W. Va. 805, 812, in an indictment for forging a negotiable note, the letters "ar" in the word "bearer," were blurred or blotted, while these letters appeared plainly in the original. Held, this constitutes no variance.

An indictment for forged indorsements on a note which is set out in *haec verba*, and which note, as it appears in the indictment, purports to

be signed "J. F. C. Duffield," as maker. A similar note signed by J. F. C. Duffield, as maker, being offered in evidence in support of said indictment, held, variance immaterial. *State v. Duffield*, 49 W. Va. 274, 38 S. E. 577.

The difference between "account" as set out in the indictment and "acct" as written in a forged order, is not a material variance, which will exclude the order as evidence. *Burruss v. Com.*, 27 Gratt. 934.

Special verdict finding the prisoner guilty of transferring a certificate of debt of the commonwealth purporting to be signed by two auditors of public accounts, knowing it to be forged. It was quæred, whether the misspelling of the christian name of one of the auditors, within the indictment, was material. *Com. v. Kearns*, 1 Va. Cas. 109.

Omissions.—When the alleged forged note is set out in *haec verba*, and in the body thereof are the words "with 6 per cent. int. from date," and the note offered in evidence contains no such words, this is a variance, both in substance and legal effect, fatal to the introduction of such last mentioned note as evidence in support of the allegations of the indictment. *State v. Fleshman*, 40 W. Va. 726, 22 S. E. 309.

The receipt described in the indictment for uttering it, knowing it to be forged, agrees with the receipt offered in evidence on the trial, with the exception that the endorsement thereon, "Witness, Susan M. Armstrong," is omitted therefrom. Held, no material variance. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

Incomplete Recital.—An indictment charges the forgery of an endorsement on a negotiable note, which is described as to the amount, date, to whom payable and when due; but the indictment does not state who is the maker of the note or where it is payable. Held, it is a good indictment. *Cocke v. Com.*, 13 Gratt. 750.

Inaccurate Recital.—The description of the writing in the indictment, as the endorsement of a person whose name is forged, will not vitiate the indictment, though the simulated liability might not be that of a technical endorser, but of a different character. *Powell v. Com.*, 11 Gratt. 822.

Effect of Variance.—Code of 1873, ch. 195, § 15, p. 1218, does not make a variance between the indictment and the forged paper immaterial. The accused must be acquitted on that ground, if no other. And if acquitted, the presumption, in the absence of evidence to the contrary, is that he was acquitted on that ground. *Burruss v. Com.*, 27 Gratt. 934.

8. Averments.

Knowledge of Character of Instrument.—A judgment will not be rendered for the offense of falsely procuring goods of other men by a false and counterfeit note, unless there be an express averment in the indictment to the effect that the defendant knew that such note was false and fraudulent. *Com. v. Speer*, 2 Va. Cas. 65.

As to Act Being in Prejudice of Another's Rights.—It is not necessary in an indictment for uttering or attempting to employ as true a forged instrument to allege that the act was to the prejudice of another's rights, but it must appear from the description of the writing in the indictment that it is such as might prejudice his right. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935.

As to the Parties.—It is not necessary to set forth in the count, the persons whom the prisoner procured to forge the instrument, or with whom he acted and assisted in the forgery. *Huffman v. Com.*, 6 Rand. 685.

Where Indictment Is for Forging a Receipt.—On an indictment for forging a receipt, it is not necessary that it should be averred that the person charged with the offense is indebted to the individual against whom the re-

ceipt is forged, in order to show that the latter stands in a situation to be defrauded by the former. The guilt or innocence of the accused is not dependent on the ultimate result of a settlement of accounts between the parties, nor can one be permitted to forge an acquittance to defeat even an unjust demand. *Gordon v. Com.*, 100 Va. 825, 41 S. E. 746.

As to Degree of Liability.—An indictment which charges that the prisoner caused and procured a certain instrument to be forged, and willingly assisted in the forgery, etc., is to be understood as charging that he caused it to be done in his presence, and that he aided, being present; in other words, as charging him as principal in the second degree, and not as an accessory. See *Rasnick's Case*, 2 Va. Cas. 356. *Huffman v. Com.*, 6 Rand. 685.

G. EVIDENCE.

See the titles EVIDENCE, vol. 5, p. 295; WITNESSES.

1. Admissibility.

a. Proof of Handwriting.

See generally, the title HAND-WRITING.

By Direct Testimony.—Upon a trial for forgery, to prove that the paper was forged, a witness was introduced, who said that he knew H., the party whose signature was in question, and who was dead, about two years; was his tenant; had seen him write; thinks he knew his handwriting tolerably well; but could not swear to a particular signature as his, without knowing the fact; thought he had a sufficient knowledge or recollection of his signature to enable him to give an opinion as to the genuineness of his signature, though he would not swear absolutely about it. Says: "I think it is not his handwriting; but at the same time, I can not say on oath positively it is not." This is admissible evidence. *Chahoon v. Com.*, 20 Gratt. 733.

A witness who states that he is perfectly familiar with the handwriting

of the accused, and states the circumstances which made him so familiar with it, expresses the confident opinion from his knowledge of the accused's handwriting, that he was incapable of writing the order. This opinion is incompetent testimony, and properly excluded. *Burress v. Com.*, 27 Gratt. 935.

By Comparison.—Upon a trial for uttering a forged receipt, witnesses may testify as to the handwriting in the alleged forged receipt; and, being acquainted with the signature of the person's name purporting to be signed thereto, may before the jury make the letters of such person's name as they think he makes them, and the jury may compare such letters, so made, with the letters in the alleged signature. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

On an indictment for forgery it is not error to admit in evidence other writings of the prisoner shown to be genuine, and of the person whose writing is alleged to have been forged, also shown to be genuine, for the purpose of comparing by expert testimony the genuine handwritings with the handwriting of the paper alleged to have been forged. Nor is it error to admit in evidence enlarged photographs of these genuine writings for the purpose of facilitating comparison. *Johnson v. Com.*, 102 Va. 927, 46 S. E. 489.

Upon the trial of an indictment for forgery, when it becomes necessary to prove the genuine signature of the party whose name is alleged to have been forged, it is inadmissible to give in evidence to the jury the genuine signature of such party, although written in the presence of the jury, that they may judge by comparing the same in whole or in part with any part of the alleged forged signature, whether the party who made the forged signature tried to imitate any part of the genuine signature, of the party whose name is alleged to have been forged. *State v. Koontz*, 31 W. Va. 127, 5 S. E. 328.

Upon a trial for uttering a forged receipt, the jury will not be permitted to receive the proved, but not admitted, signature of the person, when none had been alleged to have been forged, so as to permit them to compare the two signatures. Much less would it be proper to permit evidence to go to the jury by a witness that he had compared the alleged forged signature with one admitted to be genuine, and they were exactly alike. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 226. See the title RECEIPTS.

Change in Handwriting.—Upon a trial for uttering a forged receipt it was not error to ask a witness if the handwriting of the person whose name was alleged to have been forged had changed. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 226.

b. Documentary Evidence.

See the title DOCUMENTARY EVIDENCE, vol. 4, p. 756.

Records as Evidence.—In *Sands v. Com.*, 20 Gratt. 800, C. had forged a note, and employed the prisoner, an attorney, to bring suit thereon, which he did and recovered judgment. Held, that in the prosecution of the attorney for uttering the forged note, the records of the civil suit, and the testimony of the clerks of the court are admissible evidence to show the complicity of the prisoner in the uttering of the forged paper.

An action at law was brought upon the note alleged to be forged, against the curator of H., and judgment rendered without any defense. A suit in equity was then brought to subject the real estate of H., to the payment of the judgment; and there was a decree for sale, and sale; in both which suits the prisoner was counsel for the estate; and he purchased a part of the property. The records of these cases, with the testimony of the clerks of the respective courts, were admissible evidence with other evidence, to show the uttering of the forged paper, and the

complicity of the prisoner in the uttering of it. *Sands v. Com.*, 20 Gratt. 800.

Bank Clerk's Book Entries.—Upon a trial for the forgery of an endorsement on a note, the note having been deposited in bank for collection, the original entries in the book of the note clerk of the bank, proved by the clerk to have been made by him from the note, are competent evidence to prove that the note and endorsement thereon were as described in the indictment. *Cocke v. Com.*, 13 Gratt. 750.

Records — Depositions.—Upon the trial of an indictment for uttering, and attempting to employ as true, a forged receipt for money, knowing it to be forged, the record of a cause in chancery between the person so uttering and the person whose name is alleged to have been forged, which record includes a deposition to the genuineness of the receipt, taken by the accused, all tend to show that the accused did utter, and attempt to employ as true, said receipt, and is competent evidence. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

Irrelevant Documents.—A genuine order by the same drawers upon the same party, which had been paid to the accused, as the order which the accused was charged with having forged, is not competent evidence for the accused. *Burress v. Com.*, 27 Gratt. 935.

It is error to allow one accused of forgery, on trial therefor, to be interrogated as to other similar papers, unless it is first shown that such papers were forged, and the accused had culpable connection therewith. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

c. Pecuniary Circumstances of Parties.

Pecuniary Condition of Person Whose Note Is Forged.

—In *Sands v. Commonwealth*, 20 Gratt. 800, it was held, that on a trial for the forgery of a note of a person who has since died, the commonwealth may prove that such person was prompt in the payment

of his debts, and that he owned a large property—real and personal—and was doing a good business. See also, *Chahoon v. Com.*, 20 Gratt. 733.

On a trial for the forgery of a note of H., who is dead, the commonwealth may prove that H. was prompt in the payment of his debts, and that he owned a large property—real and personal—and was doing a good business. *Sands v. Com.*, 20 Gratt. 800.

Pecuniary Condition of Accused.—

Upon such trial it is proper to inquire into the pecuniary condition of the person in whose favor the alleged forged receipt purports to have been given, at or about the date of such receipt. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

d. Instrument Unlike Copy in Indictment.

Indictment for Forgery.—While in an indictment for forgery it is unnecessary to set forth a copy or facsimile of the instrument forged, yet if this is done, and there is a material variance between the copy so set out and the paper offered in evidence, such paper, on motion of the accused, should be excluded from the consideration of the jury. *State v. Fleshman*, 40 W. Va. 726, 22 S. E. 309. See ante, "Variance," I, F, 7, c.

Indictment for Uttering.—A forged paper is passed by a prisoner bearing date in 1828; immediately after, with the knowledge of the holder, the prisoner alters the date to 1827. The indictment sets forth its tenor, and describes it as dated in 1827. The paper is proper evidence to go to the jury in support of the indictment, notwithstanding the proof that it bore date in 1828, when passed. *Huffman v. Com.*, 6 Rand. 685.

e. Instrument Partially Obliterated by Court.

In *State v. Duffield*, 49 W. Va. 274, 38 S. E. 577, the court said: "The third assignment of error is based upon the fact that the court obliterated a part

of the endorsement contained on the note upon which the charge of forgery in this case is predicated, and then allowed the note so obliterated to be offered in evidence, as shown in bill of exception No. 2. The endorsement so obliterated was no part of the note or endorsement for the purpose of using it, but was simply an affidavit written on the back of said note, made and signed by A. J. Arnold, one of the alleged endorsers of said note, to the effect that the signature on the back of said note was a forgery, that he did not sign his name, neither did he authorize his name to be used in said note. Defendant's counsel cites *State v. Johnson*, 26 Iowa, 407, 96 Am. Dec. 158, in support of his assignment, where it is held, that 'No technical words, such as "tenor," etc., need to be used to express that copy of instrument is set out in the indictment. For this purpose the words "of the purport and effect following" are sufficient, at least, when the indictment then does, in fact, set out a copy of the instrument.' It was wholly unnecessary, in case at bar, to set out the affidavit indorsed on the back of the note, as it was no part of the instrument. *Burress v. Com.*, 27 Gratt. 934 (944); *Perkins v. Com.*, 7 Gratt. 651, 56 Am. Dec. 123."

f. Similar Mistake in Spelling.

At the examination of the prisoner by the mayor, the prisoner reluctantly at the mayor's request but without threat or promise to induce him to do so wrote the name he was suspected of having forged; in doing so he made the same mistake in spelling the name, as appeared on the forged instrument. Held, this fact was properly admitted to the jury. *Sprouse v. Com.*, 81 Va. 374.

g. Evidence as to Time of Forgery.

On a charge of forgery by the addition of words to a check, the addition may be shown to have been made at any time after delivery to the payee

thereof. *Gordon v. Com.*, 100 Va. 825, 41 S. E. 746.

h. Evidence as to Venue.

In *Spencer v. Com.*, 2 Leigh 751, the court held, that evidence that the prisoner had the notes in his possession in a county was proper evidence to go before the jury of the fact that he committed the forgery there. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 936.

Inferences of Jury.—If on the trial of a prisoner in a certain county for the forgery of a certain writing alleged to have been committed in that county, it be proved that the said writing was found in the possession of the prisoner in the said county where he had uttered or attempted to utter the same as true, and there be no evidence to show that the forgery of said writing was committed in any other county, the jury from these facts may infer that the forgery of said writing was committed in that county. *State v. Poin Dexter*, 23 W. Va. 805; *State v. Tingler*, 32 W. Va. 546, 9 S. E. 936.

2. Best and Secondary Evidence.

General Statement.—On a trial for forgery, the instrument alleged to be forged is the best evidence of itself and its contents, and therefore its production can never be dispensed with unless unavoidable. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *Pendleton v. Com.*, 4 Leigh 694, 26 Am. Dec. 342. See generally, the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 355.

On the trial of an indictment for forgery of a check on a bank, if there be proof rendering it highly probable that the original paper has been lost or destroyed, though this was not done by the accused or by his procurement, secondary evidence of the contents, character and description, of the paper, is admissible to sustain the prosecution. *Pendleton v. Com.*, 4 Leigh 694, 26 Am. Dec. 342.

On the trial of a person accused of forgery the alleged forged paper must

be produced, or its nonproduction satisfactorily accounted for, by showing it to be lost, destroyed, or in the hands of the accused or his friends; and, in the latter case, notice to produce it must be given to the accused or his counsel before evidence of its existence, character, and contents is admissible. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

Failure to Produce Forged Note.—Upon a trial for the forgery of an endorsement on a note, the commonwealth having proved that the note went into the prisoner's possession, and notice to the prisoner to produce it, may prove the note and the forgery in its absence. *Cocke v. Com.*, 13 Gratt. 750.

Foundation for Admission of Secondary Evidence.—On trial of indictment for forgery of a letter of credit with intent to defraud W. & W., the commonwealth proves that a draft, presented by the prisoner to W. & W. at the same time with the letter of credit, had been filed, together with an indictment against the prisoner for forging the same, with the clerk of the court, who, on making search for the draft among the papers in his office, has been unable to find it; and thereupon the commonwealth offered secondary evidence of the contents of the draft; no notice having been given to the prisoner, before the jury was impanelled, of any intention to offer such evidence. Held, the foundation so laid for the admission of the secondary evidence is sufficient. *Foulkes v. Com.*, 2 Rob. 836.

Proof of Nongenuineness of Instrument.—Upon a trial for forgery of a written instrument, the commonwealth may, without producing as a witness the party by whom the instrument purports to be signed, and without accounting for his absence, prove by the evidence of other witnesses that the instrument is not genuine; such evidence not being in its nature secondary to that of the party whose signature is

in question. *Foulkes v. Com.*, 2 Rob. 836.

Parol Evidence in Prosecution for Uttering.—Special verdict finding the prisoner guilty of transferring a certificate of debt of the commonwealth, purporting to be signed by two auditors of public accounts, knowing it to be forged. It was quæred, whether parol evidence of the official appointment of the auditors was sufficient. *Com. v. Kearns*, 1 Va. Cas. 109.

3. Failure to Produce.

To convict of forgery, the jury must be governed entirely by the testimony before them, and they must not presume or assume the guilt of the accused, by reason of his failure or neglect to produce evidence in his own behalf. But if the jury believe that it is in the power of the accused to produce evidence in elucidation of the subject matter of the charge against him, then his failure or neglect to produce such evidence may be considered by the jury, in connection with the other facts proved in the case. *Chahoon v. Com.*, 20 Gratt. 734.

H. VERDICT.

Separate Verdict for Forgery and Uttering.—Forging, and uttering a forged paper knowing it to be forged, being separate and distinct offenses, it is competent for the jury to find a separate verdict of guilty upon each count, and fix the punishment for each offense separately, but the usual and better practice in such cases is to find a general verdict for the two cognate offenses charged. *Johnson v. Com.*, 102 Va. 927, 46 S. E. 489. See generally, the title VERDICT.

Uncertainty—Venire Facias de Novo.—The indictment charges in one count the forgery of a note, and in another count the forgery of an endorsement upon the note. The jury find the prisoner not guilty on the first count; and then say, "On the second count, viz.: that of uttering a negotiable note knowing it to be forged, we find the

prisoner guilty, and affix the term of his imprisonment for the term of two years." The verdict upon the second count is too uncertain to authorize any judgment upon it; and a venire facias de novo on that count should be awarded. *Cocke v. Com.*, 13 Gratt. 750.

I. PUNISHMENT.

The statutes, Va. Code, ch. 182; W. Va. Code, ch. 146, prescribe as the penalty for forgery not less than two nor more than ten years in the penitentiary. The same chapters prescribe the same punishment for uttering a forged paper, knowing it to be forged. *Johnson v. Com.*, 102 Va. 927, 46 S. E. 489; *State v. Cotts*, 49 W. Va. 615, 616, 39 S. E. 605.

II. Counterfeiting.

A. WHAT CONSTITUTES.

Counterfeiting Bank Notes of Foreign State.—Previous to the revival of 1819, there was no express provision for the offense of counterfeiting the notes of any bank of another state, whether chartered or not; but there was one in relation to notes generally. *Murry v. Com.*, 5 Leigh 720, 722.

In *Murry v. Com.*, 5 Leigh 720, it is said: "And we are all of opinion, that the words any note, in the present statute, in like manner, embrace the notes of unchartered banks. Although the legislature designed, by another statute, to suppress such banks in this state, we have no reason to believe that it intended to interfere with the policy of other states which may permit them. And, certainly, there is nothing in either statute, from which we can infer, that the legislature would tolerate the offense of forgery, for the mere purpose of endeavouring to suppress unchartered banks."

Brightening Base Pieces.—One who brightens base pieces (which are brought to him ready formed, with the impression and appearance of dollars, except that they are of a dark color,

like lead, and not then passable), by boiling them in a ley, and rubbing them with woollen cloth, and subjecting them to other processes, thereby rendering them by their resemblance to real dollars, more fit for circulation, is guilty of counterfeiting. He completes the offense, and thereby subjects to the penalties of the act, not only himself, but all who acted a part, and were present assisting at the transaction from beginning to end, or who did anything thought necessary by themselves to impose on the public, by making the base coin resemble the true. *Rasnick v. Com.*, 2 Va. Cas. 356.

B. INDICTMENT.

1. For Uttering or Passing.

In the Words of the Statute.—"There can be no doubt, that, in all cases of tendering, offering, passing or uttering counterfeit notes, the indictment is sufficiently certain, if it pursue the words of the statute; if it sets forth the tenor of the instrument, thereby giving it a precise certainty; if it sets forth the scienter, and the intent to defraud some person, or corporate body by name. If the indictment moreover sets forth the person to whom it is tendered or passed, the degree of certainty and precision is greater than (it would seem) is absolutely essential." *Brown v. Com.*, 2 Leigh 769, 773. See post, "Uttering or Passing," II, D. See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Incomplete Recital.—An indictment for causing and procuring a counterfeited bank note to be offered to be passed, without stating by whom or how the accused caused and procured it to be done, is sufficiently certain, and good. *Brown v. Com.*, 2 Leigh 769.

As to Time, Place and Scienter.—Indictment for passing a counterfeit note charges that the prisoner, on a particular day, at the county of M. and within the jurisdiction of the court, being possessed of the note, feloniously,

did pass the same, well knowing it to be counterfeit at the time he passed it. Held, the time and place of passing the note, and of the scienter, are set forth with sufficient certainty. *Buckland v. Com.*, 8 Leigh 732.

Omission of Formal Allegation.—Upon an indictment for passing a counterfeit note of the bank of Louisville, without alleging that the bank is a chartered bank, or that there is no such bank, and without alleging that the note was passed "to the prejudice of another's right," or "for the prisoner's own benefit, or for the benefit of another," held, the offense so charged is a felony within the meaning of the statute, 1 Rev. Va. Code, ch. 154, § 4, and the indictment is good and sufficient. *Murry v. Com.*, 5 Leigh 720.

Omission of Indorsement.—In setting out a counterfeit bank note in *haec verba*, in an indictment for feloniously passing the same, an indorsement appearing to have been made on the note after it was passed, is properly omitted, and the omission is therefore no ground for the objection of variance. *Buckland v. Com.*, 8 Leigh 732.

Variance.—On the trial of an indictment for passing a counterfeit bank note, the prisoner moves to exclude the note produced from going in evidence to the jury, on the ground that the name of one of the firm of engravers, set out in the description of the note in the indictment, does not appear on the note produced; the attorney for the commonwealth proves, that when he drew the indictment, he had been able to make out the name on the note, from his knowledge that one of the firm of engravers bore that name, though he can not say he would have been able to do so without the knowledge of that fact; but that the word had since become indistinct, he supposes, by handling the note. The court thereupon overrules the motion to exclude, and permits evidence to be given of the passing of the note produced.

Held, it was right for the court to do so. *Buckland v. Com.*, 8 Leigh 732.

Passing to a Slave.—An indictment for passing a counterfeited bank note to a slave, with intent to defraud the bank, is good. *Brown v. Com.*, 2 Leigh 769.

2. For Felonious Possession.

Coin.—An indictment under the statute, Va. Code, ch. 193, § 6, p. 733, for feloniously having in his possession more than ten pieces of forged or base coin, must allege that the prisoner had them in his possession at the same time; and the charge that on a certain day he had them in his possession, is not sufficient. *Scott v. Com.*, 14 Gratt. 687. See post, "Felonious Possession," II, E.

Die.—An indictment on the statute of 1834-5, ch. 66, charging that the prisoner did knowingly have in his custody, without lawful authority or excuse, "one die or instrument" for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half dollar (no further describing the die or instrument) is insufficient. *Com. v. Scott*, 1 Rob. 695.

3. Irregularities—Curative Effect of Verdict.

In an indictment for the forgery of bank notes, instead of setting out the tenor of the forged notes, the attorney "for greater certainty as to their identity," referred to them as "being annexed" hereto, and actually did annex them. The prisoner did not move to quash the indictment, nor did he plead in abatement, but pleaded the general issue, and a verdict was rendered against him. Although this is a careless and irregular mode of counting, yet after verdict the irregularity is cured by the act of jeofails. A charge that a forgery of bank notes was committed, with intent to injure "divers good citizens of the commonwealth and others, to the jurors unknown," without setting out an intent to injure

the president, directors and company of those banks, or of any particular person, or body politic, by name, is good after verdict. So, to charge that the prisoners willingly acted and assisted in false making and forging, without setting out in particular any person who was assisted: "So, to charge them with causing and procuring the forged notes to be passed, without setting out the persons whom the prisoners caused or procured to pass them, nor to whom: So, to charge them with passing them to W. S. with intent to defraud the said W. S. and others: So, also, to charge them with causing and procuring them to be passed or exchanged. Held, good after verdict. *Com. v. Ervin*, 2 Va. Cas. 337.

In an indictment for the forgery of bank notes, instead of setting out the tenor of the forged notes, the attorney "for greater certainty as to their identity," referred to them as "being annexed" hereto, and actually did annex them. The prisoner did not move to quash the indictment, nor did he plead in abatement, but pleaded the general issue, and a verdict was rendered against him. Although this is a careless and irregular mode of counting, yet after verdict the irregularity is cured by the act of jeofails. *Com. v. Ervin*, 2 Va. Cas. 337.

4. Duplicity.

An indictment which charges a prisoner with the offenses of falsely making, forging and counterfeiting; of causing and procuring to be falsely made, forged and counterfeited, and of willingly acting and assisting in the said false making, forging and counterfeiting, is a good indictment, though all of these charges are contained in a single count; the words of the statute being pursued, and there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offenses are distinct. *Rasnack v. Com.*, 2 Va. Cas. 356.

An indictment, with one count, for a violation of a statute providing "if any free person shall falsely make, forge, counterfeit, or alter, or procure to be made, forged, counterfeited, or altered, or willingly act or assist in falsely making, forging, counterfeiting, or altering, any coin, etc., such person shall be deemed guilty of felony," charging that the accused certain coin did falsely make, etc., and did cause and procure to be falsely made, etc., and did willingly act, etc., was held, to be not faulty for duplicity. *Rasnick v. Com.*, 2 Va. Cas. 356; *Leath v. Com.*, 32 Gratt. 873, 883.

5. Misjoinder of Parties.

If the procurers or aiders are not present, they are accessaries, and must be indicted specifically as such, but where they are present, they are principals in the second degree, and the law making them equally guilty with the actual forger, there is no objection to uniting in one court such an offense with that of principal in the first degree. *Rasnick v. Com.*, 2 Va. Cas. 356.

C. JURISDICTION.

Of State Courts over Counterfeiting or Passing Counterfeit National Bank Notes.—"Hendricks' Case, 5 Leigh 707, was a prosecution for passing a forged check purporting to be a check of the cashier of the bank of the United States. In delivering the opinion of the court, Judge Daniel said: 'It was urged by the prisoner's counsel, that the judgment ought to have been arrested on the ground that the courts of Virginia ought not to punish criminally any forgery of the notes, bills or checks of or upon the bank of the United States, because this is an offense punishable by the courts of the United States; and if a state court, which can not oust the courts of the United States, of their jurisdiction, should proceed, it might happen that a man might be punished twice for the same offense. The answer to this is, that the law of Virginia punishes the

forgery, not because it is an offense against the United States but because it is an offense against this commonwealth, committed within its limits, and punishment of it is designed for the protection of our own citizens.'" *Jett v. Com.*, 18 Gratt. 933. See the title JURISDICTION.

In *Jett v. Com.*, 18 Gratt. 933, the court said: "This case, *Hendricks v. Com.*, 5 Leigh 707, therefore, and every other which holds that a prosecution may be maintained in a state court, under a state law, for the offense of counterfeiting the coin, or for passing counterfeit coin, or for any other offense against the coin provided for by act of congress, or for the offense of forging a note or check of the bank of the United States, or of passing such forged note or check, is an authority for the proposition which I have been maintaining, that there is no incompatibility or repugnance between the jurisdiction of the courts of the United States to punish a man for a particular act, as an offense against the United States under an act of congress, and the jurisdiction of the courts of a state to punish the same man for the same act, as an offense against the state under the laws of the state. The cases of this sort are numerous, and many of them are cited in a former part of this opinion."

In *Jett v. Com.*, 18 Gratt. 933, the court said: "Congress having, as must be assumed, authority to establish the system of national banks, had the authority to protect their circulation from being discredited by counterfeits, in order to secure the usefulness of the system. When, therefore, the forged note employed in effecting a cheat purports to be the note of a national bank, congress has a right to declare the act of uttering or attempting to pass such note to be an offense against the United States; and has accordingly done so. Literally speaking, the act of congress and the statute of the state punish the same identical act, namely,

the act of uttering or attempting to pass as true the forged note. But the two statutes aim at the accomplishment of different objects; the authority under which they were enacted is derived from different sources, and though the offense which each of them punishes is comprised in one and the same act, there is really an essential difference in the character of the two offenses."

In *Jett v. Com.*, 18 Gratt. 933, the court said: "The act of congress by which the forging of checks, etc., of the bank of the United States was made punishable is an offense against the United States, contained a provision to the effect that nothing therein should prevent the courts of the several states from taking cognizance of the same acts as offenses under state laws. But that proviso did not, as is conceded on all hands, confer jurisdiction upon the state courts, and is immaterial therefore to the purpose for which I now cite this case. The only effect claimed for such a proviso, as we shall see hereafter, is, that it relinquishes, as to the particular class of offenses, the exclusive jurisdiction of the courts of the United States under the provisions of the preceding act, and allows the courts of the states to exercise a jurisdiction which they might have exercised if not prohibited by the grant of exclusive jurisdiction to the courts of the United States by the judiciary act."

In *Jett v. Com.*, 18 Gratt. 933, the court said: "I do not think there is any solid ground for the objection that this doctrine would, in its practical working, lead to injustice and oppression, by subjecting offenders to double punishment for the same act. We must suppose that the criminal laws will be administered as they should be, in a spirit of justice and benignity to the citizens, and that those who are entrusted with their execution will interpose to protect offenders against double punishment, whenever their in-

terposition is necessary to prevent injustice or oppression; and that if, in any case, they should fail to do so, the wrong will be redressed by the pardoning power. We may safely assume that there will be no cases of double punishment hereafter, as, I presume, there have been none heretofore, except, perhaps, in cases of great enormity, or in cases attended by some peculiar circumstances, in which the ends of justice could not be otherwise secured."

D. UTTERING OR PASSING.

Elements of Guilt.—"The passing a counterfeit note, may be of itself a perfectly innocent transaction; the guilt consists in passing it, knowing it to be counterfeit." *Finn v. Com.*, 5 Rand. 701, 710. See ante, "For Uttering or Passing," II, B, 1.

"The primary intent of every man who forges notes, or passes them knowing them to be forged, is to benefit himself; he intends to increase his own fortune by getting something for nothing. When he passes a counterfeited note of a hundred dollars to another person, he defrauds and injures that person, by obtaining from him, for a worthless piece of paper, property or money to the amount of a hundred dollars. The effect of the passing, is to injure the person with whom he deals; but this intent is to benefit himself. He knows that the direct consequence of this act of felony is to injure and defraud his neighbor; he is reckless of the consequence. Then the law steps in, declares that every man shall be presumed to intend that which is the necessary consequence of his own acts. In this way only, can the law be understood which makes it felony to pass a counterfeit bank note to another, with intent to defraud that other. It is the same thing when the law speaks of the intent to injure or defraud the corporate body. The natural and inevitable consequence of counterfeiting bank notes, or of pass-

ing bad notes, is to injure the institution whose notes are so counterfeited or passed. It affects the interest, it impairs the credit of the bank. The man who passes them, knowing them to be counterfeit, is presumed to intend this which is the necessary consequence of his so passing them, and he therefore comes within the provision of the statute." *Brown v. Com.*, 2 Leigh 769, 776.

Uttering Counterfeit Notes of the U. S. Bank.—It is felony under the statute 1 Rev. Va. Code, ch. 154, § 1, to pass a counterfeit note of the bank of the United States, dated at a time when that bank was in existence, though, at the time of passing the note, the charter of the bank had expired. *Buckland v. Com.*, 8 Leigh 732.

Uttering Bank Notes of Foreign State.—In *Com. v. Hensley*, 2 Va. Cas. 149, it was held, that the false uttering of a forged bank note of another state or district, may be prosecuted as the false uttering of a "promissory note for the payment of money," under the statute of December 8, 1794.

Henley's Case, 2 Va. Cas. 149, decided that the passing of a counterfeit note, purporting to be for a bank in another state (without inquiring whether it was chartered or not), was felony, because the words of the statute then in force comprehended all notes. *Murry v. Com.*, 5 Leigh 720, 722.

Uttering Note of Unchartered Bank.—In *Murry v. Com.*, 5 Leigh 720, 724, it is said: "On the whole, then, we are of opinion that the note of an unchartered bank is not embraced by the first section of the statute but is clearly embraced by the words any note in the fourth section; that the words 'to the prejudice of another's right,' relate only to the forging of other writings not particularly named; and that the words 'for his own benefit or for the benefit of another,' refer, not to the actual uttering and publish-

ing as true, of counterfeit notes, etc., but to the mere attempt to use or employ them and the other writings mentioned."

E. FELONIOUS POSSESSION.

As a Separate Offense.—"The forging of coin, and the feloniously having in possession such forged coin, are distinct and substantive offenses." *Scott v. Com.*, 14 Gratt. 687. See ante, "For Felonious Possession," II, B, 2.

In *Scott v. Com.*, 14 Gratt. 687, the court said: "To my mind, the features which mark the felonious possession of forged coin, as an offense different from that of the forgery of the same, are as distinct as those which have been thus declared to distinguish forgery from uttering and publishing. And I do not think that the attorney general has succeeded in his effort to place this case outside of the reason and influence of the case of *Page and Mowbray*. I can not accede to the correctness of his position, that the charge of feloniously having base coin in possession is necessarily involved in the charge of forging it. For if it be conceded that the act of forging necessarily implies the possession, by the counterfeiter, of the coin, during the process of its fabrication, and at and (for an instant at least) after the completion of the process, it is yet obvious that the necessity of such an implication does not extend to the possession of any given number of pieces of the coin at one and the same point of time. The offense of 'forging ten or more pieces of coin,' would be complete, though it should appear that each piece in succession was commenced and finished, and had passed out of the hands, and beyond the control of the forger, before another came into his possession, whilst in order to make out the felony of having such coin in possession, the statute, in terms, requires it to be shown that the party accused had in his possession ten or more pieces at the same time. The

judgment of the county court, therefore, remanding the prisoner to be tried for forging and counterfeiting twenty-four pieces of coin, does not serve to show that he has been examined for the offense of having said pieces or any ten of them in his possession at the same time."

F. EVIDENCE.

1. Proof of Scienter.

In a prosecution for uttering counterfeit coin, the guilty knowledge of the prisoner that the coin was counterfeit is a fact to be proved; and there can be no presumption of law, from the existence of other facts, of this guilty knowledge, though there may be a presumption of fact. *Wash v. Com.*, 16 Gratt. 530. See the title EVIDENCE, vol. 5, p. 295.

Questions and Declaration of Accused.—In a prosecution for passing a counterfeit note, knowing it to be forged, evidence that the prisoner endeavored to engage a person to procure for him counterfeit money, that he inquired whether he had brought him any, and of declarations that he intended to cultivate the acquaintance of a counterfeiter and intended to remove to a place near his residence, etc., is admissible as tending to prove the scienter. *Finn v. Com.*, 5 Rand. 701.

Proof of Passing Other Notes of Doubtful Character.—Upon the trial of an indictment for passing counterfeit bank notes, proof that prisoner had, about same time, passed another note of same kind, which was thought to be a counterfeit and which he took back, though this note is not produced at the trial, is admissible evidence to prove the scienter. *Martin v. Com.*, 2 Leigh 745; *Hendrick v. Com.*, 5 Leigh 707.

On the trial of an indictment for passing a counterfeit bank note or check, after evidence that the prisoner passed the note, and that it was counterfeit, evidence that the prisoner had in his possession and attempted to

pass other counterfeit notes of the same kind to other persons, the day after he passed those in the indictment mentioned, is admissible to prove the scienter. *Hendrick v. Com.*, 5 Leigh 707.

Conduct of Accused.—If no other circumstances than those of the transaction itself are given in evidence, it would be impossible to ascertain whether a counterfeit note was passed with guilty knowledge, or not. Hence, courts have been driven to the necessity in such cases, of admitting evidence of the conduct of the prisoner, so that from his conduct on one occasion, the jury may infer his knowledge on another. *Finn v. Com.*, 5 Rand. 701, 711.

2. Proof of Nongenuineness.

In a criminal prosecution for passing counterfeit bank notes of a certain bank, it is not necessary to prove by an officer of that bank that such notes are counterfeit. *Martin v. Com.*, 2 Leigh 745.

3. Notes Passed by Confederates.

Upon the trial of an indictment against M. for passing counterfeit bank notes, the prisoner appears clearly to have been confederated with one L. in passing counterfeit notes, and present when L. passed such notes; the notes so passed by L. are produced in evidence against the prisoner. Held, they are proper evidence. *Martin v. Com.*, 2 Leigh 745.

4. Parol Evidence as to Existence of Bank.

On a prosecution for uttering and attempting to employ as true a forged note purporting to be the note of the bank of Delaware in Pennsylvania, a banking company authorized by the laws of Pennsylvania, the existence of such a bank may be proved by parol evidence. The averment that it was authorized by the laws of Pennsylvania is surplusage, and need not be proved. *Cady v. Com.*, 10 Gratt. 776.

5. Possession as Presumptive Evidence.

Upon trial of an indictment for forging bank notes, the fact, if proved, of the forged notes mentioned in the indictment, and other forged notes of like kind, and the plates, implements and materials, for forging such notes, being found in the prisoner's possession, is *prima facie* or circumstantial, presumptive evidence, that the prisoner was the forger, proper to be given to the jury. *Spencer v. Com.*, 2 Leigh 751.

Forged notes, plates, implements and material for forging such notes being found in the possession of the prisoner in a certain county, is *prima facie* evidence, and proper to be given to the jury of the fact that the forgery was committed in such county. *Spencer v. Com.*, 2 Leigh 751.

6. Best and Secondary Evidence.

Necessity for Production of Coin or Note.—It seems that in a prosecution for passing a counterfeit coin, the prosecutor is at liberty to prove the fact of the passing, and the counterfeit character of the coin, without either producing the coin, or accounting for its nonproduction. *Kirk v. Com.*, 9 Leigh 627. See generally, the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 355.

When Excused.—In a prosecution for passing a counterfeit coin to a person who resides in another state, if a subpoena for such person as a witness has been issued and returned not found, the fact of the passing, and the counterfeit character of the coin, may be proved without producing the coin at the trial. It seems, that in a pros-

ecution for passing a counterfeit coin, the prosecutor is at liberty to prove the fact of the passing, and the counterfeit character of the coin, without either producing the coin, or accounting for its nonproduction. *Kirk v. Com.*, 9 Leigh 627.

Kirk v. Com., 9 Leigh 627, was a prosecution for passing a counterfeit coin. On his trial, the prisoner objected to the admission of any testimony to prove the passing of the coin, or that the same was forged or counterfeit, without the production of the piece of money alleged to be forged and passed. In answering this objection, Allen, J., who delivered the opinion of the court, said: "The absence of the forged pieces may increase the difficulty of proving the prisoner's guilt; but there seems to be no good reason for rejecting the evidence tending to satisfy the jury of the fact of the felonious passing, and that the pieces passed were counterfeit. If the rule were as contended for, then secondary evidence could never be received in a prosecution for forgery; for the objection covers the whole ground, that the production of the forged piece was essential, and that all testimony to prove its counterfeit character and the felonious passing was inadmissible unless the coin was produced. The contrary has been repeatedly established by the courts in this country and in England." *Pendleton v. Com.*, 4 Leigh 694, 26 Am. Dec. 342.

7. Competency of Witness.

Proof that certain bank notes are counterfeit may be made by persons well acquainted with the notes of such bank. *Martin v. Com.*, 2 Leigh 745. See the title WITNESSES.

Formal Defects and Errors.

See the titles AMENDMENTS, vol. 1, p. 359; APPEAL AND ERROR, vol. 1, p. 581.

Forma Pauperis.

See the titles APPEAL AND ERROR, vol. 1, p. 454; COSTS, vol. 3, p. 621; PAUPERS.

FORMEDON.—In *Orndoff v. Turman*, 2 Leigh 200, 241, Cabell, J., said: "I can not subscribe to the correctness of the position as to the writ of **formedon**. Coke says: 'The writ of **formedon**, a *forma donationis*, is so called because the writ doth comprehend the form of the gift.' It has no reference to the nature of the estate which it seeks to recover; for, it is applied as well to the recovery of estates in fee simple, as of estates in fee tail."

Former Acquittal or Conviction.

See the title **AUTREFOIS, ACQUIT AND CONVICT**, vol. 2, p. 181.

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CROSS REFERENCES.

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As to point that judgment at law for damages for breach of contract is bar to bill in equity for specific performance, see the title SPECIFIC PERFORMANCE. As to conclusiveness of judgment in detinue, see the title DETINUE AND REPLEVIN, vol. 4, p. 647. As to relief in equity against verdicts and judgments, see the title JUDGMENTS AND DECREES. As to dismissal of bill in equity, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 704. As to retraxit, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, pp. 686, 723. As to dismissal of appeal, see the titles APPEAL AND ERROR, vol. 1, p. 532; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 712. As to conclusiveness of compromise, see the title COMPROMISE, vol. 3, p. 37. As to equitable defenses, see the title ACTIONS, vol. 1, p. 142. As to collateral attack, see the title JUDGMENTS AND DECREES. As to proceedings in rem, see the title SERVICE OF PROCESS; and see also, the title FOREIGN JUDGMENTS, ante, p. 208.

I. Definition, Distinctions and General Consideration.

A. DEFINITION.

The definition which would seem to embrace more fully and accurately the meaning of the term *res judicata* is: A legal or equitable issue, necessarily involved in a former suit, on which there has been a final judgment or decree, obtained without fraud and collusion, and rendered by a court of competent jurisdiction necessarily affirming the existence of that fact, is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them. 2 Bouv. L. Dict. 898; Chesapeake, etc., R. Co. v. Rison, 99 Va. 18, 32, 37 S. E. 320, 324, 6 Va. Law Reg. 665; Beckwith v. Thompson, 18 W. Va. 103.

B. DISTINCTIONS.

In General.—“There is a marked difference between the effect of a judgment as a bar or estoppel against the prosecution of a second suit upon the same claim or demand, and its effect as an estoppel in another suit between the same parties or their privies upon a different claim or cause of action. In the former case, the judgment or decree, if rendered upon the merits, constitutes an absolute bar to a subsequent suit. All those matters which were offered and received, or which might have been offered to sustain the particular claim or demand litigated in the prior suit, and those matters of defense which were presented, or which might have been introduced, under the issue to defeat such claim, are concluded by the judgment or decree in

the former suit. *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, Id. 428; *Withers v. Sims*, 80 Va. 651. But in order that a judgment or decree may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases and be determined on its merits." *Miller v. Wills*, 95 Va. 337, 353, 28 S. E. 337.

Plea of Estoppel by Former Verdict v. Plea of Res Adjudicata.—"The plaintiff seems to have confounded the plea of estoppel by a former verdict with the plea of res adjudicata, which is good only when the causes of action are the same. 7 Rob. Prac. 344." *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

Distinction between Judgments and Decrees.—It is well-established law that a final decree in chancery is as conclusive as a judgment at law. A verdict and judgment in a court of record or a decree in a court of chancery puts an end to all points decided between the parties to the suit. There is and ought to be no difference between the verdict and judgment in the court of law and a decree in a court of equity. They both stand on the same footing and may be offered in evidence under the same limitations; it would be difficult to assign a reason why it should be otherwise. There is nothing anomalous or unusual in setting up a former adjudication as an estoppel to an action for equitable relief. The rule is a beneficial one, and it is a matter in which it is said that the public has an interest as well as the parties, that there should be an end to litigation. *Tilson v. Davis*, 32 Gratt. 92; *Tracey v. Shumate*, 22 W. Va. 474; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. 806; *Adams v. Shenandoah Val. R. Co.*, 76 Va. 913; *Blackwell v. Bragg*, 78 Va. 529; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

"It makes no difference whether the fact has been decided in a court of law or chancery, provided the court has jurisdiction thereof; and the decree or judgment may be pleaded as an estoppel either in a law or chancery court." *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250.

A final decree in a chancery cause is just as conclusive as a judgment at law. See *Sibbald's Case*, 12 Pet. 492; as is said in *Smith v. Kernochen*, 7 How. U. S.: "A verdict and judgment of a court of record or a decree in chancery puts an end to all points thus decided between the parties to the suit. In this there ought to be no difference between a verdict and judgment in a court of law and a decree in a court of equity. They both stand on the same footing and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise." *Tracey v. Shumate*, 22 W. Va. 474, 509.

"In the case of *Adams, Hamner & Co. and others v. The Shenandoah Valley R. Co. and others*, decided by this court November 16, 1882, and reported in 76th Va. Rep., p. 913, along with other cases heard with that case, Judge Lewis, in delivering the unanimous opinion of this court, said upon this subject: 'It is a familiar maxim in our jurisprudence that no person shall be twice vexed for one and the same cause. Therefore, a judgment of a court of competent jurisdiction directly on the point is, as a plea, a bar, and conclusive between the same parties upon the same matter directly in question in a subsequent action; and in this there is no difference between a verdict and judgment in a court of common law and a decree of a court of equity. Both stand on the same footing. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end would never be put to litigation.'" *Blackwell v. Bragg*, 78 Va. 529.

A creditor of a decedent, by specialty, after accepting from the administrator a confession of judgment when assets, files a bill in equity against the administrator for a discovery and account, and upon taking the account it appears, that at the time of the judgment there were assets in the hands of the administrator, which he afterwards applied in discharge of another specialty, on which he was bound as the endorser or assignor thereof; held, under such circumstances, the technical estoppel will avail in equity as a defense against the creditor's claim. "Even courts of equity will not suffer that to be again brought into litigation, which has been once solemnly settled between the parties by their admissions on record, unless there be some good reason assigned for so doing." *Dupuy v. Southgates*, 11 Leigh 92.

C. STATEMENT OF GENERAL RULE.

In order that the defense of res judicata may prevail, the judgment or decree in the first suit must have been rendered by a court of competent jurisdiction between the same parties, as in the second, or their privies, and the matters in controversy must have been the same in the former suit as in the latter, and have been determined on the merits. When these requisites concur, the adjudication in the first suit constitutes a bar not only to the points actually decided, but to every point which properly belonged to the particular matter in litigation, and which the parties might have brought forward at the time. All matters offered and received, or which might have been offered to sustain the claim in the prior suit, and all matters of defense which were, or might have been introduced, under the issue to defeat such claim, are concluded by the judgment or decree in the prior suit. *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60; *Richmond v. Sitterding*, 101 Va. 334, 43 S. E. 562, 99 Am. St. Rep. 879; *Coville v. Gil-*

man, 13 W. Va. 314; *Beckwith v. Thompson*, 18 W. Va. 103; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Findlay v. Trigg*, 83 Va. 539, 543, 3 S. E. 142; *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760; *Beale v. Gordon*, 2 Va. Dec. 35; *Tate v. Bank*, 96 Va. 765, 32 S. E. 476; *Withers v. Sims*, 80 Va. 651, 658, *Corprew v. Corprew*, 84 Va. 599, 5 S. E. 798; *Currie v. Chowning*, 2 Va. Dec. 25, citing *Diehl v. Marchant*, 87 Va. 447, 12 S. E. 803; *Martin v. Columbian Paper Co.*, 101 Va. 699, 44 S. E. 918.

"I regard it as settled by our decisions that a point once adjudicated by a court of competent jurisdiction, however erroneous that adjudication, may be relied upon as an estoppel in a subsequent collateral suit in the same or any other court at law or in chancery, when either party, or their privies, allege anything inconsistent with it; and this, too, when the subsequent suit is upon the same or a different cause of action, nor is it necessary that precisely the same parties were plaintiffs or defendants in the same suit, provided the same subject matter in controversy between two or more of the parties plaintiff or defendant to the two suits, respectively, has been in the former suit directly in issue and decided. The conclusiveness of the judgment or decree extends beyond what may appear on its face to every allegation which has been made on the one side, and denied on the other, and was in issue and determined in the court of proceedings. If it appears by the record that the point in controversy was necessarily decided in the first suit, whether upon demurrer or upon facts in issue, it can not be again considered in any subsequent suit between any of the parties or their privies. But this law of res adjudicata is subject to this qualification; no party can ever be estopped or in any way prejudiced by any judgment or decree, if the record in the first suit on its face shows that he had no opportunity to be heard in opposi-

tion to the entry of such judgment or decree. See *Poole v. Dilworth*, 26 W. Va. 583; *Corrothers v. Sargent*, 20 W. Va. 351, 357; *Beckwith v. Thompson*, 18 W. Va. 103; *Coville v. Gilman*, 13 W. Va. 314, 328; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Tracey v. Shumate*, 22 W. Va. 509; *Renick v. Ludington*, 20 W. Va. 511; *Haymond v. Camden*, 22 W. Va. 180, 199; *Stephens v. Brown*, 24 W. Va. 234, 236; *Underwood v. McLeigh*, 23 Gratt. 409. The first six of these cases established the general principles of the law as to res adjudicata as above stated; and the last five of them establish the qualification of these rules of law as above stated. The cases of *Haymond v. Camden*, 22 W. Va. 180, 182, point 9 of syllabus, and the case of *Stephens v. Brown*, 24 W. Va. 234, 236, decide expressly that a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. And, this being so decided in these cases, it must follow, as a matter of course, that such party to a suit can not be estopped by such a decision as res adjudicata in any other suit between the same parties involving the question at issue, and so decided in the first suit. In these cases the party against whom the decision was rendered, was, when it was rendered, resident in a country at war with the country in which such decision was rendered, and was thus prevented from having an opportunity to be heard on the questions decided when the decree was rendered. Such decree was not binding on him as res adjudicata." *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.

It is a just maxim of the law that no person shall be twice vexed for one and the same cause of action, but the justice of the maxim requires that the judgment or decree in a former suit, which is relied on as a bar to the subsequent suit, must have been rendered

upon the merits of the controversy. The adjudication, when so made, it may be added, constitutes a bar not only to the points actually decided, but to every point which properly belonged to the particular matter in litigation, and which the parties might have brought forward at the time, for a party is required to present the whole of his case and not omit a part, which, by the exercise of reasonable diligence, he might have brought forward at the time. All those matters which were offered and received, or which might have been offered to sustain the particular claim or demand litigated in the prior suit, and all those matters of defense, which were presented or might have been introduced under the issue to defeat the claim or demand, are concluded by the judgment or decree in the former suit. It must, however, have been rendered in a proceeding between the same parties or their privies, and the matter in controversy must have been the same in the former suit as in the latter, and been determined on the merits. *Chrisman v. Harman*, 29 Gratt. 494; *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Miller v. Wills*, 95 Va. 337, 354, 28 S. E. 337; *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60.

If a new suit is brought by the plaintiffs against the same defendant for the same cause of action, and the plea of res judicata is interposed by the defendant, it will bar the action. *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. 806.

A final adjudication of a court of competent jurisdiction upon the merits of a controversy, so long as it remains unreversed, is a bar to any new suit for the same cause of action between the same parties. *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

The defense of res judicata, made by answer, is sufficiently supported by the production of the record of the former suit between the same parties, touching the same matter, and showing a final

decree therein on the merits. *Miller v. Miller*, 92 Va. 196, 23 S. E. 233.

As said by Judge Tucker, the law "has wisely established the rule that interest reipublicæ res judicatas non rescindi. For I can not conceive of anything more inconvenient to society, than a power in the courts below to reverse and alter the solemn judgments of the supreme tribunal, as controversies would then be perpetual and suits become interminable." *Price v. Campbell*, 5 Call 117. Public policy demands that there should be an end to litigation, and hence the law adopts another maxim, that interest reipublicæ ut sit finis litium. *Coke Litt.* 303. *Harmon v. Bowyer*, 15 W. Va. 538.

The rule laid down in the *Duchess of Kingston's case* (20 Howell St. Trials 355, 538), is, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court. The judgment in the former suit must be directly on the point which is in question in the subsequent suit, to make it a bar when pleaded, or conclusive when relied on as evidence. A judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. Approved in *Kelly v. Board of Public Works*, 25 Gratt. 755.

II. Nature, Requisites and Sufficiency of Former Judgment.

A. NATURE OF FORMER JUDGMENT.

1. In General.

What Constitutes an Adjudication.—

By decree of November 1, 1897, a fund of \$568, with interest from November 6, 1889, ascertained to be in the hands of John E. Roller, special receiver, was declared to be a real fund, arising from the rentals of the real estate of Andrew Houck, deceased, subject to the liens

of the Dunham and Kerfoot judgments; and the special receiver was ordered to pay the same to the administrator of the surviving partner of that firm, after first deducting a fee of \$150 allowed counsel, and the unpaid costs of the suits. From this decree the cause is again before this court, and contention now being that the fund in question is not a real fund, that the real estate from which it arose was partnership property of Andrew Houck and Alfred Sprinkle, and the rentals thereof personalty, which should pass into the hands of the administrator of Andrew Houck, to be distributed in equal proportions to all of his creditors. In the absence of other evidence to support the contention that this real estate was partnership property of a firm composed of Andrew Houck and Alfred Sprinkle, appellant relies upon certain recitals in the decrees and other proceedings had in the several chancery causes mentioned; and chiefly upon the proposition that the question is res adjudicata under the decrees of April 19, 1884, November 5, 1887, and October 28, 1889. There was a settlement to be had between the estates of Andrew Houck and Alfred Sprinkle, involving the purchase money paid by them respectively upon their joint purchase of the houses and lots, and the rents arising from the same. The several commissioners, in dealing with these matters, would speak of the firm of Houck and Sprinkle, and the partnership accounts of Houck and Sprinkle, and the decrees following the language of the commissioner would use the same description; but it is apparent that this was done without reference to the technical meaning attached to the terms employed. The decrees and other proceedings frequently speak of Houck and Sprinkle as joint owners of the houses and lots, the terms "partners" and "joint owners" being sometimes indifferently used in the same decree. The decrees relied on were interlocutory, and do not con-

stitute an adjudication of the question that a partnership existed between Houck and Sprinkle with respect to their ownership of these houses and lots. The adjudication of a question is the deliberate action of the court upon that question. It is clear that no such question was ever considered by the court until the decree appealed from was entered. *Houck v. Kerfoot*, 99 Va. 658, 39 S. E. 590.

The mere fact that in a suit between estates of the two joint owners to settle the account of rents of the property, the commissioner, and the court, in its decrees, occasionally spoke of them as partners, is not an adjudication of that question, and does not affect the relations of the alleged partners. The adjudication of a question is the deliberate action of the court on that question. *Houck v. Kerfoot*, 99 Va. 658, 39 S. E. 590.

2. Orders of Court.

In assumpsit by the contractor against the county for the price contracted to be paid for building a jail, the defendant pleads specially, that the building was not completed in time, and that the material used and the work was defective, so that it is unfit for use as a jail; and the plaintiff takes issue on this plea. Upon the trial the defendant offers a witness to sustain the defense, when the plaintiff objects to the evidence, and offers in evidence an order of the court, showing that the court had appointed commissioners to examine the building, and upon their report, that it had been done according to contract, had received it. Held, the order was not an estoppel, it not being a judgment, and the report of the commissioners not being an award. *Carroll County v. Collier*, 22 Gratt. 302.

3. Orders of Commissioner of Delinquent and Forfeited Lands.

The acts of the legislature of Virginia of March 30th, 1837, and March

15th, 1838, and amendments in *pari materia*, created and provided for putting in operation a proceeding to ascertain and determine what lands were thus forfeited; and an officer, called the "Commissioner of Delinquent and Forfeited Lands," was provided for the purpose, whose duty it was to ascertain and report such lands to the circuit superior court of law and chancery for his county. Such proceeding was a judicial one, in the nature of a proceeding against the land itself; and, when completed by a sale, is *prima facie* evidence of such forfeiture against all persons. And the orders and decrees made therein are conclusive against strangers in all collateral proceedings. *Holly River Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214.

4. Orders of Board of Supervisors.

The powers and duties of a board of supervisors are executive, not judicial; and its allowance of a claim is not an adjudication, and does not bar its contesting the claim's validity, and pleading the statute of limitations, when a mandamus is applied for to compel payment. "As to the merits, the principal point made by the defendants in error is, that the allowance of the claim by the board on the 14th of December, 1871, was in its nature and effect an adjudication of the merits of the claim, which it was not competent for the board, at a subsequent meeting, to reverse or ignore. But we do not concur in this view. The powers and duties of a board of supervisors in Virginia are not judicial in their character, but are wholly executive or administrative. If it allows a claim not properly and legally chargeable on the county, or which it has not authority to allow, it exceeds its power, and its act is not binding on the county. Its allowance of a claim has no more effect than a settlement between individuals, and a warrant to pay a claim which has been allowed is nothing more than an order upon the county itself,

the debtor. That the allowance of a claim by a board of supervisors does not partake of the nature of a judgment which will estop the county, has been decided in many states and in numerous cases. In a recent case in the supreme court of North Carolina, it was held, that an allowance of a claim by a county board of commissioners is not final and conclusive, and may be re-examined by the board itself, and that it was error to instruct the jury that the allowance of a claim by the board was an adjudication as binding as the judgment of a court. *Abernathy v. Phifer*, 84 N. C. 711. So in *Gurnee v. Brunswick county*, 1 Hughes 270, Chief Justice Waite, in considering the nature of the powers exercised by a board of supervisors, under the laws of this state, in passing upon claims against the county, said: "The board are the representatives of the people elected to supervise the business of the county, which has been by law committed to their care. They constitute a branch of the executive department, not of the judiciary. * * * When an account is presented to them, it is for allowance, not for adjudication. In settling and allowing they do not act judicially. * * * Their duties are purely administrative." To the same effect is the opinion of Judge Dillon in *Shirk v. Pulaski County*, 4 Dill. 209, who cited the following authorities in support of his ruling that the allowance of a claim by a board of supervisors is not an adjudication, which will estop the county from setting up a defense to the claim when subsequently sued upon it, viz.: *Webster County v. Taylor*, 19 Iowa 117; *Clark v. Des Moines*, Id. 199; *Clark v. Polk County*, Id. 248; *School District v. Lombard*, 2 Dill. 493; *Keller v. Leavenworth County*, 6 Kan. 510; *Goodnow v. Ramsey County*, 11 Minn. 31; 1 Dill. Mun. Corp., § 412; *The Mayor of Nashville v. Ray*, 19 Wall. 468." Board of Supervisors *v. Catlett*, 86 Va. 158, 9 S. E. 999.

B. REQUISITES AND SUFFICIENCY OF FORMER JUDGMENT.

1. Erroneous Rulings and Errors of Form.

In General.—An erroneous ruling of the court will not prevent a matter from being *res adjudicata*. *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633, cited and approved in *Brown v. Squires*, 42 W. Va. 367, 26 S. E. 177; *Pickens v. Love*, 44 W. Va. 725, 29 S. E. 1018, 1019; *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154, 157; *Lee v. Smith*, 54 W. Va. 101, 46 S. E. 352; *Tracey v. Shumate*, 22 W. Va. 474.

"The force of a judgment as *res adjudicata* can not be destroyed or impaired by showing that it is clearly erroneous and ought not to have been rendered." *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633.

"An essential principle also is, that the action of the court is conclusive, even if it could be shown to be erroneous, unless in a direct action to reverse the judgment by appeal, or by some other legal method as to the parties and the issues. On this matter the New Hampshire supreme court remarks: 'It is a well-established principle, that the judgment of a court of record, having jurisdiction of the cause and of the parties, is binding and conclusive upon parties and privies in every other court until it is regularly reversed by some court having jurisdiction for that purpose. Notwithstanding the proceedings may be erroneous, yet, as between the parties, the judgment must stand until regularly vacated or reversed. Where a court has jurisdiction, it has a right to decide every question which arises in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdic-

tion of them and of the subject matter.'" Wells on Res Adjudicata, page 4, § 6. *Howison v. Weeden*, 77 Va. 704.

"They can not be impeached, when pleaded in bar or given in evidence in other tribunals, because of a wrong judgment, based upon the erroneous application of legal principles, or insufficiency of the evidence, or that the evidence was false, or for the reason that the writ and service were defective. The question of the sufficiency of service, or whether property attached was subject to seizure is one of jurisdiction. A judicial determination of jurisdiction is binding upon the parties until set aside or reversed in a direct proceeding. The judgment of a court of superior jurisdiction may be collaterally attacked upon the ground that the court rendering such judgment had not jurisdiction of the action. But such facts or circumstances only can be shown or relied on, in support of such attack, as affirmatively appear on the face of the record, or what, under the law as it read at the date of the judgment, constituted the judgment roll. Where a judgment recites the fact that the defendant had been duly served with process, this a direct adjudication by the court upon the point, and is as conclusive on the parties as any other fact decided in the cause, provided it does not affirmatively appear from other portions of the record constituting the judgment roll, that the recital is untrue. * * * The record of a court of superior jurisdiction imports absolute verity; it can not be collaterally attacked by proof aliunde. If the court has jurisdiction of the subject matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been; its final order can not be regarded as a nullity, and can not, therefore, be collaterally impeached. And this even where the judgment would, without question, be reversed on appeal. *Id.*, § 269. *St Lawrence*

Co. v. Holt, 51 W. Va. 352, 41 S. E. 351.

Failure to Pass on Some Questions Involved.—"Although the opinion of this court should indicate that important questions involved in the pleadings had been overlooked, which, had they been considered, might have changed the adjudication, nevertheless the decision, when it has been rendered and has become final, settles the right of the parties in that particular case, and it may be pleaded as an estoppel." *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561.

Secondary Evidence.—Where a party has failed to plead a set-off in the original action, which consisted of a note which he had misplaced, and the court, though erroneously, refuses to allow parol evidence of its contents, it is no ground for relief in equity. *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

Decree in Partition.—Where, in partition, the issue was whether the complainants were entitled to the shares of their deceased brothers and sisters, under the will of the complainant's grandfather, or whether such shares belong to their father, it was held, that a decree that the complainants were entitled to such shares was binding on the father, who was a party to the suit, since it settled the question that he had no interest in the property, though it did not finally adjudicate the rights of the children as between themselves; and in the absence of fraud, such decree can not be assailed by the creditors of the father, and the lands subjected to their claims. *Gardner v. Stratton*, 89 Va. 900, 17 S. E. 553. The court said: "Whether the decree in said partition suit is right or wrong is a matter not now to be inquired into, for, even if it were conceded to be erroneous, the result would be the same."

Grammatical Errors.—Where the plaintiff already has an intelligible judgment, though defective in form and grammar, against the same parties in

the same cause of action, he is precluded thereby from instituting another suit therefor before another justice, or in court. "He should have the defective judgment corrected, which the justice has the right to do on his motion, as to any clerical error committed by him, he being his own clerk." *Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

Joint Assignment of Damages.—A judgment assigning damages jointly, on the breaches assigned in a declaration on an injunction bond payable to several obligees jointly, while it is not a formal ascertaining the damages according to the statute, it is substantially so, and should be held as in full satisfaction and discharge of all the breaches alleged in the declaration, and a bar to any other or further recovery for the same breaches. *Peerce v. Athey*, 4 W. Va. 22.

Failure to Enter Judgment.—"If a judgment on a summary motion be reversed, on the ground that the plaintiff's claim is not supported by evidence, the appellate court should proceed to enter judgment, that the plaintiff take nothing by his motion. And such judgment would be a bar to another motion for the same cause of action. But if such judgment be not entered, the judgment of reversal is too imperfect to be a legal bar. See *Mantz v. Hendley*, 2 Hen. & M. 308, and *Darby v. Henderson*, and others, ante." *Webb v. M'Neil*, 3 Munf. 184.

Necessity of Declaration.—If there be judgment upon a general count in assumpsit; or by confession without a declaration; the plaintiff, in a second action for the same cause, must show two subsisting debts, or he can not sustain his action, if the former recovery is pleaded. "It was objected, however, that a declaration was necessary, in order to bar a future suit for the same thing, as the identity of the claim could not be made to appear without one. But that objection would apply, as was observed by the counsel, with

equal force to all general counts in assumpsit; which are scarcely more explicit. Besides, if to such new suit, the recovery, in this, were to be pleaded the plaintiff would be bound to show two subsisting debts at the time of the former judgment, or he would not be able to sustain his action." *Pickett v. Claiborne*, 4 Call 99.

2. Court Must Have Jurisdiction.

See the titles JUDGMENTS AND DECREES; JURISDICTION.

a. In General.

A judgment rendered by a court of competent jurisdiction in a former suit between the same parties, and involving the same subject matter, is conclusive. *Currie v. Chowning*, 2 Va. Dec. 25; *Beale v. Gordon*, 2 Va. Dec. 35; *Withers v. Sims*, 80 Va. 651, 658; *Corprew v. Corprew*, 84 Va. 599, 5 S. E. 798; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Lamar v. Hale*, 79 Va. 147.

When the judgment of a competent court is pronounced on any question, it is conclusive on all other tribunals, until it is reversed by a regular course of proceedings. *Cottom v. Cottom*, 4 Rand. 192.

That a judgment or decree may be a bar to a subsequent action between the same parties concerning the same subject matter, the first requisite is, that the court pronouncing the judgment or decree must have jurisdiction of the parties and of the subject matter. All judgments and decrees of courts which do not belong to that class called inferior courts and courts of limited jurisdiction, are conclusive in themselves, unless clearly beyond the jurisdiction of the tribunals from whence they emanate. 1 *Herman Est. & Res.*, § 346. *St. Lawrence Co. v. Holt*, 51 W. Va. 352, 41 S. E. 351.

Validity of Contract.—While the judgment of a competent court of any state that has jurisdiction over the person or subject matter is conclusive upon the merits of the controversy in every

state, a court of another state has not the power, without service of process or voluntary appearance, to render a judgment on a contract that is absolutely void, under the statutes of the state where it is made. *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101.

A doubt intimated by the chancellor as to his right to entertain jurisdiction of the suit will not affect his judgment, when he did exercise jurisdiction. *Williams v. Tomlin*, 2 Va. Dec. 565.

b. Notice and Opportunity to Be Heard.

See the title SERVICE OF PROCESS.

In General.—The law of res judicata is subject to this qualification; no party can be estopped by any judgment or decree if the record of the first suit shows that he had no opportunity to be heard in opposition to such judgment or decree. *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809; *Renick v. Ludington*, 20 W. Va. 511; *Renick v. Ludington*, 16 W. Va. 378; *Haymond v. Camden*, 22 W. Va. 180, 182; *Stephens v. Brown*, 24 W. Va. 234; *Underwood v. McVeigh*, 23 Gratt. 409; *Wandling v. Straw*, 25 W. Va. 692; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879.

It is essential to the jurisdiction which gives a judgment conclusiveness that the defendant had legal notice. If the record shows no notice, the judgment is null. If the judgment be of a court of general jurisdiction, and the record shows legal notice to defendant, extrinsic evidence is inadmissible to show want of such notice. As to decrees under which sales have been made to bona fide purchasers, this is especially true. *Wilcher v. Robertson*, 78 Va. 602.

"This is impliedly recognized by me as law, when, in pronouncing the opinion of *Tracey v. Shumate*, 22 W. Va. 479, 510, I said: 'It is sufficient to make a decree an estoppel as res adjudicata if the status of the suit was

such that the parties might have had their suit disposed of on its merits, or if they had presented all their evidence, and the court had properly understood the facts, and correctly applied the law to the facts.' For, of course, from this it would follow that if the status of the suit, when the decree was rendered, was such that any of the parties to it had then or prior thereto the opportunity to present any proof as to the facts bearing on these points decided, and had no opportunity to be heard on the law involved in the decision when it was rendered, he could not be bound by such a decree as res adjudicata in another subsequent suit in which the points so decided would be prejudicial to him. It matters not that, when such decree was rendered, such person was a party to the suit, if for any reason he had no opportunity to be heard." *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.

Review of Cases by Judge Green.—

"But this law of res adjudicata is subject to this qualification; no party can ever be estopped or in any way prejudiced by any judgment or decree, if the record in the first suit on its face shows that he had no opportunity to be heard in opposition to the entry of such judgment or decree. See *Poole v. Dilworth*, 26 W. Va. 583; *Corrothers v. Sargent*, 20 W. Va. 351, 357; *Beckwith v. Thompson*, 18 W. Va. 103; *Coville v. Gilman*, 13 W. Va. 314, 328; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Tracey v. Shumate*, 22 W. Va. 474, 509; *Renick v. Ludington*, 20 W. Va. 511; *Renick v. Ludington*, 16 W. Va. 378; *Haymond v. Camden*, 22 W. Va. 180, 182, 199; *Stephens v. Brown*, 24 W. Va. 234, 236; *Underwood v. McVeigh*, 23 Gratt. 409. The first six of these cases establish the general principles of the law as to res adjudicata as above stated; and the last five of them establish the qualification of these rules of law as above stated." *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.

"The cases of *Haymond v. Camden*, 22 W. Va. 182, point 9 of syllabus, and the case of *Stephens v. Brown*, 24 W. Va. 234, 236, decide expressly that a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. And, this being so decided in these cases, it must follow, as a matter of course, that such party to a suit can not be estopped by such a decision as *res adjudicata* in any other suit between the same parties involving the question at issue, and so decided in the first suit. In these cases the party against whom the decision was rendered, was, when it was rendered, resident in a country at war with the country in which such decision was rendered, and was thus prevented from having an opportunity to be heard on the question decided when the decree was rendered. Such decree was not binding on him as *res adjudicata*." *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.

In *Renick v. Ludington*, 20 W. Va. 511, 555, it was decided that the law of *res adjudicata*, as above stated, can not be permitted to overthrow or destroy another fundamental principle which lies at the foundation of justice, that every person who is to be affected by an adjudication should have an opportunity of being heard in his defense, both in repelling matters of fact and upon matters of law. In that the decree which was relied upon as *res adjudicata* had been pronounced before the party who resisted it being so regarded, had been made a party to the suit in which such decree was rendered, and therefore did not have an opportunity, when such decree was rendered, to be heard in his defense. It is the status of the cause when the decree was entered which is relied upon as *res adjudicata* that must be looked to in determining whether it can be so regarded if the party as against whom

it is relied upon as *res adjudicata* had not an opportunity to dispute before the court the points of law or of fact decided which affect his interest in some subsequent suit.

But this rule is still better illustrated by the case of *Underwood v. McVeigh*, 23 Gratt. 409. In that case, Underwood was a party to the suit at the time when a decree, relied upon in a subsequent suit as an estoppel, was pronounced, but the court had improperly, in the first suit, stricken out his answer, and refused to let him defend the suit, because he was a rebel, and for this reason he did not have an opportunity, when this decree was entered, to be heard. The court held, in another subsequent suit, he could not be estopped by this decree as *res adjudicata*. Enough has been said to make it clear that, however firmly the principles of *res adjudicata*, as stated above, are incorporated in our jurisprudence, and however pertinaciously they may have been upheld despite the wrongs occasionally inflicted on individuals, they must yield to the still more fundamental principle that no one can be bound by any judgment or decree, if, when it was rendered, the record of it shows he had no opportunity to be heard, then or before, on the question of law and fact decided, whether the decision be prejudicial to his rights in the cause in which it was rendered, or be only prejudicial to his rights in a subsequent suit arising from another cause of action with other parties to such suit or their privies.

An *ex parte* order made without notice to the plaintiff can not transfer any rights of the plaintiff or in any manner divest or affect his rights. And the mere circumstances that certain of the private stockholders of the corporation for whom the plaintiff held the legal title to the land in dispute, subsequently appeared and moved the court to rescind the said order which it declined to do, could not confer jurisdiction on the court to pass upon the

rights of the plaintiff or corporation or give any validity to the order as against either of them. *Moore v. Schoppert*, 22 W. Va. 282, 287, citing *Tarpin v. Thomas*, 2 Hen. & M. 139, 3 Am. Dec. 615.

Proceedings against Absent Defendants.—In a suit in the nature of a foreign attachment, the subpoena is served upon the absent defendant, and there is a personal decree against him in favor of the plaintiff, for the amount of the debt. In another suit brought by the plaintiff to obtain satisfaction of this decree, the validity of the decree in the first suit can not be questioned. *Burbridge v. Higgins*, 6 Gratt. 119.

Failure to Appear and Defend.—R. conveyed to K. certain real estate in consideration of twelve thousand dollars, of which three thousand dollars was paid in cash and the residue secured by deed of trust. K. then conveyed the land to the St. L. B. & M. Co. and, later, R. caused the trustee to advertise the land for sale, under the deed of trust. Thereupon, K. and the St. L. B. & M. Co. enjoined the sale, alleging in their bill that H. & M. claimed to own 1,632 acres of the land in fee under an older grant than the one under which plaintiffs claimed and had included the same in a survey made by them, that this claim constituted a serious cloud on the title, and the plaintiffs did not know whether said surveys were accurate or said title of H. & M. valid, and praying that the sale be stayed until the title should be settled and quieted and that H. & M. and R. be required to deduce their respective titles. Although made parties and served with process, H. & M. made no appearance nor defense to the bill. The circuit court caused the St. L. B. & M. Co. to bring an action of ejectment and enjoined the sale pending the trial of the ejectment suit. R. appealed from this action and the appellate court dissolved the injunction and unqualifiedly dismissed the bill and decreed costs against the complain-

ants. Held, that the decree is an absolute and final adjudication that H. & M. had no valid title to the land and estops them to set up, in the action of ejectment, the said older grant under which they claim, and that the court properly allowed the St. L. B. & M. Co. to introduce, on the trial of said action, the record, and decision of the appellate court, in said chancery cause, as evidence, and instructed the jury that the legal title to the land was in said trustee. *St. Lawrence Co. v. Holt*, 51 W. Va. 352, 41 S. E. 351.

Recitals in Record.—The fact that the former judgment recites that it was entered by consent of parties, the court is not at liberty to presume that any proceeding was had, in a cause which does not appear by the record, or that a judgment was rendered against a man, who, the record shows, was dead at that time, or that the defendants to the scire facias appeared, when it does not appear that any scire facias ever issued, or if it did, that any of these defendants were named therein. While it is true that when the record recites a jurisdictional fact, such recital is prima facie evidence in support of the judgment, yet where the record recites in general terms the appearance of the parties, such appearance will be confined to those who have been served with process. *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143.

Determination of Jurisdiction.—Where the jurisdiction of a court to pronounce certain decrees is directly assailed in a collateral action or suit, and the court in such collateral action or suit decides that such court had jurisdiction of the cause in which said decrees were pronounced, such decision is conclusive of that question upon the parties or their privies in any subsequent direct proceeding or appeal taken in the same suit to correct or set aside said decrees. But the decision in such collateral action or suit is conclusive of no other question in said suit, and any party thereto may,

by any direct proceeding, in the court below or by appeal, have any erroneous decree or order entered therein reversed or set aside. *Hall v. Lowther*, 22 W. Va. 570.

Waiver of Objections.—L. instituted his chancery suit in the circuit court of Harrison county, the county in which the alleged cause of action arose, against S.; but, the writ commencing, the same was directed to the sheriff of, and served on S. in, the county of Jefferson, where he then resided. L. filed his bill, and took depositions. S. appeared and, objected to the taking thereof, because no issue had been made on the bill, by plea or answer thereto by defendant; but S. cross-examined plaintiff's witnesses, reserving his right to object to the jurisdiction of the court in said suit, because the writ was directed and served as aforesaid. The court afterwards refused the motion of S. to quash said writ and dismiss the bill. S. afterwards took and filed depositions, and also filed his answer to the bill; whereupon the court heard the cause upon the bill and exhibits, answer of defendant and replication thereto, and depositions; and, by its decree, dismissed said bill at the costs of plaintiff, which decree has not been appealed from, but is in full force and effect. Held, that said decree is not void; but may be relied upon by S. as a bar to a subsequent suit brought by L. against him upon the same cause of action. "Whenever a party seeks the aid of a court of justice to enforce his rights, and submits his case to the decision of the court, and invites it to decide upon them, and makes no objection to the jurisdiction until after the court has heard and adjudicated, he is estopped from subsequently objecting to its decision, and the proceedings taken thereon. *Herman on Est. & Res. Ad.*, § 389." *Lee v. Smith*, 54 W. Va. 89, 46 S. E. 352.

B. Judgment Must Be on Merits.

See post, "Dismissal, Discontinuance and Nonsuit," V, C.

a. In General.

A judgment is not *res judicata* if it does not go to the merits of the case. *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879, following *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60; *Chrisman v. Harman*, 29 Gratt. 494; *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Tate v. Bank*, 96 Va. 765, 32 S. E. 476; *Wilcher v. Robertson*, 78 Va. 602; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

The general rule is that for a judgment to be evidence against a party in another suit upon a different cause of action, it must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases and must have been determined upon its merits. If the first action is disposed of on any ground that does not go to its merits, the judgment rendered will not conclude the party. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879.

"It is undoubtedly the rule that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, constitutes a bar to any other suit between the same parties or their privies for the same points of controversy; but to constitute such a bar it must appear either upon the face of the record or be shown by extrinsic evidence that the previous question was raised and determined in the former suit, and that the said former suit was determined on its merits." *Cornell v. Hartley*, 41 W. Va. 493, 23 S. E. 789.

Law and Equity.—A verdict and judgment at law, against a plaintiff, is no bar to his recovery in equity for the same cause of action, where it does not appear that the merits of the controversy were fully and fairly tried and de-

terminated at law. *Hawkins v. Depriest*, 4 Munf. 469.

A plea of *res judicata* must show that the former judgment was on the merits. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

Duchess of Kingston's Case.—"If the real merits of the second action have not been decided in the first, the prior judgment is no bar. This principle is consistent with the rule laid down in the *Duchess of Kingston's case*, *supra*, and is reasonable and just. I am not aware that it has ever been seriously controverted." *Kelly v. Board of Public Works*, 25 Gratt. 755.

Meaning of "On the Merits."—"It is true that a judgment or decree, to be an estoppel, must be a judgment or decree upon the merits; but by a decree upon the merits is not meant 'on the merits' in the moral sense of those words. It is sufficient that the status of the suit was such that the parties might have had their suit disposed of on its merits if they had presented all their evidence, and the court had properly understood the facts, and correctly applied the law to the facts." *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633; *Tracey v. Shumate*, 22 W. Va. 474, 510.

By a decree on the merits is not meant the abstract or moral merits. It is sufficient, that when such decree was entered, the status of the suit was such that the parties might have had their suit disposed of on its merits, if they had then presented all their evidence, and the court had properly understood the facts and properly applied the law. Such a decree is thus conclusive till reversed or in some appropriate manner set aside. *Tracey v. Shumate*, 22 W. Va. 474.

b. Specific Application of Rule.

A verdict and judgment at law against the plaintiff, is no bar to his recovering in equity for the same cause of action; it not appearing that the merits of the controversy were fully

and fairly tried and determined at law; and the case stated in his bill, and supported by proof, being such as to entitle him to equitable relief. *Hawkins v. Depriest*, 4 Munf. 469.

A consent decree dismissing a bill with costs, with no saving therein of the right to bring another suit, is an adjudication of the merits of the cause. *Lockwood v. Holliday*, 16 W. Va. 651.

In an action of trespass on the case to recover damages for suing out a distress warrant and levying it upon the plaintiff's property for rent alleged to be due, when in fact there was no rent due and in arrears, a judgment in a second action of unlawful detainer, which action was dismissed before the appearance of the defendants, and which was not disposed of on the merits, is no bar to the first action. *Fishburne v. Engledove*, 91 Va. 548, 28 S. E. 354.

A decree dissolving an injunction upon the merits, where no relief but injunction is sought, is final, and *res judicata*. *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521, citing *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

Appointment of Trustee.—It was held, in *Pettus v. Atlantic Savings, etc., Ass'n*, 94 Va. 477, 26 S. E. 834, that an order of a hustings court, in the exercise of its special statutory jurisdiction, appointing a trustee to take the place of the trustee named in the deed, who has resigned the trust, determines nothing as to the rights of the parties under the deed, nor as to the character of the deed, and will not debar the grantor from asserting its true character.

Judgment on Pleadings.—A judgment for the defendant, upon pleadings not going to the foundation of the action, is no bar to the plaintiff's bringing another action for the same cause. *Lane v. Harrison*, 6 Munf. 573.

"A judgment that a declaration is

bad in substance (which alone, and not matter of form, is the ground of general demurrer), can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment on the merits." *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

Upon a former appeal the special court, with all the parties interested before it, having held that the bond was valid, though executed after two months, the judgment concludes the question, though the decree of the court below was reversed because the proceeding was by petition, and the cause was sent back to be regularly prepared and matured. *Corbell v. Zeluff*, 12 Gratt. 226.

Petition for Rehearing.—Notwithstanding the rejection of a previous irregular and defective petition for a rehearing, it was error in the court below to reject a regular and sufficient petition filed for the same purpose, and setting forth that an abatement of the vendor's lien should be made to the extent of the failure of title to part of the land growing out of a decision of this court in another suit, the rejection of the former petition not rendering the matter *res judicata*. "We are of opinion that leave to file the petition ought to have been granted, notwithstanding a previous petition filed by the appellants to rehear the same decree had been rejected on the ground that it was not accompanied by an affidavit, and because it gave no explanation of why the matters set up had not been brought to the attention of the court before the decree of September term, 1887, was rendered. The rejection of that petition was not an adjudication, rendering the matter *res judicata*, in the sense contended for by the appellees. Even a final decree dismissing a bill in equity, when made, because of some defect in the pleadings, or upon some other ground not going to the merits of the case, is not a final determination, which bars a renewal of

the litigation in proper form. 1. *Henn Estop.*, § 403; *Durant v. Essex Company*, 7 Wall. 107; *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433." *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431.

Judgment on Cognovit Actionem.—In a joint action against A. J. W. S. and J. S. on a joint obligation and process served on each of them, A. J. W. S. confessed judgment which, as to him, a separate judgment was entered. J. S. plead to the action and had a trial before a jury, and on verdict found against him at a subsequent term of the court, a separate judgment was entered against him on the verdict, from which he appealed to the court of appeals. Held, that the judgment entered on the "cognovit actionem" of A. J. W. S. did not merge the plaintiff's cause of action, so as to exonerate the said J. S. *Snyder v. Snyder*, 9 W. Va. 415.

Instructions on Plea of Statute of Limitations.—If a city and a property owner are sued jointly for injury resulting from an improper use of a street, and judgment is rendered in favor of such owner on his plea of the statute of limitations, and against the city, and the city then brings an action against such owner to recover the amount it has been compelled to pay under the judgment, the property owner is not estopped from showing therein that the injury happened through no fault of his, nor is the question of his ultimate liability *res judicata* by reason of the judgment against the city. "That case was not heard on its merits, but went off under an instruction of the court on the plea of the statute of limitations." *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879.

Nul Tiel Record, Act of Limitations.—Where, to a scire facias to revive a decree, the defendants plead nul tiel record and the statute of limitations, and on these pleas issue is joined, and there is a final general judgment in

favor of the defendants, this ends all right in the plaintiff to enforce the decree against the defendants, either at law or in equity. *Raub v. Otterback*, 92 Va. 517, 23 S. E. 883.

Construction of Wills.—"The decree relied upon as a bar to the present suit was not rendered upon the merits of the matters now in controversy. The former suit was brought by John T. Dillard mainly for the construction of the will of his mother, the settlement of the accounts of her executor, and the recovery of the interest he claimed under her will. He was sole plaintiff and made, among other persons, the complainants and the executor defendants. The court decided that the plaintiff took nothing under the will of the decedent, and upon that ground alone dismissed his bill. *Dillard v. Dillard*, 2 Va. Dec. 28. This was clearly not a decision on the merits of the matters now in issue. The complainants in the present suit do not claim in the same right as the plaintiff in the former suit. All claim under the same will, but the rights asserted by them are separate, distinct, and antagonistic to those asserted by him. In no sense were they in privity with him. A decision that he was without any right to maintain the suit did not determine their right to sue, and was not as adjudication in any manner of the matters now put in issue. And no such case was made by the pleadings or proof as warranted a decree between them and the appellant as codefendants." *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60.

4. Judgment Must Be Final.

a. In General.

As to what judgments and decrees are final or interlocutory, see the title APPEAL AND ERROR, vol. 1, p. 437.

"It is well settled that the doctrine of res judicata applies only to final judgments, not to interlocutory judgments or orders, which the court which rendered has power to vacate or modify

at any time." 2 Black Judgm., § 509, cited, with approval, in *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670; *Quarles v. Kerr*, 14 Gratt. 48; *Yates v. Wilson*, 86 Va. 625, 10 S. E. 976; *Hopkins v. Prichard*, 51 W. Va. 385, 41 S. E. 347; *Martin v. Columbian Paper Co.*, 101 Va. 699, 44 S. E. 918.

A decree in a former suit that is merely interlocutory and not final, is no bar. *Quarles v. Kerr*, 14 Gratt. 48, citing *Story's Eq. Pl.*, § 791; 2 *Daniel's Ch. Pr.* 756; *Houck v. Kerfoot*, 99 Va. 658, 39 S. E. 590; *Gardner v. Stratton*, 89 Va. 900, 17 S. E. 553; *Renick v. Ludington*, 16 W. Va. 378.

A final adjudication of a court of competent jurisdiction upon the merits of the controversy, so long as it remains unreversed, is a bar to any new suit for the same cause of action between the same parties. *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

After the close of the term of the court at which a decree is rendered settling any of the principles of a cause, though such decree be interlocutory as a general rule, the court can not set it aside or disregard it in any future decree, unless there be a petition for a rehearing. *Davis v. Demming*, 12 W. Va. 246.

Points once adjudicated by a final decree can not again be put in issue between the same parties or their privies in the same or another suit, unless it be by a direct attack on such final decree through appeal or other legal method. *State v. Irwin*, 51 W. Va. 192, 41 S. E. 124.

b. Specific Applications of Rule.

Decree Dissolving Injunction.—A decree dissolving an injunction upon the merits, where no relief but an "injunction" is sought, is final, and res judicata. *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Gallagher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

An order dissolving an injunction, based on the merits of the case, where the only relief sought by the bill is such injunction, is, as regards finality, such a decision as will sustain the defense of *res judicata*. "Another point suggested to me serious doubt whether the principle of *res judicata* would apply. It is a principle that, to support the theory of *res judicata*, the judgment or decree must be final, and it is broadly laid down in Virginia decisions that an injunction may at any time be reinstated. *Radford v. Innes*, 1 Hen. & M. 7. But I conclude that such reinstatement is not as a matter of course, but cause must be shown by further evidence during the pendency of the case. *Toll Bridge v. Free Bridge*, 1 Rand. 206; *North v. Perrow*, 4 Rand. 4; *Bart. Ch. Pr.* 470. But at any rate, until reinstatement or reversal, there stands the order of dissolution, adjudging the law of the case on the facts." *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859.

When in a suit in chancery a purchaser at a judicial sale moves the court for a rule against the former owner to show cause why the purchaser should not be awarded a writ of possession, and the former owner files an elaborate answer to the rule in the nature of a cross bill, claiming a right to the possession upon equitable grounds bearing upon the conscience of the purchaser, and fully set out, and the purchaser files a special replication, and the issue between these parties thus made up as to their mutual rights is fairly tried by the court upon extensive proofs on either side, and a decree is rendered of an appealable character, such decree is final between the parties so long as it remains unreversed, and the issue thus decided can not be reopened by an original suit instituted by the losing party. *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

Trustee files a bill to enforce the trust deed, and in this case the court

decrees the sale and distribution of the trust subject among the creditors provided for, except one, who is excluded under the provisions of the deed, because he sued out execution on his judgment. This creditor then files a bill to set aside the trust deed, on the ground that it is fraudulent on its face. Held, the decree in the first case being interlocutory merely, it can not be a bar to the second suit. *Quarles v. Kerr*, 14 Gratt. 48.

Decree of Reference.—In several suits, consolidated, certain tracts of land were attached by creditors as the individual lands of P. B., a partner of P., who was not a party to the suits, filed his petition and answer claiming these tracts were the property of P. and B.; the causes were referred to a commissioner to ascertain and report among other things what real estate said P. owned and possessed and by what title held, and also what real estate B., a former partner of P. under the name of B. and P., was interested in. The commissioner took testimony in the matter and without passing thereon referred the question to the court for decision upon the evidence certified up. The parties excepted to the report because the commissioner failed to report according to their respective contentions. The court overruled the exceptions of B. and decreed that the tracts held in the name of P. and of P.'s trustee were the individual property of P., purchased with his individual assets and not with the partnership funds of B. and P. for partnership purposes and there was no resulting trust in favor of the creditors of B. and P. superior to the rights of the attaching creditors in the causes acquired under their attachments, but said land was first subject to the attachments; and directing the commissioner to carry out the former decree of reference accordingly. Held, the decree adjudicated the rights of B. and was appealable. *Hopkins v. Prichard*, 51 W. Va. 385, 41 S. E. 347.

Shares of Children of Testator.—

Testator willed property to his daughter for life, remainder to her children. She died, her husband and four children surviving, two of whom died under age and childless. In a suit, to which the father and two children were parties, the circuit court, in 1885, adjudged that the surviving children took the shares of the deceased children, and that the father had no interest in the land. The decree remains unreversed. In 1889 a suit (by his creditor) was brought to set aside (for alleged fraud) trust deeds made after that decree, and to subject the moiety inherited from his deceased children. The circuit court decreed in favor of the complainants. On appeal, held, the decree of 1885 was final as to the father, though not as to the infant children, and the question as to his having no interest in the moiety was *res adjudicata*; and that, there being no proof of the alleged fraud, the trust deeds could not be assailed, whether that decree were erroneous or not. "It is contended, however, that the doctrine of *res judicata* has no application, because the decree of partition was not a final decree. But as to *John v. Gardner* the decree was final, though not as to the other parties. It settled the question that he had no interest in the land, and that was the only question in which he was concerned. This court has repeatedly decided that a decree may be final as to one party, and not as to another, depending upon the circumstances of the case. *Royall v. Johnson*, 1 Rand. 421; *Noel v. Noel*, 86 Va. 109, 9 S. E. 584. Whether the decree in said partition suit is right or wrong is a matter not now to be inquired into, for, even if it were conceded to be erroneous, the result would be the same. It is not only a final decree, but, having been rendered by a court of competent jurisdiction, with all the necessary parties before the court, it can not, in the absence of fraud, be assailed, or its legal effect

avoided." *Gardner v. Stratton*, 89 Va. 900, 17 S. E. 553.

A decree ascertaining and fixing the amount and priority of liens on real estate, and providing for a sale thereof by special commissioner, unless such liens are paid by a future day named in the decree, it was held, that such decree was *res adjudicata* as to all payments made prior to its date, on account of another claim therein decreed to be paid, because such decree is appealable. *Lehman v. Hinton*, 44 W. Va. 1, 29 S. E. 984, cited and approved in *Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 292.

Judgment on Nul Tiel Record and Statute of Limitations.—

To a scire facias to revive a decree in an attachment suit in equity, defendants plead nul tiel record and the act of limitations. On these pleas issue was joined, and there was a final general judgment in favor of the defendants. This ended all right in the plaintiff to enforce said decree against the defendants, either at law or in equity. *Raub v. Otterback*, 92 Va. 517, 23 S. E. 883.

Decision by Rule or Motion.—If the matter in question has been fully tried upon an issue made up on a rule or motion, and the judgment of the court is so far final that an appeal would lie, then, so long as such judgment remains unreversed on review, rehearing, appeal, or otherwise, no new suit can be prosecuted between the same parties to reopen the same question. *Burner v. Hevener*, 31 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

Bigelow's View.—The older authorities are not quite so emphatic upon the subject of estoppel upon a decision by motion as those of more recent date. Thus Mr. Bigelow, on page 56 of the edition of 1886 of his treatise on the Law of Estoppel, observes: "The judgment further should have been final. We have seen that a preliminary decree or judgment, or a decision upon a motion in the course of a trial, can not ordinarily result, if the case go no

further, in precluding the parties from drawing the matter into issue again. The case must have gone to a complete termination, so that nothing more is necessary to settle the rights of the parties or the extent of those rights. Thus, an order in garnishment, directing the garnishee to deliver certain property of the defendant to the sheriff for sale, from the proceeds of which the garnishee is to be paid a sum named in the order, is not an adjudication that the defendant owes the garnishee the amount fixed by the order, unless there was an issue concerning the sum due." *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 863, 26 Am. St. Rep. 948.

Herman's View.—On the other hand, in an edition of the same date, Mr. Herman says: "A motion is an application made to a judge or chancellor or to the same parties when constituting a court in open court for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant. This is usually an incidental proceeding to an action, but it may be wholly distinct from that kind of proceeding. The great variety of objects for which this class of proceedings are available render it impossible to classify the numerous adjudications relating to them, and general principles can only be stated. There may be the following general classification made: (1) Orders made upon motions respecting collateral questions arising in the course of a trial; (2) final orders affecting substantial rights, for motions from the determinations of which an appeal lies, and those which are unappealable. All motions affecting the substantial rights of parties are appealable, and therefore final, unless reversed or modified by an appellate tribunal, and are placed on the same basis as any final judgment. Whenever a motion admits of grave discussion and deliberation, and is made part of the record of a cause, and subject to a review in another court, the decision

by a court upon such motion is generally regarded as a final judgment or adjudication, and the rule of *res judicata* applies." *Herm. Estop.*, § 472. *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 816, 863, 26 Am. St. Rep. 948.

Black's View.—To the same effect is the authority of Mr. Black in his recent and able book on *Judgments* (2 Black, *Judgm.*, § 691): "According to the doctrine of the earlier cases (and some more recent decisions), the determination of a motion or summary application is not *res judicata*, so as to prevent the parties from drawing the same matters in question again in the more regular form of an action. Thus a party is not estopped from bringing an action to set aside a judicial sale, made without authority, by the fact that the court may have overruled a motion to set aside the order confirming such sale. So, where a motion to open a judgment rendered on a warrant of attorney is refused, the party may resort to equity, and the denial of such motion is not such a prior adjudication as to bar him. But it is now said that this rule no longer obtains in its former strictness; and regard is now had less to the form of the proceeding, and more to the substance and condition of the decision. Further, there is a distinction to be noticed between orders made upon motions respecting collateral questions arising in the course of a trial and final orders affecting substantial rights from which an appeal lies. The latter are *res judicata*, and binding upon the parties, unless reversed or modified by an appellate tribunal. Following these principles, it is held, that when a motion to set aside a verdict is overruled and judgment rendered thereon, a similar motion in a subsequent suit between the same parties, or their privies in estate, to set aside a verdict settling the same questions in the same way, must be overruled. So, to a complaint by a judgment defendant to have a judgment declared satisfied, it is a

good answer on the part of the judgment plaintiff that the same matters alleged in the complaint were set up in answer to a motion for leave to issue execution on the judgment, and that such matters were in that proceeding adjudicated. In Louisiana it is held, that if the form of procedure by rule instead of injunction to arrest an execution has been adopted without objection, and a decision rendered thereon after issue joined on the merits, the defendant in execution, by whom the rule was taken, can not afterwards renew the litigation by resorting to an injunction." *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

Motion to Dismiss.—The judgment of a court overruling a motion to dismiss a cause for want of jurisdiction is interlocutory, and does not preclude a similar motion at a subsequent term. *Hilton v. Consumers' Can. Co.*, 103 Va. 255, 48 S. E. 899.

Motion to Substitute New Trustee.—A proceeding by motion under the statute to substitute a new trustee in a deed of trust to secure a debt, in the place of a trustee who has resigned, determines nothing as to the rights of the parties under the deed, nor as to the character of the deed itself. *Pettus v. Atlantic Savings, etc., Ass'n*, 94 Va. 477, 26 S. E. 834.

Petition to Rehear.—Where a petition to rehear is rejected on the ground that it is not accompanied by an affidavit, and because it does not state why the matters set up were not brought to the attention of the court before the decree was rendered, the matter does not become *res judicata*, and it is error to refuse leave to file a new petition, accompanied by an affidavit that the matter therein set up was unknown to the petitioners, and could not have been known by the use of reasonable diligence. *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431. See *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36.

5. Effect of Fraud, Collusion or Surprise.

See the title JUDGMENTS AND DECREES for a full discussion.

If it be alleged and proved that a judgment or decree was procured by fraud, it ceases to protect the wrongdoer, or to obstruct the injured party in the assertion of his rights. *Francis v. Cline*, 96 Va. 201, 31 S. E. 10; *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 641, 22 S. E. 556; *Gardner v. Stratton*, 89 Va. 900, 17 S. E. 553.

A decree of a court of competent jurisdiction, in a suit between proper parties, is valid and conclusive until reversed on some proper proceedings in the same suit and in the same court, or on appeal, unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in some other suit. *Wilson v. Smith*, 22 Gratt. 493; *Fox v. Cottage Building Fund Ass'n*, 81 Va. 677.

A judgment of a court of record can not be impeached in another action, except for want of jurisdiction in the court, or fraud in the parties or actors in it. *Lancaster v. Wilson*, 27 Gratt. 624.

Suit by Legatees.—It seems that a final decree, in a suit by legatees, for the division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the executor had kept back part of the property, but not averring that this was new matter since discovered, or that the decree was obtained by fraud. *Legrand v. Francisco*, 3 Munf. 83.

III. Persons Concluded.

A. PARTIES AND PRIVIES.

1. In General.

The general rule is well settled that a judgment or decree in a prior suit to conclude a party in a subsequent suit, must have been rendered in a proceeding between the same parties or their privies. Persons who are not

parties to the prior suit nor in privity with those who were, are not bound by judgments or decrees entered therein, and can not be prejudiced thereby. *Fishburne v. Engledove*, 91 Va. 548, 556, 22 S. E. 354; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879; *Shelton v. Barbour*, 2 Wash. 64; *Chapman v. Chapman*, 1 Munf. 398; *Findlay v. Trigg*, 83 Va. 539, 543, 3 S. E. 142; *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760; *Bargamin v. Clarke*, 20 Gratt. 544; *Martin v. Columbian Paper Co.*, 101 Va. 699, 44 S. E. 918; *Stinchcomb v. Marsh*, 15 Gratt. 202; *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854; *Long v. Willis*, 50 W. Va. 341, 40 S. E. 340; *State v. Irwin*, 51 W. Va. 192, 41 S. E. 124; *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143; *Randolph v. Longdale Iron Co.*, 84 Va. 465, 5 S. E. 30; *Chrisman v. Harman*, 29 Gratt. 494; *Pollard v. Coleman*, 4 Call 245; *Cleaton v. Chambliss*, 6 Rand. 86; *Loop v. Summers*, 3 Rand. 511; *Adams v. Alkire*, 20 W. Va. 480.

"There is no general principle of law that seems better settled than that no one shall be injured or affected by the event of any suit in which he was not a party; the reasons of which are laid down in all the books, and are too obvious to need repeating here." *Carter v. Washington*, 2 Hen. & M. 345.

A point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied on as an estoppel in any subsequent collateral suit in the same or any court at law or in equity, when either the party or his privies allege anything inconsistent with it, and that, too, whether the subsequent suit is upon the same or a different cause of action; nor is it necessary that precisely the same parties should have been plaintiffs or defendants in the same suit, provided that the same subject matter in controversy between two or more parties to the two suits, respectively, have been in a former suit directly in issue

and decided. The conclusiveness of the judgment or decree extends beyond what may appear on its face, to every allegation which has been made on one side, and denied on the other, and was in issue and determined in the course of the proceedings. If it appears by the record that the point in controversy was necessarily decided in the first suit, whether upon the law on demurrer, or upon the facts in issue, it can not again be considered in any subsequent suit between any of the parties or their privies. *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809; *Peole v. Dilworth*, 26 W. Va. 583; *Corrothers v. Sargent*, 20 W. Va. 351; *Beckwith v. Thompson*, 18 W. Va. 103; *Coville v. Gilman*, 13 W. Va. 314, 327; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 19 W. Va. 250; *Tracey v. Shumate*, 22 W. Va. 474, 509; *Tate v. Bank*, 96 Va. 765, 32 S. E. 476.

If it appears that the issue presented in the latter suit was involved and determined in the former suit, the judgment or decree in such former suit is not only a bar to a second suit, between the same parties or their privies upon the same claim or demand, but also bars a suit between the same parties or their privies upon a different cause of action. Such a judgment or decree is conclusive upon the parties to it until reversed upon appeal, or until set aside or annulled by some proceeding instituted for that purpose. *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372.

A record of one suit can not be read as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both; another plaintiff, and the person under whom the said plaintiffs jointly claim, not having been parties to such former suit. *Chapman v. Chapman*, 1 Munf. 398, cited in *Baring v. Fanning*, 2 Fed. Cas. 794.

Different Plaintiffs.—A judgment in

a former suit is not evidence in a second suit, by a different plaintiff against the same defendant. *Bargamin v. Clarke*, 20 Gratt. 544.

Meaning of Parties.—To support a plea of *res judicata*, it is essential that the person alleged to be concluded should have been a party or privy to the judgment by which the matter in controversy was adjudged and determined. And in that connection parties include all who are directly interested in the subject matter, and who had a right to make defense and to appeal from the judgment. Persons not having substantially those rights are regarded as strangers to the cause, and are not bound by the judgment. *Dillard v. Dillard*, 78 Va. 208.

Reason of Rule.—In *Dent v. Ashley*, 7 Fed. Cas. 496, it is said, the principle is universally acknowledged, that no one can be bound by a verdict or judgment unless he is a party to the suit, or is in privity with the party, or possesses the power of making himself a party. The reason is obvious. He has no power of cross-examining witnesses, or adducing evidence in maintenance of his rights; in short, he is deprived of all means provided by law for ascertaining the truth, and consequently it would be repugnant to the first principles of justice, that he should be bound by the result of an inquiry to which he is altogether a stranger. Citing *Payne v. Coles*, 1 Munf. 373; *Turpin v. Thomas*, 2 Hen. & M. 139, 3 Am. Dec. 615, as illustration of the above rule.

"Moreover, although the witnesses in the first cause might all have been competent to give evidence in the second, yet it might have been otherwise, and the verdict and judgment may have been founded upon the testimony of the party himself who offers the record in the second cause or some other witness who would be equally incompetent. But this inquiry the court can not stop to make. It would be opening a door to subjects and questions entirely apart

from the true issue before the jury, and might lead into a wide field of irrelevant inquiry and discussion. Because, therefore, of the potential vice in the record as an instrument of evidence in the second cause, the court has no alternative but to exclude it." *Stinchcomb v. Marsh*, 15 Gratt. 202, 205.

"Now, as we have seen, the court will not enter upon inquiries as to the nature of the proofs in the former case or the competency of the witnesses who then deposed to give evidence in the principal case. To attempt it would only lead to indefinite delays and breed inextricable confusion. That the former verdicts and judgments may have been obtained under such circumstances as should preclude them from being evidence in the principal case and that the court can not undertake to analyze the proceeding of which they were the result, renders their rejection a matter of inevitable consequence." *Stinchcomb v. Marsh*, 15 Gratt. 202, 207.

How Far Identity Necessary.—Nor is it necessary that precisely the same parties were plaintiffs or defendants in the two suits; provided the same subject matter in controversy, between two or more of the parties, plaintiffs or defendants, to the two suits respectively, have been in the former suit directly in issue and decided. The conclusiveness of the judgment or decree extends beyond what may appear on its face, to every allegation which has been made on the one side and denied on the other, and was at issue and determined in the course of the proceedings. *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Coville v. Gilman*, 13 W. Va. 314; *Beckwith v. Thompson*, 18 W. Va. 103; *Corrothers v. Sargent*, 20 W. Va. 351, 356; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.

The cases of *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250, holds "that it is not necessary

that precisely the same parties were plaintiffs and defendants in the two suits, provided the same subject in controversy between two or more of the parties, plaintiffs and defendants to the two suits, respectively, has been in former suit directly in issue and decided." The fact that others are concluded, as well as they, can not enable the plaintiffs to escape the effect of the decision. *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859, 860.

It is well settled, that a point once adjudicated by a court of competent jurisdiction, however erroneous that adjudication, may be relied on as an estoppel in any subsequent collateral suit in the same or any other court, at law or in chancery, when either party, or the privies of either party, allege anything inconsistent with it; nor is it necessary that precisely the same parties were plaintiffs or defendants in the two suits. *Corrothers v. Sargent*, 20 W. Va. 351.

"A judgment is conclusive of the issues involved in a controversy, as between the parties and those standing in privity with them, although in the action in which it is pleaded some, only, of the parties are litigants." *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911.

Cosureties.—Appellant insists that he can not be required to contribute one-half or any part of the Barrackman judgment on the ground that he was liable to Barrackman as cosurety with plaintiff, as that question was fully settled in the action of Barrackman against Conaways, Hood, and Morgan, wherein there was a trial before a jury of the issue made, and verdict and judgment in favor of Morgan against Barrackman, which action was brought by Barrackman against the makers of the note at the instance of plaintiff, Hood, for the purpose of holding defendant, Morgan, liable as a cosurety; and in the trial of said action it appears, from the record in this cause, that he took an active part in behalf

of said Barrackman against said Morgan, both in consulting and as a witness. It also appears that others of plaintiff's witnesses in this cause were also witnesses against Morgan in that case. There do not appear, from anything in the record, to be any contractual relations between plaintiff, Hood, and defendant, Morgan. The only liability, if any existed, was that of mutual burden bearers, which depended solely on their liability on said note to Barrackman. That matter had been settled by the verdict of a jury, and the judgment of a court of competent jurisdiction, and Morgan found not to be liable on the obligation to Barrackman. In *Corrothers v. Sargent*, 20 W. Va. 351 (syl., point 1): "It is well settled that a point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied on as an estoppel in any subsequent collateral suit in the same or any other court, at law or in chancery, when either party, or the privies of either party, allege anything inconsistent with it; nor is it necessary that precisely the same parties were plaintiffs or defendants in the two suits." *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911.

2. Privies.

"It is well settled that a judgment is conclusive not only upon those who were actually parties to the litigation, but also upon all persons who are in privity with them. This is not only a doctrine of our own, but also a principle of general jurisprudence, as appears from the rule of the Roman law that 'the plea *res adjudicata* is available against him who has succeeded to the rights of ownership of the person who suffered the judgment.'" 2 Black, *Judgm.* 549; *Smith v. Parkersburg Co-Op. Ass'n*, 48 W. Va. 232, 37 S. E. 645; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *Tate v. Bank*, 96 Va. 765, 32 S. E. 476.

"The Golden Rule."—The general

rule is that verdicts and judgments bind conclusively parties and privies; because privies in blood, in estate, and in law, claim under the person against whom the judgment is rendered; and, they claiming his rights, are, of course, bound as he is. But, as to all others, they are not conclusively binding; because it is unjust to bind a party by any proceedings in which he had no opportunity of making a defense or offering evidence, of cross-examining witnesses, or of appealing, if he was dissatisfied with the judgments; and this is called by the court in *Bourke v. Granberry*, Gilm. 16, 9 Am. Dec. 589, "a golden rule." *Munford v. Overseers of the Poor*, 2 Rand. 318; *Crawford v. Turk*, 24 Gratt. 176, 183.

"A stranger, who is not a party or a privy, can neither be barred nor aided' by a judgment or decree. Bart. Ch. Prac. 213; 2 Pom. Eq. Jur., § 813." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

A privy in estate is not affected by a judgment against him from whom the privy derived his estate rendered after such privy acquired his estate. *Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420.

It is a rule that, to bind a man as a privy in estate, he must have acquired his interest after the judgment, not before. A grantee of land is not affected by a judgment against the grantor after the conveyance. 2 Black Judgm., § 549; *Freem. Judgm.*, § 162; *Bigelow, Estop.* 135; 1 *Greenl. Ev.*, § 536; *Kitty v. Fitzhugh*, 4 Rand. 600. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 1082, 29 Am. St. Rep. 774.

A privy in estate is not bound by a judgment or decree recovered against him from whom he derived his estate, after he derived it, merely because of such privy. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

Absent Defendant.—If A and B hold a tract of land in common, and A sells it to C and removes out of the state,

B may bring a suit in chancery against C and A as an absent defendant, to confirm the sale, and obtain a decree for his part of the purchase money. And if in such case, C had brought a suit against A and B to rescind the sale, and failed, but was permitted to retain part of the purchase money, until B's title should be tried by a jury; the latter will be entitled to avail herself of the proceedings in that cause. *Pollard v. Coleman*, 4 Call 245.

Assignor and Assignee.—Where the assignment of a chose in action is absolute in its terms, and judgment has been obtained thereon in the name of the assignor, for the benefit of the assignee, which judgment has subsequently been declared void in a suit brought by the assignee to enforce the collection of said judgment out of the lands of judgment debtor, the assignor of the debt is bound by the decree against his assignee, and is estopped from setting up said judgment as a lien on the lands of his judgment debtor, even though said assignment was merely a collateral security for a debt, or intended to carry only a partial interest. The assignor and assignee are at least privies in the transaction, and the question of the lien of said judgment is *res judicata*. *Cox v. Crockett*, 92 Va. 50, 22 S. E. 840.

Subsequent Owners of Ferries.—A former adjudication by a court of competent jurisdiction, in 1810, wherein the question of the right of the ancestor of plaintiff in the suit, his heirs and tenants, to free ferriage across a stream, and the construction of the deed on which the right was based, was decided in his favor, is binding and conclusive in a subsequent suit involving substantially the same question, between those in privy with the parties to the former suit. "The decision and decree made in that case is therefore binding, not only on the original parties to the deed and to the said suit, but also on all subsequent owners of the said lands and ferry in privy

with them. *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249." *Williams v. Tomlin*, 2 Va. Dec. 565.

3. Strangers.

It is a well-settled rule of evidence that a verdict and judgment in an action at law, can not be received in evidence upon the trial of an action between others, not parties to the first, nor standing in privity with those who were, for the purpose of proving any fact upon which such verdict and judgment were founded and which being essential to their rendition, is to be regarded as established by them. *Stinchcomb v. Marsh*, 15 Gratt. 202; *Cady v. Gale*, 5 W. Va. 505; *Adams v. Alkire*, 20 W. Va. 480; *Reherd v. Long*, 77 Va. 839; *Pollard v. Coleman*, 4 Call 245.

The record of a suit between other plaintiffs and the defendants, to which the present plaintiffs were neither parties nor privies, is not competent evidence against them. *Downer v. Morrison*, 2 Gratt. 250.

A person, not a party to a judgment, is not bound by it, in law or equity, merely on the ground that he was present, and cross-examined the witnesses. *Turpin v. Thomas*, 2 Hen. & M. 139, 3 Am. Dec. 615.

"A stranger, who is not a party or a privy, can neither be barred nor aided by a judgment or decree. *Bart. Ch. Prac.* 213; 2 *Pom. Eq. Jur.*, § 813." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

A decree of partition can not have the effect of showing title in the parties to it, as against strangers to the suit and its parties. *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536.

4. Mutuality of Estoppel.

See the title ESTOPPEL, vol. 5, p. 201.

In General.—An estoppel must be mutual, or it is no estoppel. "A party will not be concluded against his contention by a former judgment, unless he could have used it as a protection or the foundation of a claim, had the

judgment been the other way; and, conversely, no one can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision." 2 *Black Judgm.* 548; *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 213; *Erskine v. Henry*, 9 Leigh 188. *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143.

An estoppel, to be binding, must be mutual. Hence, if a party to a suit claims title adversely to a former adjudication, not binding on him, he can not rely on that adjudication as an estoppel against the parties to the former suit. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854.

A corollary from the rule that judgments and decrees are not to be admitted but between parties and privies is that nobody can take benefit by a verdict that would not have been prejudiced by it had it gone contrary. *Chapman v. Chapman*, 1 Munf. 398.

In *Pegram v. Isabell*, 2 Hen. & M. 193, Judge Tucker said: "I find it also mentioned as a rule, that nobody can take benefit by a verdict that would not have been prejudiced by it, had it gone contrary. Whether the converse of this rule, viz., that whosoever might be prejudiced by a verdict, if one way, shall be entitled to the benefit of it, if to the contrary, also holds, I have not been able to meet with any authority that has decided. I may, perhaps, notice this point, after considering the two exceptions to the general rule above mentioned."

A record of one suit can not be read as evidence in another, unless both the parties, or those under whom they claim, were parties to both suits, it being a rule that a document can not be used against a party who could not avail himself of it, in case it was made in his favor, nor can it be read in evidence on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former,

and that the same point was in controversy in both, when another plaintiff, and the person under whom both the plaintiffs jointly claim, were not made parties to the former suit. *Payne v. Coles*, 1 Munf. 373; *Chapman v. Chapman*, 1 Munf. 398.

In a suit in *forma pauperis* brought by negroes against Erskine to recover their freedom, it is adjudged, that the paupers are slaves; then Henry and others bring suit against Erskine to recover the same negroes as their property. Held, the judgment in the pauper suit is not conclusive evidence for the plaintiffs in this suit, that the negroes are slaves, and if the court in this suit holds them to be free, the plaintiffs here can not recover them. "The obligatory character of a judgment or decree must be reciprocal." *Erskine v. Henry*, 9 Leigh 188.

A determination, in an action of ejectment, that a will is invalid and can not pass title to certain land, and that the plaintiff is entitled to only one-half thereof, does not, in a subsequent action of ejectment against different parties to recover the other half, brought by heirs who were not made parties to the first action, estop the parties to the last action from litigating the title as to such other half, or the validity of the will as to the whole. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854.

An action of ejectment was brought in 1848, on the demise of S. v. C., to recover the possession of 2,300 acres of land. In 1870, S. died, and the cause was revived in the name of his heirs. In August, 1872, C. having died, his death was suggested on the record, and a *scire facias* was awarded to revive the cause against his "heirs," none of whom were named, but no *scire facias* ever issued, and the cause was never revived, nor were any of the heirs of C. ever made parties to the suit, nor did they ever appear therein. On the 19th of November, 1872, the court entered therein the following judgment,

which was never reversed or set aside: "For reasons appearing to the court, and by consent of parties, this cause is dismissed agreed." In 1879 the heirs of S., to recover the same land, brought an action of ejectment against the heirs of C., who relied upon said judgment as a bar to the plaintiff's recovery in their new action; and, the circuit court having so instructed the jury, there was judgment for the defendants. Upon a writ of error, held, that the said judgment operated as a simple dismissal of said action, and can not operate as a bar to a recovery in said new action for the recovery of the same land. "In this state of the case, no order or judgment made or rendered therein could in any manner affect or impair the rights of the heirs of Copeland to the land in controversy, nor could they in any manner be bound by such order or judgment, not being parties to the suit, and therefore the heirs of said Copeland were not bound by said order of dismissal 'agreed' entered in the action on the 19th of November, 1872; for, not being parties to said action, they are not bound by the recital in said judgment, that, 'for reasons appearing to the court, and by consent of parties, this cause is dismissed "agreed."' If, therefore, the defendants in this cause were not bound by the said judgment, and according to the terms thereof, it follows as a necessary consequence that the plaintiffs are not in any manner bound thereby; for it is a general rule that no party is bound in a subsequent proceeding by a judgment unless the adverse party, seeking to secure the benefit of the former adjudication, would have been prejudiced by it if it had been determined the other way. Both litigants must be alike concluded, or the proceeding can not be set up as conclusive upon either." *Stockton v. Copeland*, 30 W. Va. 674. 5 S. E. 143.

Coheirs.—In *Chapman v. Chapman*, 1 Munf. 398, the question was whether

the record, verdict, depositions and exhibits in a former suit between George Chapman, the uncle, defendant in the present suit, and George Chapman, the nephew, one of the parties complainant in the present suit, originally brought by his elder brother, Nathaniel, and now revived in the names of himself and his brother, John, as coheirs of Nathaniel, are to be considered as evidence in the case at bar, or not. The court held, that according to the general rule that verdicts and judgments are not to be admitted except between parties or privies, and the corollary from that rule, that nobody can take benefit by a verdict that would not have been prejudiced by it, "Nathaniel Chapman could not avail himself of the verdict between his younger brother, then in full life, and his uncle; for he was not his heir, nor did he claim the lands under him. Neither could he be prejudiced by that verdict between those parties; because he claimed as heir to his father, Pearson Chapman, whose heir his younger brother was not, nor, as the laws then stood, could be. Consequently, had there been no abatement of the suit, the record and verdict in the former suit, between George, the uncle, and George, the brother, could not have been admitted as proper evidence in this suit. Is the case altered by the abatement, and the revivor in the names of George, the brother, and John, his brother, as heirs of Nathaniel? I conceive not. Whatever right George, the brother, might have, in an original suit between himself and his uncle, George, to avail himself of that verdict, he is to be regarded, in the present suit, only as one of several heirs of his brother, Nathaniel, all of whom collectively, represent that brother as his heirs, or more properly as his heir; according to the known rule of law that all the heirs in parcenary make but one heir. As, therefore, he comes to revive and continue the suit *jure representationis*, the

suit must remain in the same plight and condition, according to the prayer of his bill of revivor, as if his brother, Nathaniel, the original complainant, were still alive."

In *Chapman v. Chapman*, 1 Munt. 398, the question was whether the record, "verdict, depositions and exhibits in the before-mentioned suit between George Chapman, the uncle, defendant in the present suit, and George Chapman, the nephew, one of the parties complainant in the present suit, originally brought by his elder brother, Nathaniel, and now revived in the names of himself and his brother John, as coheirs of Nathaniel, are to be considered as evidence in this cause, or not." It was held, that "whatever personal right George might have to avail himself of that verdict, that right was not communicable to another, not claiming as a privy under him. Therefore, George, in a joint suit brought by himself and his brother, John, who does not claim under him, but independently of him, can not be entitled, from the bare circumstances of their being joint complainants in the same suit, to communicate to that brother the benefit of that verdict, to which John was neither a party, nor privy; and by which he could not possibly have been prejudiced. Therefore, taking the matter either way, I think the record in the former suit inadmissible as evidence in this cause. This case appears to me to be much stronger than that of *Payne v. Coles*, lately decided; in the decision in that case I cheerfully acquiesce, and think it furnishes an additional reason for my present opinion."

B. PARTICULAR PARTIES AND PROCEEDINGS CONSIDERED.

1. Persons Not Named in Pleadings.

In General.—In order to create an estoppel, or conclude a matter as *res judicata*, it is not only necessary that the person to be concluded should have

been a party to the suit, but it is also essential that the matter or right in question should have been so presented by the pleadings, and so involved in the issues of the suit, as to call upon the party, and make it his duty to assert his demand in that suit. Although a person may be named in the bill and served with process, still, if there are no allegations in the bill with reference to him, he is not to be considered a party to the suit. *Chapman v. Pittsburg, etc.*, R. Co., 18 W. Va. 184; *Renick v. Ludington*, 20 W. Va. 511, 536; *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328.

And in *Chapman v. Pittsburg, etc.*, R. Co., 18 W. Va. 184, it is said: "If a person is not named in the bill and no allegation with reference to him appears therein, the naming of him in the summons does not make him a party to the suit, although he may have been served with process; and though named in the prayer of the bill and in the summons and served with process, yet if there is no allegation in the bill with reference to him, he is not a party to the suit, because there is nothing in the bill to which he could answer, and his rights, if he has any, are not to be adjudicated without giving him an opportunity to defend his interest." Citing *Moseley v. Cocke*, 7 Leigh 224. To the same effect, see, citing *Moseley v. Cocke*, 7 Leigh 224, *James River, etc., Co. v. Littlejohn*, 18 Gratt. 53, 81; *Ogden v. Davidson*, 81 Va. 757, 761; *Newman v. Molloyhan*, 10 W. Va. 503; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 506; *McCoy v. Allen*, 16 W. Va. 724, 730; *Renick v. Ludington*, 20 W. Va. 511, 539; *Rickard v. Schley*, 27 W. Va. 633; *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328; *Shaffer v. Fetty*, 30 W. Va. 248, 270, 272, 4 S. E. 290, 291; *McKay v. McKay*, 33 W. Va. 724, 734, 11 S. E. 217; *Cook v. Dorsey*, 38 W. Va. 196, 199, 18 S. E. 468, 469; *Shinn v. Board of Education*, 39 W. Va. 497, 506, 20 S. E. 604, 607. See also, *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215;

Bland v. Wyatt, 1 Hen. & M. 543; *Henderson v. Henderson*, 9 Gratt. 394; *Strother v. Mitchell*, 80 Va. 149; *Strother v. Xaupi*, 80 Va. 159.

A decree is a mere nullity as to persons not named as party in the bill, and against whom no allegations are made and no relief is asked. *Cronise v. Carper*, 80 Va. 678, 681, citing *Moseley v. Cocke*, 7 Leigh 224.

Amended Bill.—Where the court ordered a person to be made a defendant, and process issued and was served upon him, but the bill was not amended so as to incorporate matter touching him, it was held, that the court had no jurisdiction over him, and any decree against him was void. *McCoy v. Allen*, 16 W. Va. 724; *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215.

Where a bill in equity neither makes one a party nor contains matter touching him, and asks no relief as to him, any decree touching him is void, and not res judicata. "If a person is not named in a bill, and no allegation with reference to him appears therein, even if he is named in the summons, and he is served with process, he is not a party, and any decree against him would be void, and not res judicata; and though named in the prayer of the bill and in the summons, and served with it, but there is no allegation as to him, he is not a party, because there is nothing in the bill to which he could answer, and his rights are not adjudicated. *Chapman v. Pittsburg, etc.*, R. Co., 18 W. Va. 184; *Renick v. Ludington*, 20 W. Va. 511, 536; *McNutt v. Trogden*, 29 W. Va. 469, 471, 2 S. E. 328." *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215.

Upon a bill in chancery against several defendants, process issues against one not made a party defendant in the bill, and against whom there is no allegation therein, and no relief prayed, and a decree is made against him by default, and against the defendants, by some of whom an appeal is taken to the court of appeals, where the decree

is reversed as to the appellants, and in all things else affirmed. Held, the decree is a mere nullity and not res adjudicata as to the party who was not named in the bill, and against whom the bill contained no allegation and prayed no relief. *Moseley v. Cocke*, 7 Leigh 224, cited and approved in *Newman v. Mollohan*, 10 W. Va. 488, 503; *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184, 196; *Renick v. Ludington*, 20 W. Va. 511, 536.

Settlements of accounts of administrator, and decree confirming same, he not being a party, and no matter touching such accounts or his administration appearing in the bill, will not, on the ground of res judicata, bar a bill brought to surcharge and falsify such account by those who were parties to the suit in which such settlement was made. The appearance of the administrator before the commissioner, and making such settlement, will not make him a party, or bring the matter of the administration into the cause, so as to render the decree upon it res judicata as to any party. But where parties to such suit, interested in such settlement, having actual knowledge of it, delay bringing a suit to surcharge and falsify such settlement, and to have a settlement of the administration for very nearly ten years after its confirmation, and because of such laches, and the loss of important papers touching the matters of the account, relief will be denied them. *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215.

Persons Merely Present at Trial.—

A person, not a party to a judgment, is not bound by it, in law or equity, merely on the ground that he was present, and cross-examined the witnesses. *Turpin v. Thomas*, 2 Hen. & M. 139, 3 Am. Dec. 615.

2. Parties Not Served with Process.

"A party, it was held, would not be bound by decree where he was not served with process, though it were

proved that he took part in the preparation of the defense. He must appear in court. *Lyle v. Bradford*, 7 T. B. Mon. 111. Therefore the proceedings in the former suit do not, by their own force, furnish a bar to this suit as res judicata." *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215.

It is well settled that before a judgment, as such, can be an estoppel, the party must have had right to make defense. 1 Greenl. Ev., § 535; *Bigelow, Estop.* 98; *Herman, Estop.*, § 135; *Munford v. Overseers of the Poor*, 2 Rand. 313. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 1081, 29 Am. St. Rep. 774.

3. Suit against Defendant by Adversary at Law.

A verdict at law against a party is no bar to a decree in his favor if he is brought into chancery by the adverse party; but it is otherwise, if he is the plaintiff in equity. *Jones v. Jones*, 4 Hen. & M. 447.

4. Identity of Capacity.

In General.—Where the same person has two separate and distinct rights or interests in the subject matter of a suit, and the allegations of the bill comprehend but one of said rights or interests, the fact that such person is made a party to such suit will not estop, conclude, or prevent him from asserting or defending his rights or interests in regard to said subject matter so far as they were not involved or comprehended in the allegations of the bill in such suit. As to the matters not so comprehended in the bill, he will not be regarded as a party to the suit. *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328.

Character of Executor and Husband.

—A plaintiff suing for slaves as administrator of his wife, is not barred by a decision against her, in her lifetime, in a suit to which she was not a party; the ground of that decision having been that, under the act of limitations, the opposite party had ob-

tained a legal title to the slaves by five years' possession commencing during the coverture, during which also the right of the wife accrued, and the husband having never had possession in his character as husband. *Blakey v. Newby*, 6 Munf. 64, citing *Wallace v. Taliaferro*, 2 Call 447.

Character of Trustee and Beneficiary.

—If a person is interested in the subject matter of a suit in two capacities, the one as trustee in one deed of trust, and the other as beneficiary in a different deed of trust, both deeds of trust being upon the same property, and he is made a party to a suit brought to set aside the latter trust deed, in which no reference is made to him as trustee in the other trust deed, he will not be regarded as a party to said suit in his capacity of trustee in the former trust deed. *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328.

If a person has a vendor's lien on real estate which his vendee has conveyed to him as trustee by a subsequent trust deed to secure certain debts to other persons in which no reference is made to his debt, and a suit is afterwards brought to set aside said trust deed, and subject the property to the payment of a judgment to which suit such person is made a party as trustee, but in no other capacity, and there is no convention of the lien creditors or reference in the bill or proceedings to said vendor's lien, the said person may, as against the purchaser of the land in said suit, enforce his vendor's lien against the land in a subsequent suit. *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328.

Where two deeds of trust are given on land by husband and wife, the fee belonging to her, with a life estate in the husband as husband, and a part of it is afterwards conveyed by them to a third party, and there is a chancery suit to enforce the said trusts against the entire tract and sell it outright, and the purchaser of such part is a party and his rights set up therein, and there

is a decree exonerating that part from liability for one of the trusts, such decree is *res judicata* to bar another suit to sell the life estate of the husband in such part for that debt. "I do not think that that adjudication is a bar to this debt of Pickens. It is true Pickens was an actual party to that suit, but he was such only as a owner of a deed of trust given by Mrs. Love upon her 74 acres, and the bill contained nothing whatever touching Pickens' rights under the deeds of trust which had been given to Pickens by Knisley and wife." *Pickens v. Love*, 44 W. Va. 725, 29 S. E. 1018, 1020.

Taxpayers.—Five persons, as taxpayers, on behalf of themselves and all other taxpayers of M., obtain an injunction to restrain the issue and sale of municipal bonds on account of their legal invalidity, the defendants being the mayor and clerk of the city authorized by such ordinance to sign and countersign and seal such bonds, and deliver them to commissioners authorized by the ordinance to receive and sell the same. Such injunction is dissolved. Afterwards two of these plaintiffs, as taxpayers, obtain an injunction to restrain collection of taxes to pay interest on such bonds on account of their legal invalidity, the defendants being the city and its marshal. There is sufficient identity of parties here to justify the application of the defense of *res judicata*. *Galagher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859.

5. Administrator and Administrator De Bonis Non.

It was decided in an early Virginia case that there is privity between the original executor and the administrator *de bonis non*; otherwise the debtor would be deprived of the benefit of the plea of *res judicata*. *Dykes v. Woodhouse*, 3 Rand. 287, reviewing and disapproving the English cases.

Quære: What would be the effect generally of a judgment against an ad-

ministrator de bonis non in establishing a debt against the estate, so as to conclude a former executor or administrator, and thereby subject him to a devastavit? *Sheldon v. Armstead*, 7 Gratt. 264.

"Under the circumstances of this case, the decree against the administrator de bonis non of D. in 1822, in pursuance of the decree of the court of appeals of 1821, and substantially affirming the decree of 1816, must be held as conclusive upon L., the prior executor of D., upon the question of the indebtedness of the estate of W.; the right to follow his assets in the hands of D.; the receipt of sufficient assets by D. for the payment thereof; and the liability of his estate for the amount." *Sheldon v. Armstead*, 7 Gratt. 264.

G. died in 1762, making W. his executor. In 1784, bill by legatees of G. against administrators of W. for an account. The administrators having turned over the estate of W. to D., the husband of S., the only child of W., he attends to the settlement of the account before the commissioner, which is returned in 1798. After the death of D., S., the executrix of D., and her second husband, in 1804, upon the rule for counter security, surrender the office, and L., another executor of D., qualifies, to whom S. and her husband pay over the assets in their hands. In 1805, bill amended, and S. and her husband and L., executor of D., made parties, and they answer contesting the claim of plaintiffs, and except to the report. After the revival of the suit against L., he pays over to the legatees of D. a large amount of the assets in his hands; and in 1814 he dies, when the suit is revived against the administrator de bonis non of D.; and in 1816 there is a decree against him based upon the report of 1798. 'He takes an appeal, and in 1821 the decree is reversed for a matter of form, but affirmed in other respects, and the court below is directed to enter a decree accordingly. In 1822, the court be-

low enters the decree in favor of all the legatees of G. except B., as to whom her marriage is suggested, and the entry of the decree is postponed until the husband is made a party. Afterwards B.'s husband dies; and then in 1826 all the legatees of G., including B., file their bill against the administratrix of the administrator de bonis non of D. and his legatees, and the representative of L., to have satisfaction of the decrees of 1816 and 1822. In 1829 the bill is dismissed as to the administratrix of the administrator de bonis non and the representative of L., which, on appeal, is reversed in 1836. In 1838, the plaintiffs make the sureties of the administrator de bonis non of D. and the legatees of L. parties. Held, that the decrees of 1816, 1821 and 1822, taken in connection with the decree of the court of appeals of 1836, conclusively establish against D. and all his representatives, the indebtedness of W.'s estate to the legatees of G.; that they had a right to follow the assets in the hands of D.; that a sufficiency of such assets had come to his hands; and that his representatives who have received his assets are accountable to said legatees for the assets so received. *Sheldon v. Armstead*, 7 Gratt. 264.

6. Administrator and Creditors of Decedent.

After the death of the husband, the wife and children file a bill against his administrator to recover the property conveyed by the decree which remained, and for satisfaction for that which had been wasted by the husband; and there is a decree in their favor. Held, such recovery of the property undisposed of, and for the value of such as was wasted, is conclusive against the administrator and creditors of the husband. *Dabney v. Kennedy*, 7 Gratt. 317.

7. Ancestor and Heir.

In General.—A judgment against the ancestor prior to his death is conclu-

sive against the heirs as to matters brought directly in issue, but it is not conclusive as against heirs who were no parties, and whose ancestor the record itself shows was dead at the time it was pronounced, especially as to matters brought into controversy only incidentally. *Early v. Garland*, 13 Gratt. 1.

"A verdict against an ancestor, in order to bind those claiming under him, must have taken place during the existence of his title. If this criterion be not adhered to, I see nothing to prevent the ancestor and his heirs from binding those deriving title under him, at the most remote periods of time." *Carter v. Washington*, 2 Hen. & M. 345.

In 1819, L. conveys a lot of ground to C., in trust, to pay certain debts, some of which are upon executions in the hands of the sheriff, and the other is due to the father of C. Ten years after, the father dies and makes C. his executor and one of his residuary legatees. The lot is never sold under the deed of L., but, in 1839, C. takes possession of it and encloses it, and some years after leases it, in his own name to R. for eight years. In 1854, W., claiming it under another title, sues R. for it, and C. being then dead, his heirs make themselves parties and defend the suit, and obtain a final judgment in 1867. Then the heirs of L. sue the heirs of C. for the lot, alleging that C. took and held possession as trustee under the deed, and his heirs held under the trust, and defended the action under that title. The heirs of C. deny this, claim that C. took possession for himself, and he and they have so held for twenty-eight years, and they defended the suit for themselves. Held, the heirs of L. are barred. *Bargamin v. Clarke*, 20 Gratt. 544.

Revival against Heir on Death of Ancestor.—Where, upon the death of a party to a suit in equity to recover land, the suit is revived against his administrator, but not against his heirs,

and a decree is obtained, such decree is not conclusive as to the heirs upon the principle which binds parties to a cause. *Early v. Garland*, 13 Gratt. 1.

In 1809, C. T., assuming to act as the agent of M. T., sold to M. a lot in the town of Lynchburg, and L., from whom M. T. purchased the lot, conveyed it to M. M. T. then filed a bill to set aside the sale, and in 1819 the court made a decree setting the sale aside, and directing M. to convey the lot to M. T. This decree was affirmed in the court of appeals as far as it went, but the court held, that there should have been a decree over in favor of M. against C. T., and sent the cause back for that purpose. Pending these proceedings M. conveyed twenty feet of the lot fronting on Main street to P. and ten feet to C., and C. purchased the remainder of the lot from R., who had verbally acquired M.'s right in the subject; and C. had enclosed the ten feet first acquired and twenty feet adjoining that part which he bought of R. as an alley leading from the street to his house. After the case went back, M. T. filed an amended bill making C. a party, and C. filed a cross bill to obtain the benefit of M.'s rights against C. T. In 1834, C. died, and the suits were revived in the name of his administrator; and in 1836 there was a decree in the first suit directing a commissioner to convey that part of the lot obtained by C. from R. to M. T., which was done. In 1837, M. T. conveyed that part of the lot conveyed to him to L., and L. conveyed it to G., who died, having devised it to his son, the plaintiff. In 1835, in a friendly suit between the widow and heirs of C., the alley was allotted to the widow, and after her death to C.'s daughter, H. In an action of ejectment brought in 1849 by the son of G. against the trustee of H. for the twenty feet included in the alley, held, the suit not having been revived against the heirs of C., they are not concluded by the decree of 1836, upon the principle which binds parties

to a judgment or decree. *Early v. Garland*, 13 Gratt. 1.

An action of ejectment was brought in 1848, on the demise of S. v. C., to recover the possession of 2,300 acres of land. In 1870, S. died, and the cause was revived in the name of his heirs. In August, 1872, C. having died, his death was suggested on the record, and a scire facias was awarded to revive the cause against his "heirs," none of whom were named, but no scire facias ever issued, and the cause was never revived, nor were any of the heirs of C. ever made parties to the suit, nor did they ever appear therein. On the 19th of November, 1872, the court entered therein the following judgment, which was never reversed or set aside: "For reasons appearing to the court, and by consent of parties, this cause is dismissed agreed." In 1879 the heirs of S., to recover the same land, brought an action of ejectment against the heirs of C., who relied upon said judgment as a bar to the plaintiff's recovery in their new action; and, the circuit court having so instructed the jury, there was judgment for the defendants. Upon a writ of error, held, that as said action was never revived against the heirs of C., and none of them were ever made parties thereto, or appeared therein, they were never in any manner bound by said judgment, and, as a consequence thereof, the heirs of S., who were the plaintiffs in the new action of ejectment, were not bound thereby to any other or greater extent than to disable themselves from proceeding further in said first action. *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143.

B. Assignor and Assignee.

See generally, the title ASSIGNMENTS, vol. 1, p. 795.

Where the assignment of a chose in action is absolute in its terms, and judgment has been obtained thereon in the name of the assignor for the benefit of the assignee, which judgment

has subsequently been declared void in a suit brought by the assignee* to enforce the collection of the judgment out of the lands of the judgment debtor, the assignor of the debt is bound by the decree against his assignee, and is estopped from setting up the judgment as a lien on the lands of the judgment debtor, even though the assignment was merely a collateral security for a debt, or intended to carry only a partial interest. The assignor and assignee are at least privies in the transaction, and the question of the lien of the judgment is *res judicata*. *Cox v. Crockett*, 92 Va. 50, 22 S. E. 840.

A final decree of foreclosure, in favor of the assignee of a mortgage, ought to put to rest any controversy between the parties thereto, on the ground of any supposed defect in the deed of assignment. *Chapman v. Armistead*, 4 Munf. 382.

9. Codefendants.

A purchaser of land, having applied for and obtained an injunction in a circuit court restraining the trustee from selling on account of an alleged cloud upon the title, and this court having, on appeal, reversed the circuit court, and decided that the alleged cloud and defect did not constitute sufficient ground for an injunction and dismissed the bill, a second suit, not by the plaintiff in the original suit, but by his codefendants, the holders of the alleged adverse claim, who, it is said, are in possession of the land at the time of the second suit, can not be brought against the same parties for the same purpose and cause of action; and on a plea of *res judicata* the plea will be sustained. *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66.

Where in a suit charging two administrators with the joint devastavit of the intestate's estate, they jointly except to the report wherein they were charged with the devastavit, and the court sustained the exception, one of these administrators can not afterwards

be heard to charge his coadministrators with the same devastavit whereby a debt due by the estate to the alleged was lost. The decree sustaining the exception is the law of the case, binding upon the parties and those claiming under them. *Kent v. Kent*, 82 Va. 205.

Where a city and a property owner are sued jointly for an injury resulting from alleged negligence in obstructing a street, and there is judgment in favor of the property owner on his plea of the statute of limitation, and against the city for damages, in a subsequent action by the city against the property owner to recover the damages it has been compelled to pay, the property owner is not estopped from showing that the accident happened through no fault of his, nor is the question of his ultimate liability *res judicata* by reason of the judgment against the city. The second action is not between the same parties or their privies. The judgment in the first action is only conclusive of the injury of the plaintiff therein, the negligence of the city, and the amount of the recovery against it. *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562.

Matters Not Involved.—The notice states that the sheriff levied an attachment, issued against the plaintiff and another, on the property of the plaintiff, but returned the attachment as though the property of the plaintiff so levied on was the property of the other defendant, and when the attachment was quashed the court ordered the sheriff to return the property to such other persons to whom by his return it appeared to belong. This was no judgment of the court that the property belonged to such other defendant, and not to the plaintiff, and it can not be relied upon as estopping the plaintiff from alleging in such notice that it was his property. It is not *res adjudicata*. "The court never adjudged who was the owner of this property; it simply directed, when the attachment

was quashed, that the sheriff should return the property to the person to whom he had stated in his return it belonged. The court could not have determined that the property belonged to Samuel Stewart, and not to his co-defendant, the plaintiff in this suit. We have over and over again decided that a court could not determine matters between codefendants, when they were in no manner involved in the pleading between the plaintiff and the defendants. See *Vance v. Evans*, 11 W. Va. 342. And as a necessary consequence of this we have decided that, when the plaintiff's bill is dismissed, there can be no decree between codefendants. *Hansford v. Chesapeake Coal Co.*, 22 W. Va. 70. (Point 3 of syllabus.) As the court could not in this chancery cause named in the notice, as the bill was dismissed, have decided to whom the property levied on belonged, and as the plaintiff in this suit had no opportunity to have the judgment of the court thereon, it can not be, therefore, as to her, *res adjudicata*. See *McCoy v. McCoy* (decided at this term), 29 W. Va. 794, 2 S. E. 809." *Shepherd v. Brown*, 30 W. Va. 13, 3 S. E. 186.

10. Coheirs.

There is no such privity as between coheirs, as that a verdict and judgment against one in a suit to which the other was not a party, will bind the latter. *Chapman v. Chapman*, 1 Munf. 398.

11. Corporation and Its Officers.

It was held, in *Fidelity Ins., etc., Co. v. Shenandoah, etc., R. Co.*, 33 W. Va. 761, 11 S. E. 58, that an attachment against a defendant which summons M., president of the S. V. R. Co., garnishee, to answer what property of the defendant he has in hand, and a judgment is rendered that the plaintiff recover of M., president of S. V. R. Co., garnishee of the defendant, a sum of money, are not an attachment and judgment against the S. V. R. Co., as garnishee, and do not bind property in the hands of the latter company belonging

to the defendant; and the sale of the property under execution upon such judgment does not pass title thereto, or bar the defendant from setting up its claim to such property against the S. V. R. Co.

12. Corporation and Its Stockholders.

In a suit involving, among other things, a debt between two corporations, a decree is rendered for a certain sum in favor of the one against the other, ascertaining the amount of the liability on the basis of the amount of paid-up stock of the creditor company. That decree is *res judicata* and estoppel between the companies as to the amount of recovery, and also as between the creditor company and its stockholders, and also between such stockholders as regards the amount of the recovery, but not as to the amount of paid-up stock in settling the rights of stockholders in the distribution of the fund arising from the debt so recovered. *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627, 22 S. E. 91.

13. Deed of Trust Creditor.

A., having recovered a judgment against N., M. and J., upon a bond on which they were sureties of C., deceased, files his bill against them to subject the lands of N. to pay the judgment; and he makes G., who had a deed of trust on the land, a party defendant. Held, G. can not question the validity of the judgment against N., except upon grounds that would avoid it between A. and N., or on the ground that there was fraud and collusion between A. and N. in procuring the judgment. *Gentry v. Allen*, 32 Gratt. 254.

14. Foreign and Domestic Administrators.

After a foreign administrator has come into a cause by petition to assert a demand of his decedent, the domestic administrator comes by petition to assert the same demand in his name. It is proper to recognize the latter as the proper party to represent the estate, and he takes the place of the foreign

administrator. In such case, orders or decrees rendered before the domestic administrator became a party do not bind him. *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627, 22 S. E. 91.

Joint Executors.—"Between the executors of the same decedent in different jurisdictions, there is privity derived from, or through the will of the testator, and a judgment or decree is evidence against the other, and may be enforced against each (see *Hill v. Tucker*, 3 How. 458), and it is sufficient to ground a suit or action on or against either executor. An administrator with the will annexed is, in legal contemplation, executor of that will, and a decree against the domiciliary executor binds every executor of the same will in every jurisdiction." *Garland v. Garland*, 84 Va. 181, 4 S. E. 334.

15. Foreign Corporations.

Where a strip of land with a railroad track thereon in a proceeding against a foreign corporation and with no charter privilege from this state, in which the road is situated, is attached at the suit of a creditor, and it does not appear in the record, that any railroad chartered in this state has any interest therein, the court will regard the strip of land so attached as ordinary real estate; but no decree with reference thereto or sale of the land thereunder can affect the rights of any railroad chartered in this state or any interest of such railroad in such land, of whatever character that interest may be, such road not being a party to the suit. *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184.

16. Guardian and Ward.

See the title **GUARDIAN AND WARD**.

In 1866, J. has a suit brought by his ward, by her next friend, against him, as executor and guardian, for the settlement of his accounts, and the commissioner reports the executorial account up to January, 1863, and then

opens a guardian account from that day, and transfers the balance due from J. as executor to him as guardian, and the report is confirmed by the court. It was held, that the ward had no agency in bringing or conducting the suit, and the sureties of the guardian not having been parties to it, neither the ward nor the sureties are bound by it. *Smith v. Gregory*, 26 Gratt. 248.

17. Intervenor.

a. In General.

A person who puts in a claim pending a suit, and is made a party thereto after the cause goes back from the supreme court, is bound by the proceedings therein. *Nichols v. Campbell*, 10 Gratt. 560.

b. Parties Made on Appeal.

If, in a chancery cause, a commissioner reports that the lands of certain persons not parties to the cause are liable to be sold in the cause, and the court confirms this report and orders the sale of their lands, and they appeal from this decision, and the appellate court on their appeal hears the cause on its merits and affirms such decree, these appellants are bound by this decree as *res adjudicata*, as the appellate court in so deciding, must have held, that it had jurisdiction not only of the cause but also of the parties; and this judgment as well as that on the merits of the case is binding on the parties. *Renick v. Ludington*, 20 W. Va. 511.

But if the appeal had been taken in such case not by these persons but by some other party to the cause, neither the judgment of the court below nor its affirmance by the appellate court would have bound such person as *res adjudicata*; for in such case there would be no implied judgment of the appellate court, that it had jurisdiction over such persons as parties to the cause. *Renick v. Ludington*, 20 W. Va. 511.

If a person's land is by the decree ordered to be sold, or he is otherwise injuriously affected by the decree but

is not made a party to the cause, till after the affirmance of such decree by the appellate court, though such affirmance would make the decree binding on all the parties to the cause, when the decree was rendered, and also on the appellants, yet to the extent that such decree prejudiced the right of such person made subsequently a party, it must necessarily be modified, even though its modification incidentally benefited the appellants or others bound by the decree; but the modification of it would be only to those portions of the decree that injuriously affected such persons not a party or appellant. The law of *res adjudicata* must yield in such case to the principle, that a person, who is not a party and has neither been heard or had an opportunity of being heard, can not be bound by a decree prejudicial to his interest. *Renick v. Ludington*, 20 W. Va. 511, citing *Moseley v. Cocke*, 7 Leigh 224.

c. Parties to Amended Pleadings.

When new parties are made to a suit in equity by amended or supplemental bill, decrees made in such suit before such amended bills were filed, do not bind these new parties as *res adjudicata*; but they are open to any objection which might have been made prior to the rendition of such decrees. *Renick v. Ludington*, 20 W. Va. 511, 535. See *Early v. Garland*, 13 Gratt. 1.

If an amended bill is filed making new parties and additional allegations, and after it is ready for hearing, on this amended bill, a decree is rendered reciting that the cause was heard on the papers formerly read, but not reciting that it was heard on the amended bill, and the decree is such as might have been rendered on the original bill, nothing being decided with reference to the new allegations of the facts stated in the amended bill, the failure to recite in this decree, that the cause was heard also on the amended bill, can not be regarded as a clerical

error; and the new parties are not bound by this decree as *res adjudicata*. *Renick v. Ludington*, 20 W. Va. 511.

18. Judgment Creditor and Judgment Debtor.

Where a creditor, who claims under a judgment at law, comes into equity to enforce his judgment, that judgment is *prima facie* evidence against the debtor, or mere strangers; unless they can impeach it on the ground of fraud, or by showing that a full defense was not made, and can produce new proof showing that the debt is not due. *Garland v. Rives*, 4 Rand. 282, 15 Am. Dec. 756.

Judgment Creditor—Pendency of Suit.—A judgment creditor is concluded by a decree in a cause in which he is a defendant, though he has, at the same time, a suit depending against the same parties to enforce his prior lien. "It was a decree not only upon the same matter, the apparent paramount lien and title of the schedule creditors in regard to the Dinwiddie land, which carried with it the negation of a paramount lien or title in all other persons; but it was a recovery of the identical subject, the proceeds of the sale of that land made by the sheriff. Nor was it the less decisive and conclusive that the money was not in the hands of Myrick, but in the hands of the sheriff who held it subject to the control and decision of the court; nor that Myrick in his answer did not deny the lien or title asserted in the bill, and asserted no lien or title in himself, nor that the present suit was then pending and the first brought, for it is not the institution of a suit, but the judgment or decree therein, which concludes the rights of the parties." *Jones v. Myrick*, 8 Gratt. 179, 217.

A judgment creditor having the prior lien on the lands of his debtor, files a bill against his debtor and other creditors having incumbrances on his debtor's lands. Pending this suit an-

other creditor of the same debtor files a bill against him and his creditors, and among them the judgment creditor, seeking to subject the lands under his lien; and in this suit the proceeds of the whole lands which were sold by the sheriff under the insolvent laws, or by the trustees in the deeds, are distributed by the decree of the court to other creditors. The judgment creditor afterwards matures his suit and brings it on for hearing. Held, that the decree in the other cause concludes him, so that he is not entitled to recover from the creditors who received them, the proceeds of the land sold by the sheriff; nor is he entitled to have the land sold, as against the purchaser thereof. *Jones v. Myrick*, 8 Gratt. 179.

19. Judicial Records.

An answer in chancery in another suit is admissible as evidence of an admission therein in behalf of one though not a party to the suit in which it was filed, though it would not be admissible as an estoppel under the principle of *res judicata*. "A judicial record is not admissible against or binding upon parties to it in favor of strangers to it, its effect being confined to the parties and their privies, that is, when offered to have the effect of estoppel, under the principle of *res judicata*; but that was not the purpose of its introduction here, it being offered only as an item of evidence as an admission by the defendant, open to explanation or rebuttal." *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S. E. 1035.

20. Landlord and Tenant.

See the title **LANDLORD AND TENANT**.

Where an action of ejectment is brought by an adverse claimant against a tenant to recover possession of the premises, and judgment is rendered for such plaintiff against the tenant by default, and a writ of possession is executed by which the plaintiff

is placed in actual possession, the possession is thereby changed, and the landlord is thereby actually turned out—in a second action of ejectment by plaintiffs, who derive title from the plaintiff in the first suit, against such landlord, sued as defendant, the record of the recovery in the former suit is competent evidence on behalf of plaintiff in the latter suit as showing or tending to show that the defendant's possession at that time was ended and changed by the execution of such writ of possession. "George W. Perdue, being the landlord, was the real party in interest, who could not, as the law then was, have been made a defendant, who would, however, have been the real party benefited had there been a defense and judgment in favor of his tenant, or had he made himself a defendant, and obtained such judgment. Such an one, having an opportunity to make defense, and standing by and letting judgment against his tenant go by default, would, under our then statute, seem to be as much bound and concluded as his tenant in possession (there being no fraud or collusion which vitiates such judgments), for the plaintiff could not make him a defendant, but he could enter himself as such, and make defense, if he saw fit. But the law has been changed, and now permits the plaintiff to make the landlord a codefendant. See § 5, ch. 90, Code (Ed. 1891), p. 699." *Clark v. Perdue*, 40 W. Va. 300, 21 S. E. 735.

H., the owner of a ground rent in fee secured upon a lot of ground owned in fee by L., brought ejectment against V., the tenant in possession, to recover the lot for the failure of L. to pay the rent; and there was a judgment by default in favor of H., who proved by his own testimony that the rent was due; and there was no sufficient distress upon the premises; and H. was put into possession of the premises. At this time L. was an infant under twenty-one years of age. After one year from the time H. was put into

possession, but within five years after L. came of age, he brought ejectment against H. to recover the lot. Held, though L. was not a party to the action of H., yet V., the tenant in possession, was, and that, under § 16 of ch. 138, is sufficient. And the proof by H. was sufficient. *Leonard v. Henderson*, 23 Gratt. 331.

21. Lienors.

Commissioner's Sale.—Where liens on land have been ascertained by commissioner's report and decree, and the land sold by special commissioner for more than sufficient sum to pay all such liens, sale confirmed, purchase money all paid, and a decree entered declaring that all such liens were "fully satisfied and discharged," such decree is res adjudicata as to holders of such liens who were parties to the suit. *Mann v. Peck*, 45 W. Va. 18, 30 S. E. 206.

Judgment Lienors.—See the title JUDGMENTS AND DECREES.

M. was adjudged a bankrupt and discharged in 1873. He claimed as his homestead certain land, which the bankrupt court allotted him, but without notice to his creditors, who were lienors by judgments recovered in 1857. Those creditors in 1878 filed their bill in the state court to enforce their liens on said land, but did not make T., who was the assignee in bankruptcy of M., a party. M. demurred, answered, and pleaded that the enforcement of the judgments was barred by the lapse of twenty years between their date and the filing of the bill. The demurrer was overruled and decree of sale entered, but the commissioner of sale was not directed to give the usual bond. On appeal by M., held, the decree of the state court for sale of the land does not impinge the decree of the bankrupt court allotting the land to M. for his homestead, because the judgment lienors were not parties to the proceedings wherein the latter decree was rendered. *McAllister v. Bodkin*, 76 Va. 809.

Convention of Lien Creditors.—"Before ch. 126, acts, 1882, amending and re-enacting ch. 139 of the Code, it was common to direct the convention of lien creditors of a debtor by publication in a suit to subject his land to a judgment, whether brought by one judgment creditor only, or by one for himself and others; and any creditor filing his claim before a commissioner became an informal party, and bound as effectually by the decrees in the cause as if he had been made a formal party. *Arnold v. Casner*, 22 W. Va. 444; *Bilmyer v. Sherman*, 23 W. Va. 662. But a creditor not appearing could not be so bound. No doubt the amounts of the debts of the various lienors against their common debtor, as fixed by a decree in case of such a convention of creditors, would be final for all purposes, as between the debtor and such creditors, and conclusive as between the creditors, for the purposes of that cause, as to the land of the debtor sought to be sold; and it would, as between the creditors, not because of the statute, but on general principles of law, being conclusive as between the debtor and his creditors, be conclusive as to the existence and amounts of the various debts decreed against the debtor by decree binding him, as a personal decree, in other litigation between such creditors, or touching other property than that decreed to sale in the cause in which such decree was made. I take it that the act of 1882, making § 7, ch. 139, as it appears in the edition of 1887 of our Code, does not change the law as regards this point; that is, it does not give the decree any more force than it had before, as between parties proving debts either as between them and their debtor, or as between themselves. It does not require that before a sale for a judgment there must be a reference and notice to lienholders, and it does prescribe the particular notice, and it does give the decree a force as to creditors not presenting debts which it did not possess

before the act of 1882, by barring them from afterwards asserting liens on the land, and thus more effectually protects purchasers under the decree; but it does not otherwise impart any additional effect to the decree. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078. 1080, 29 Am. St. Rep. 774.

Balance in administrator's hands at settlement of his accounts was ordered in 1868 to be apportioned among the creditors, the amount to each being ascertained. In 1887 a creditor filed his bill to establish his claim against the administrator's sureties. On demurrer the bill was dismissed and never amended, nor the decision reversed. He then filed his petition in a lien suit pending against the administrator, asking that his debt be paid out of the fund. The question having been decided and the suit dismissed, and no appeal taken, the question is *res judicata*. *White v. Offield*, 90 Va. 336, 18 S. E. 436.

"It is not necessary, however, to enlarge upon the familiar doctrine of *res judicata*, or to multiply authorities upon the subject. We are of opinion that William J. Kelly, being in possession of land confessedly liable to the lien of the judgments asserted in this cause, can not escape that liability by vouching the record of a suit in which no effort was made to subject the land in question to those judgments, and in which they could not have been enforced, as he was not a party to the proceeding. As we have said, diligent effort was made in that litigation to ascertain a subject upon which the lien of the judgments therein reported could be enforced." *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491.

22. Municipal Corporation and Taxpayers.

The parties to two suits must be regarded as the same, when the complainants in both are certain taxpayers of a municipality suing on behalf of themselves and all other taxpayers, and

the defendants in both, though consisting of different persons, were, in each suit, representing and acting for the municipality without any private interest. *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859.

23. Persons under Disabilities.

a. In General.

Judicial proceedings bind the parties to them, whether the parties are capable of binding themselves out of court or not; whether they be insane persons, married women, or others under disabilities. Therefore, proceedings in court were held to bind a married woman when she was a party, even before the statutes. *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. 610.

b. Infants.

It is well settled with us that an infant, as a general rule, is as much bound by a decree against him as a person of full age. The law recognizes no distinction between a decree against an infant and a decree against an adult. And therefore it is that an infant can impeach only upon the grounds which would invalidate it in the case of another person, such as fraud, collusion or error. *Zirkle v. McCue*, 26 Gratt. 517, 528; *Pennybacker v. Switzer*, 75 Va. 671, 688; 1 *Minor's Inst.*, at pp. 507, 508. *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372.

The saving in favor of infants, married women or insane persons in the 36th section of ch. 135 of the Code, in relation to actions of ejectment, does not apply to actions of ejectment, brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord under the 16th section of ch. 138 of the Code. "The defendant's instruction does not assume that the judgment in that case is conclusive. It asks the court to tell the jury, if they believed the defendant had a right of re-entry into the premises, by reason of any rent being in arrear, that the defend-

ant recovered a judgment for said premises, and had execution therefor, and that the plaintiff, or other person for him, did not pay the rent in arrear, nor file a bill in equity for relief within twelve months, the plaintiff is barred of all right in law or equity to be restored to the premises; and could not recover. The instruction substantially follows the language of the statute. There is no valid reason, as the record is now presented, why it should not have been given, unless the infancy of the plaintiff protected him. This, I have already attempted to show, does not relieve the tenant or grantee of the obligation to pay the rent according to the contract; nor does it impair the force and effect of a judgment in ejectment fairly recovered by reason of its nonpayment." *Leonard v. Henderson*, 23 Gratt. 331, 340.

c. Married Women.

All questions involved in an appeal are finally adjudicated, whether distinctly raised and passed on below and here, or not; and a married woman, when she is a party, is bound by the proceedings in court. *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. 610.

Husband filed his bill to enjoin sale of land conveyed in trust by himself and wife. Later, the circuit court decreed that wife be made a party. She attempted to unite in the amended bill as coplaintiff by suing by her next friend; but the court decided that she should sue simply as a coplaintiff with her husband. From this decision she did not appeal. But from the final decree the defendant did appeal, and the decree was reversed. Thereupon, she, by her next friend, filed her bill for an injunction to the sale of said land on the same ground which had been set up in the former bill. Held, she was a party jointly with her husband in the former suit; and, though a married woman, she is bound by the final decree of this court therein; and the matters set forth in the second bill were

res judicata. *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. 610.

24. Personal Representative and Heirs and devisees.

Former Rule.—Prior to the statute, the general doctrine, without qualification or exception, was well settled that there being no privity between the personal representative and the party to whom the real estate passes, a judgment against such personal representative was not even prima facie evidence against the heir or devisee. *Merchants' Nat. Bank v. Good*, 21 W. Va. 455; *Laidley v. Kline*, 8 W. Va. 218; *Custer v. Custer*, 17 W. Va. 113, 124; *Mason v. Peter*, 1 Munf. 437; *Saddler v. Kennedy*, 26 W. Va. 636; *Foster v. Crenshaw*, 3 Munf. 514, 520; *Shields v. Anderson*, 3 Leigh 729, 736; *Chamberlayne v. Temple*, 2 Rand. 384, 396.

A judgment against the executor was no evidence against the heirs or devisees of the real estate. *Mason v. Peter*, 1 Munf. 437.

And Chief Justice Marshall, in delivering the opinion of the supreme court in *Deneale v. Stump*, 8 Peters 531, said: "It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them. It could not be given in evidence against them." See also, *Robertson v. Wright*, 17 Gratt. 534; *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124; *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143.

Judgment by Default.—A judgment by default against a personal representative in a suit to which the heirs or devisees of the decedent are not parties, is not evidence against such heirs or devisees in a suit or proceeding by the creditor to subject the real estate, descended or devised, to the payment of the debt, and the reason assigned is, that there is no privity between the representative and such heirs or devisees. *Brewis v. Lawson*, 76 Va. 36, 41; *Watts v. Taylor*, 80 Va. 627; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

Effect of Statute on Rule.—Virginia Code, 1873, ch. 127, § 3, does not alter the above-stated rule. *Brewis v. Lawson*, 76 Va. 36; *Watts v. Taylor*, 80 Va. 627.

Evidence of Debt.—A judgment against the personal representative of a decedent was not even prima facie evidence of a debt against the heirs of such decedent. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213; *Broderick v. Broderick*, 28 W. Va. 378.

In *Garnett v. Macon*, 6 Call 308, the court, by Chief Justice Marshall, said: "The defendants insist that the decree against a personal representative of George Brooke is conclusive evidence against the devisee of the existence of the debt. The cases cited by counsel, in support of this proposition, do not decide the very point. Not one of them brings directly into question, the conclusiveness of a judgment against the executor, in a suit against the heir or devisee. They undoubtedly show, that the executor completely represents the testator, as the legal owner of his personal property, for the payment of his debts in the first instance, and is, consequently, the proper person to contest the claims of his creditors. Yet, there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit—can not controvert the testimony—adduce evidence in opposition to the claim—or appeal from the judgment. In case of a deficiency of assets, the executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir, who does not claim under the executor, should be estopped by a judgment against him. * * * In this case, the creditor is bound to proceed against the executor and to exhaust the personal estate, before the lands become liable to his claim. The heir, or

devisee, may indeed, in a court of chancery, be united with the executor in the same action, but the decree against him, would be dependent on the insufficiency of the personal estate. Since, then, the proceeding against the executor, is, in substance, the foundation of the proceeding against the heir, or devisee, the argument for considering it as prima facie evidence, may be irresistible, but I can not consider it as an estoppel. The judgment not being against a person representing the land, ought, I think, on the general principle, which applies to giving records in evidence, to be re-examinable when brought to bear upon the proprietor of the land."

Lost Bond.—But a judgment upon an alleged lost bond, against the personal representative of the obligor, is not even prima facie against the heir or devisee of his estate. *Board v. Calihan*, 33 W. Va. 209, 10 S. E. 382. See also, *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

Justice or Amount of Demand.—"With the settlement before auditors, the heir as such has no concern, nor can such settlement be evidence against him either prima facie or otherwise. Even a judgment against an executor is no evidence against the heir, of the justice or the amount of the creditor's demand; it is *res inter alios acta*. *Mason v. Peter*, 1 Munf. 437. A fortiori, it would seem, that the ex parte report of auditors, appointed only to settle the disbursements of the personal assets, can not be so. The account in this case, then, was no evidence before the commissioner of the court of chancery except so far as the acknowledgment of the brothers made it so. But in that acknowledgment the sisters did not join, and it did not therefore bind them. Therefore it could not avail the administrator; for he could have no decree for a sale of realty without establishing his demand in such mode as would bind all the heirs. It is like the case of a confession of judgment by

one of two joint obligors, and a successful defense of the action by the other; in which case, the confession avails nothing, and the judgment is entered for both defendants. The demand is entire and if disapproved as to one, is disapproved as to all, the confession to the contrary notwithstanding." *Street v. Street*, 11 Leigh 498.

Where Personal Representative Is Heir or Devisee.—A judgment against an administrator of an estate is not even prima facie much less conclusive evidence against the heir or devisee of such estate, when the administrator against whom the judgment was recovered is also the heir or devisee. The court said: "*Freeman on Judgments*, § 163, after announcing the general rule that proceedings against the executor or administrator of an estate do not preclude a defense on original grounds by the devisee or heir of such estate, states that cases in which the executor or administrator and the devisee or heir are the same person are exceptions to the rule. 'For though in this case,' says this author, 'the party claims in two capacities, a judgment against him in one capacity is also conclusive against him in the other. He represents the interests of one and the same person; and has full opportunity, in a suit against himself as personal representative, to protect his rights as successor to the realty.' In support of this doctrine, two cases only are cited, the one from Pennsylvania, *Stewart v. Montgomery*, 23 Pa. St. 410, and the other from Alabama, *Boykin v. Cook*, 61 Ala. 473. Upon an examination of these cases I find that they grow out of the statute laws of those states and have no application where such statutes do not exist. The general doctrine, without qualification or exception is well settled in Virginia and in this state, that 'there being no privity between the personal representative and the party to whom the real estate passes, a judgment against such personal representative is not even prima

facie evidence against the heir or devisee.' *Laidley v. Kline*, 8 W. Va. 218; *Custer v. Custer*, 17 W. Va. 113; *Mason v. Peter*, 1 Munf. 437; *Foster v. Crenshaw*, 3 Munf. 514, 520; *Shields v. Anderson*, 3 Leigh 729, 736." *Merchants' Nat. Bank v. Good*, 21 W. Va. 455, 461.

In *Brewis v. Lawson*, 76 Va. 36, the question here presented was not passed upon, but the court in that case, after referring to the rule laid down by *Freeman*, says: "The inconvenience and apparent hardship of the rule, as it is understood in Virginia, may generally be obviated. In most cases, certainly in cases of liquidated demands, and where there is a known deficiency of personal estate, the creditor need not proceed against the personal representative separately in the first instance, but may bring him and his heirs or devisees before the court in the same suit in equity, and thus avoid the hazard, delay and expense of a repeated litigation of the same matter."

Present Rule.—But the Va. Code now provides that an heir or devisee may be sued in equity by any creditor to whom a claim is due for which the estate descended or devised is liable, or for which the said heir or devisee is liable in respect to such estate; and he shall not be liable to an action at law for any matter for which there may be redress by such suit in equity. And any judgment or decree for such claim hereafter rendered against the personal representative of the decedent shall be prima facie evidence of the said claim against the heir or devisee in such suit in equity. But this section applies only to judgments and decrees rendered since its enactment. Va. Code, 1904, § 2668; *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

25. Personal Representative and Legatees and Distributees.

A judgment against an executor is conclusive, both as to the validity and amount of the demand, on both executors and legatees. *Hooper v. Hooper*,

32 W. Va. 526, 9 S. E. 937; *Corrothers v. Sargent*, 20 W. Va. 351; *Sheldon v. Armstead*, 7 Gratt. 264; *Freem. Judgm.*, § 163. See also, *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. 265, in which case it was held that where the question raised by a bill in equity is as to whether certain bonds and notes therein described are a part of the estate of a decedent, or have been disposed of by assignment and delivery, as a gift to two of his brothers, and the property has by a decree of the supreme court been determined to belong to the estate of the decedent, the decision is binding and conclusive upon all the distributees of the estate.

But in Virginia the court said, it would seem, by analogy, from the case of *Atwell v. Milton*, 4 Hen. & M. 253, that a judgment against an executor or administrator is at least prima facie evidence against the legatees or distributees of the personal estate; though liable to be rebutted by showing it was fraudulently or irregularly obtained. *Mason v. Peter*, 1 Munf. 437.

It seems that a final decree, in a suit by legatees, for the division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the executor had kept back part of the property, but not averring that this was new matter since discovered, or that the decree was obtained by fraud. *Legrand v. Francisco*, 3 Munf. 83.

A decree in favor of legatees against an executor and his sureties, in a proper suit for that purpose, is conclusive as to the amount decreed, and also that the claim of the legatees is not barred by the statute of limitations. Such a decree so long as it remains unreversed, is binding on all of the parties to the suit in which it was rendered, and can not be collaterally assailed. *Smith v. Moore*, 102 Va. 260, 46 S. E. 326.

Where the question raised by a bill in equity is as to whether certain bonds

and notes therein described are part of the estate of a decedent or have been disposed of by him, by assignment and delivery, as a gift to two of his brothers, and said property has by a decree of this court been determined to belong to the estate of said decedent, said decision is binding and conclusive upon all of the distributees of said estate. *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. 265.

Where in a creditor's suit against an administrator, to which the distributees are not parties, a master stated and reported an account of the sums collected by the administrator, which report was confirmed, and later the distributee filed a bill against the administrator and his sureties for an account of sums previously collected by him and for payment of the whole, it was held that the former report did not preclude an account of the last, especially where the sums collected, and the dates when, and persons from whom they were collected, are specified in the bill. *Hurt v. West*, 87 Va. 78, 12 S. E. 141.

Distributees of Deceased Partner.—The administrator of O., a deceased partner, who had the sole management of the business of the concern, is employed by G., the surviving partner, to wind up the partnership affairs; and after the input capital is returned, he enters into a contract with G. to allow the latter a certain sum for his share of the net profits; and G. relinquishes to the administrator all the remaining assets of the partnership. At the time this contract is made there is a large claim in suit against one of the debtors of the firm, who sets up a payment of \$1,000 as having been made to O.; but which he had not entered on the books of the concern; and this contest delays the trial of the case, until the debtor who was solvent when the contract was made, becomes insolvent; and then the credit is allowed by the jury, and a verdict and judgment for the balance. Held, the verdict and judgment is con-

clusive that the debtor was entitled to the credit. "The court is of opinion that, in the absence of all fraud and collusion, the judgment of the court in the suit by the surviving partner, who represents the firm, against R. C. Floyd, is conclusive against the distributees of the deceased partner, in the matters decided thereby, and that the effect of the said judgment is to sustain the claim of said Floyd, that he paid the money to Oglesby." *Boyd v. Oglesby*, 23 Gratt. 674, 686.

26. Personal Representative and His Sureties.

A judgment or decree against an executor in favor of a creditor, payable out of assets, is conclusive evidence upon the executor and his sureties as to the existence and justness of the demand. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

But in Virginia, a verdict and judgment against an executor or administrator are not conclusive evidence against his surety; nor are they conclusive even against the party against whom they are rendered, unless they are pleaded as an estoppel. *Henrico Justices v. Turner*, 6 Leigh 116; *Hobson v. Yancey*, 2 Gratt. 73.

27. Principal and Surety.

See the title SURETYSHIP.

"I think, therefore, that the question is still open, whether a judgment against the principal is conclusive evidence against the sureties, or not. Judgments bind conclusively, parties and privies; because, privies in blood, in estate, and in law, claim under the person against whom the judgment is rendered; and they, claiming his rights, are, of course, bound as he is. But, as to all others, they are not conclusively binding; because, it is unjust to bind a party by any proceeding, in which he had no opportunity of making a defense, of offering evidence, of cross-examining witnesses, or of appealing, if he was dissatisfied with the judgment; and this is called by the court,

in *Bourke v. Granberry*, "a golden rule." *Gilm.* 16, 25, 9 *Am. Dec.* 589. Sureties, and joint contractors, do not claim, to any purpose, under their principal, or under each other. There are cases, in which those who are not parties to the suit, and do not claim under either of the parties, may be bound by the judgment, as in the cases of contracts of indemnity, and in the nature of contracts of indemnity, and in those cases in which a person, although not in form a party to the suit, is bound to assist in the prosecution or defense, and either does so in fact, or, having notice of the pendency of the suit, fails to do so." *Munford v. Overseers of the Poor*, 2 *Rand.* 313, 318.

On this subject, *Munford v. Overseers of the Poor*, 2 *Rand.* 313, is also cited in *Henrico Justices v. Turner*, 6 *Leigh* 116, 128; *Crawford v. Turk*, 24 *Gratt.* 176, 181, 184; *Board of Supervisors v. Dunn*, 27 *Gratt.* 608, 622. And in *State v. Nutter*, 44 *W. Va.* 385, 389, 30 *S. E.* 67, 69, the court speaking through Brannon, P., said: "I think that in this state a judgment against a principal does not bind the surety, as a general rule. *Bigelow, Estop.* 145; *Henrico Justices v. Turner*, 6 *Leigh* 116; *Munford v. Overseers of the Poor*, 2 *Rand.* 313; *Jacobs v. Hill*, 2 *Leigh* 393; *Black, Judgm.*, § 586. These cases overrule *Baker v. Preston*, *Gilm.* 235. There is high authority, however, in favor of the conclusiveness of a judgment against the principal upon the sureties. *Stovall v. Banks*, 10 *Wall.* 583; *Bigelow, Estop.* 146, note 2. I said above that the judgment is not generally conclusive upon sureties. It depends upon the character of the bond. If it undertakes to pay such judgment as may be recovered, that judgment is conclusive, because, that judgment is the event on the happening of which the surety agrees to pay. *Crawford v. Turk*, 24 *Gratt.* 176." It is well settled that before a judgment, as such, can be an estoppel, the party

must have had right to make defense. *Bensimer v. Fell*, 35 *W. Va.* 15, 23, 12 *S. E.* 1078, 1081. *Munford v. Overseers of the Poor*, 2 *Rand.* 313, is also cited in *Douglass v. Fagg*, 8 *Leigh* 588, 596.

In *Henrico Justices v. Turner*, 6 *Leigh* 116, 125, it was said: "No man shall be bound by the act or admission of another, to which he was a stranger, and consequently, no one ought to be bound as to a matter of private right, by a judgment or verdict to which he was not a party, where he could make no defense, from which he could not appeal, and which may have resulted from the negligence of another, or may even have been obtained by means of fraud and collusion. *Id.* These principles are stated and enforced with great strength by Judge Green, in the case of *Munford v. Overseers of the Poor*, 2 *Rand.* 313, in which he examines, in detail, the question how far the sureties in an administration bond, are concluded by a verdict in an action against their principal establishing a devastavit. It is very clear from his argument, that he did not consider them as concluded; and he produces a variety of cases to show, that the general rule, which protects one from the conclusive operation of a verdict to which he was no party, embraces this very case of a principal and surety. The justice of this general rule can not be called in question, and its generality must, of course, comprehend all cases not shown to be exceptions to it." The record in a chancery suit whereby a sheriff's liability on his return has been adjudicated is properly evidence *prima facie*, against his sureties, although they were not parties thereto. *Carr v. Meade*, 77 *Va.* 142, 160, citing *Munford v. Overseers of the Poor*, 2 *Rand.* 313.

A judgment against a principal in a bond, is not conclusive evidence against his sureties. *Munford v. Overseers of the Poor*, 2 *Rand.* 313.

Sureties of Guardian.—In 1866, J. has a suit brought by his ward, by her next friend, against him, as executor and

guardian, for the settlement of his accounts, and a commissioner reports the executorial account up to January, 1863, and then opens a guardian account from that day, and transfers the balance due from J. as executor to him as guardian; and the report is confirmed by the court. The ward having had no agency in bringing or conducting the suit, and the sureties of the guardian not having been parties to it, neither the ward nor the sureties are bound by it. *Smith v. Gregory*, 26 Gratt. 248.

28. Respondents.

Quo Warranto Proceedings.—A judgment in quo warranto determining respondent's right to hold the office, involves an adjudication of his right to receive the salary. "Although the respondents were not formally parties, and could not have been made actual parties to the proceeding in the circuit court, yet * * * the judgment rendered therein is binding upon them, as being the parties upon whom the law has cast the duty of making provision for the payment of the salary of the county court judge of Fauquier county. Hence, they are not strangers to that proceeding, and could not, if they would, question the judgment therein." *Shumate v. Supervisors*, 84 Va. 574, 5 S. E. 570.

Contempt Proceedings.—Upon the petition of John D. Alderson, the present relator, a rule was ordered by this court against the county commissioners of Kanawha county to show cause why a mandamus should not be awarded to compel them to sign a bill of exceptions. They appeared and answered, and, the answer not being deemed sufficient cause, a peremptory mandamus issued, directing them to settle and sign said bill of exceptions in the manner therein prescribed. The relator subsequently filed his petition, charging that the respondent, who was a member and president of said commissioners, had violated the order, and

refused obedience to the mandamus; and praying for a rule, which has been issued against the said respondent, to show cause why he should not be fined for contempt. Held, the peremptory writ having issued, its legality, and the authority to issue it, can not now be questioned by the respondent, as the matter as to him is *res judicata*. *State v. Cunningham*, 33 W. Va. 607, 609, 11 S. E. 76.

29. Sheriffs and Deputies.

See the title SHERIFFS AND CONSTABLES.

A judgment against an officer is evidence for him in an action against the deputy and his sureties to show that he had been subjected to the payment of money by reason of the default of the deputy. *Cox v. Thomas*, 9 Gratt. 323.

The sheriff, in a suit upon a prison-bonds bond, though not a party to the suit on the bond, is bound by the judgment, unless he can prove that it was obtained by collusion. *Hooe v. Tebbs*, 1 Munf. 501.

Judgments having been recovered against a deputy sheriff, he applied for and obtained an injunction on the grounds that he had been induced to confess the judgment, upon the agreement of the high sheriff that the account should be settled by persons named; and the execution should only issue for the amount, if any, found due from the deputy, and that in fact nothing was due, and in breach of this agreement execution has been sued out on the judgment. At the hearing, the injunction was dissolved and the bill dismissed; and this decree was affirmed on appeal. The deputy was held to be estopped from proceeding by bill in equity against the justices of the county to recover the amount he had paid to the county creditors above what he had collected from the county levies. *Lee County Justices v. Fulkerson*, 21 Gratt. 182.

In an action against the sureties of a sheriff for breach of duty, judgments

obtained against the latter are not evidence against the former. Nor are the admissions of the sheriff evidence against the sureties. *M'Dowell v. Burwell*, 4 Rand. 817.

Notice by Deputy of Action.—In an action by an execution creditor against a high sheriff, for the failure of his deputy to pay over money made on the execution, the deputy is present at the trial and examined as a witness, but there is a verdict and judgment for the plaintiff. In a subsequent action by the high sheriff against the deputy and his sureties, on their bond with condition to indemnify the high sheriff from all loss and damages from the conduct of the deputy in said office, the judgment against the high sheriff, in the absence of fraud and collusion, is conclusive evidence of the default of the deputy against not only the deputy, but also his sureties. Though the declaration in the action by the high sheriff does not allege that the deputy was requested to defend the suit against the high sheriff or had an opportunity of doing so, or had notice thereof, his presence at the trial and being active in the defense may be proved by oral testimony. *Crawford v. Turk*, 24 Gratt. 176.

If the deputy is notified of the creditor's action or motion against his principal, it is his duty to appear and defend it. It is in effect his suit, and his liability and that of his sureties is as fully established by the judgment as though it were a direct proceeding against the deputy himself. Such a judgment is a judicial ascertainment of the deputy's default or misconduct, which can not be called in question in any subsequent proceeding against the deputy and his sureties. *Allebaugh v. Coakley*, 75 Va. 628, 629.

On a notice and motion by the administratrix of a high sheriff against a deputy and a surety, for the default of the deputy in not paying over money collected on an execution, the judgment recovered by a creditor, showing

that it is for such default of the deputy, is prima facie evidence against the deputy and his sureties, that the administratrix had been subjected to the liability for the default of the deputy, although the deputy was not notified of the action. *Cox v. Thomas*, 9 Gratt. 323.

30. State and Her Citizens.

See the title STATE.

If the boundary line between the two states has been judicially ascertained in a suit between those states so as to be binding on them, it is equally binding on the citizens of those states. *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

31. Trustee and Cestui Que Trust.

See the title TRUSTS AND TRUSTEES.

Rights of a cestui que trust can not be cut off by a decree in equity rendered against his trustee in a suit in chancery to which the cestui que trust was not a party. *Collins v. Lofftus*, 10 Leigh 5, 34 Am. Dec. 719.

In *Richardson v. Davis*, 21 Gratt. 706, 710, the court said: "In *Collins v. Lofftus*, 10 Leigh 5, 34 Am. Dec. 719, and of the *Com. v. Ricks*, 1 Gratt. 416, decided by this court, it was held, that cestuis que trust, not being parties, are not bound by the decree."

If a creditor files a bill to subject the real estate of a debtor to a judgment lien, and in his bill fails to state that there is any other lien on this real estate, or to ask the auditing of other liens, and makes only the debtor a party defendant, though the court in such case by its decree directs a commissioner to ascertain all liens and their priorities, still the court can not, upon the report of the commissioner that a prior deed of trust had been satisfied, decree that the debt secured by it has been paid, and order its release. Such a decree of the court is a mere nullity, and not binding on the trustee or cestui que trust, because they were not parties to the suit; nor does such

order of reference or an actual service of notice by the commissioner on the cestui que trust make him a party, or render such a decree valid as against him. *McCoy v. Allen*, 16 W. Va. 724.

In a suit claiming under an adverse title property which has been conveyed to trustees for the payment of debts, to which only the grantor and the trustees are parties defendants, a decree in the cause in favor of the plaintiff, does not bind the cestuis que trust. *Com. v. Ricks*, 1 Gratt. 416, is cited for the above statement in *Simon v. Ellison*, 90 Va. 157, 17 S. E. 836.

Where two deeds of trust are given on land by husband and wife, the fee belonging to her, with a life estate in the husband as husband, and a part of it is afterwards conveyed by them to a third party, and there is a chancery suit to enforce the said trusts against the entire tract and sell it outright, and the purchaser of such part is a party and his rights set up therein, and there is a decree exonerating that part from liability for one of the trusts, such decree is *res judicata* to bar another suit to sell the life estate of the husband in such part for that debt. "Pickens was not a party as to his rights under the Knisely trust, and his trustee was not in any shape a party to the Queen & Eib suit, and we have held, that the trustee and beneficiary under deeds of trust are indispensable, formal parties, and can not be affected by a convention of general lienors. *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300; *Benson v. Snyder*, 42 W. Va. 223, 24 S. E. 880; *Turk v. Skiles*, 38 W. Va. 404, 18 S. E. 561; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078." *Pickens v. Love*, 44 W. Va. 725, 29 S. E. 1018, 1020.

32. Vendor and Purchaser.

See the title VENDOR AND PURCHASER.

a. In General.

A grantee of land is not affected by a judgment against his grantor, after

the conveyance, merely because of privity in estate. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078.

R. C. and others being tenants in common of certain lands, and R. C. having sold a part thereof to E. W. and others, a decree for partition obtained by the other tenants against R. C. in a suit commenced subsequently to the sale, is no evidence in their favor in an action of ejectment brought by them against the vendees who were no parties to the suit for partition. *Carter v. Washington*, 2 Hen. & M. 345.

Purchasers under Trust Deed.—In *detinue* for slaves, the plaintiff claims as trustee in a deed of trust to secure a debt, defendant claims as purchaser under a subsequent trust deed from the same grantor. Defendant offers a witness to prove that the debt secured by plaintiff's deed has been paid by the sale of slaves by the grantor in that deed to the beneficiary therein, to which evidence plaintiff objects, and to sustain his objection, introduces the record of a chancery cause between the grantor and the beneficiary, in which it has been decided that the price of these slaves has been, by agreement between the parties, applied in part discharge of another debt. Held, that decree is conclusive, and defendant's evidence is inadmissible. "The question as to the balance due on the bond was directly in issue in the suit; and the plaintiff in error (who claims title as a purchaser under Patterson pending the suit, and was made a party thereto after it went back from this court), is bound by the proceedings therein." *Nichols v. Campbell*, 10 Gratt. 560.

Administrator and Former Owner of Premises.—To rebut the defendant's evidence of adversary possession for twenty years, under such circumstances as would give him a prescriptive right to a dam across a stream, the record of a suit by the plaintiff against the administrator of a former owner of the

premises, under whom the defendant claims, brought within twenty years from the date of the raising of the dam, for the injury sustained by the same, and in which the plaintiff recovered damages, is competent evidence for the plaintiff. *Field v. Brown*, 24 Gratt. 74.

b. Pendente Lite Purchasers.

See the title LIS PENDENS.

Pendente lite purchasers, after recordation of a notice of lis pendens, where that is required, though not formal parties, are bound by the adjudication touching the property purchased by them, involved in the suit, as if formal parties. *Stout v. Philippi Mfg., etc., Co.*, 41 W. Va. 339, 23 S. E. 571, citing *Lynch v. Andrews*, 25 W. Va. 751.

Pendente lite purchasers are bound by the decrees entered affecting the property so purchased by them, although they may not be parties to the suit. *Lynch v. Andrews*, 25 W. Va. 751.

But the rule that a person who acquires an interest in land involved in a pending suit, and from a party litigant, takes subject to the rights of the parties to the suit as finally adjudicated, and is concluded by the judgment or decree, is confined in its operation to giving effect to the judgment or decree which may be rendered in the suit depending at the time of the purchase. *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661, 49 S. E. 984.

c. Purchasers at Judicial Sales.

See the title JUDICIAL SALES.

M. conveys a house and lot to W. in trust for B. for life, remainder to her children. On the 30th of June, 1870, B. contracts in writing with C., to sell to him the property for \$10,000, on the terms of \$2,000 when he received a good deed for the property, and the balance in five years' equal annual payments; possession to be delivered on July 15th, B. to produce the approval of the contract by the proper court with-

out cost to C. On the 9th of July, W. files his bill against B. and her children, to have the contract approved, and by a decree on the same day the contract is approved, and W. is directed to convey the house and lot to C. with special warranty. On the same day, W. executes the deed, and hands it to C., who in a few days writes to W. stating various objections to the title, and saying he can not have anything to do with the property in the state of the title. On the 15th of July, W. tenders C. possession, saying, any objections which may be made to the title are erroneous or imaginary. And thereupon C. refuses to take possession, and renounces the contract. Held, this was a private, and not a judicial sale, and C. is not concluded by the decree from making objection to the title. "When a person purchases at a judicial sale, he thereby becomes in a certain sense a party to the cause, and submits himself to the jurisdiction of the court. In this case the appellant was no party to the suit for confirmation in any sense. It does not appear that he was even apprized of the court in which it was pending until after the decree was rendered." *Christian v. Cabell*, 22 Gratt. 82.

The person who buys the title of the state to forfeited lands at a judicial sale is bound by the final decrees entered in the suit in which such sale is had, prior to the confirmation thereof, as though he were a party to such suit. "Stoddard and Hall being privy to the state and having purchased its title with full knowledge of such adjudication are estopped from again putting the questions thus settled in issue, although they may have been settled erroneously." *State v. Irwin*, 51 W. Va. 192, 41 S. E. 124.

In a creditor's suit afterwards brought by another creditor, to convene and enforce liens against lands of such judgment debtor, but not against the land sold, there is a personal de-

cree against the debtor based on such judgment for an amount beyond the legal call of the judgment by reason of such usury, and the lands of such debtor are decreed to sale to pay that and other liens ascertained by a commissioner's report of liens under an order to convene them, and after publication of notice to creditors, and such purchaser's administrators and heirs are not formal parties, but prove a debt before the commissioners; and afterwards an amended bill is filed to subject the land which had been so sold to such purchaser to said debt. Held, that the administrators and heirs of such purchaser are not precluded by such convention of creditors and such decree from disputing the amount of the debt as fixed by such decree, and the land so sold is to be held liable only for the amount legally called for by the judgment. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

"No subsequent decree or judgment for an amount beyond the legal call of the first judgment, in a suit to which such purchaser is not a formal party, or wherein the true amount due by reason of the judgment was not in fact litigated, can estop such purchaser from satisfying the demand by payment of a sum lawfully called for by the judgment as it was when he purchased." *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

Under a decree of the court, a commission is directed to sell three tracts of land; on the day of sale the land is bid off to A., the debtor, and he being unable to comply with the terms of sale makes a parol agreement with D., by which it is agreed he shall be reported as the purchaser instead of A., and the latter, as an inducement to D. to purchase, agrees to get his wife to release her contingent dower in the lands, which the wife afterward refuses to do; the commissioner reports D. as the purchaser, and the court confirms the sale without objection; on a

subsequent day of the same term N., a creditor of A., offers for one of said tracts an upset bid of twenty per cent. advance on the price of said tract, and the court sets aside the confirmation as to said one tract; at a subsequent term D. moves the court to confirm the sale to him of said tract, and A. moves to have the same set aside and a resale ordered; the court sets aside the sale and orders a resale on the basis of the upset bid; the resale is made and N. becomes the purchaser at his upset bid; this sale is confirmed, and D. appeals to this court. Held, the said parol agreement could not be specifically enforced; nor could it operate as an estoppel or conclude the right of A. to resist the confirmation of the sale. *National Bank v. Jarvis*, 28 W. Va. 805.

Where two deeds of trust are given on land by husband and wife, the fee belonging to her, with a life estate in the husband as husband, and a part of it is afterwards conveyed by them to a third party, and there is a chancery suit to enforce the said trusts against the entire tract and sell it outright, and the purchaser of such part is a party and his rights set up therein, and there is a decree exonerating that part from liability for one of the trusts, such decree is *res judicata* to bar another suit to sell the life estate of the husband in such part for that debt. *Pickens v. Love*, 44 W. Va. 725, 29 S. E. 1018.

By decree of sale of land for partition, it had been adjudicated that the purchaser's wife's share therein should be credited on the purchase money due from him; and judgment had been had against his sureties, execution issued, and forthcoming bond taken for the deferred payment, and those sureties moved the court to continue the motion for judgment on the forthcoming bond until the amount of the credit should be determined and applied. Held, the motion was properly overruled, because the rights of the parties,

so far as the proceeding at law was concerned, had been settled by the judgment. *Newberry v. Sheffey*, 89 Va. 286, 15 S. E. 548.

By decree in an equity suit for partition the sum of \$2,000, owing purchaser from a subpurchaser of part of the land, was directed to be credited on the forthcoming bond, instead of on account of his former purchase of the same land, and the matter was res judicata, and not open to review on the writ of error to said judgment. *Newberry v. Sheffey*, 89 Va. 286, 15 S. E. 548.

One purchasing at a judicial sale lands sold from a person is a privy in estate with such former owner, and is entitled to the benefit of a real covenant running with the land and bound as res judicata by a decree binding a former owner. *Hurxthal v. St. Lawrence, etc., Lumber Co.*, 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954.

33. Parties by Representation.

See generally, the title PARTIES.

In General.—In 15 Ency. Pl. & Prac. 627, the law is stated to be that "where it appears that a particular party, though not before the court in person, is so far represented by others who are before the court in person that his interests receive actual and efficient protection, his actual joinder may be dispensed with, and the decree may be held to be binding upon him." This rule is founded on convenience, and often the necessity of things. *Burlingham v. Vandevender*, 47 W. Va. 804, 25 S. E. 835.

As is said in the case of *Faulkner v. Davis*, 18 Gratt. 651, 690, it "applies to living persons, who are allowed to be made parties by representation, for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self interest and affection to make such defense, and it is therefore unnecessary to make such living persons parties,

and, indeed, improper to do so, and thus compel them to litigate about an interest which may never vest in them. But the rule also often, and a fortiori, applies to persons not in being, and who, of course, may never be in being, who are allowed to be made parties by representation, for reasons, not only of convenience and justice, but of necessity, also, because it is impossible to make them personally parties. It will be found by an examination of all the cases that the rule and the reason of it go to this extent, and that necessity is recognized as an all-sufficient reason for it, whenever such necessity exists." *Burlingham v. Vandevender*, 47 W. Va. 804, 35 S. E. 835.

Where all parties are brought before the court that can be brought before it, and the court acts upon property according to the rights that appear, without fraud, its decision is final and conclusive not only on the parties before the court, but also on those who thereafter come into being. The latter are regarded as parties by representation, and are as effectually bound by decrees as if they had been in being and made parties in person. "The general rule certainly is that no person is bound by a judgment or decree except those who were parties or standing in privy with others who were parties. But there are exceptions to the rule of equal authority with the rule itself. *Baylor v. Dejarquette*, 13 Gratt. 162, 164. It would certainly be unreasonable and unjust that a party having a charge upon an estate affecting the whole fee should be delayed or embarrassed in enforcing his claim because of limitations by way of remainder to persons whom it might be impossible or improper to make parties to the cause. To obviate this difficulty the doctrine of virtual representation has been introduced by which certain parties before the court are regarded as representing those coming after them with contingent interests. *Baylor v. Dejarquette*, 13 Gratt.

162, 166. It was said by Lord Redesdale in *Giffard v. Hart*, Sch. & Lef. 686, 407, 408, that where all the parties are brought before the court that can be brought before it, and the court acts upon the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. And this statement of the law is cited with approval by Judge Lee in *Baylor v. Dejarnette*, 13 Gratt. 162, and by Judge Moncure in *Faulkner v. Davis*, 18 Gratt. 651, 690, where the question is fully discussed." *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372.

Illustrative Cases.—Where, in an action to enjoin a sale under a trust deed on the ground that it has been merged in a judgment on the bond secured by it, a resettlement is asked of the accounts of the defendant's testator or administrator de bonis non because of the recent discovery of a receipt showing assets unaccounted for, and it appears that all these parties were parties to a former suit against the deceased's administrators, in which it was charged that the deceased had not fully accounted for the assets, the judgment in the latter case is *res judicata*. *Gibson v. Green*, 89 Va. 524, 16 S. E. 661.

Foreign Judgments.—L., a citizen of New York, dies, leaving a will, which is duly admitted to record there. He owned an estate, real and personal, in New York, the residuum of which was valued at \$306,000, and he owned the farm called Monticello, in Virginia, valued at not more than \$10,000. By his will he gave the residue of his estate, including Monticello, to the people of the United States, in trust, for the establishment and maintenance, at Monticello, of an agricultural school, for the purpose of educating as practical farmers, the children of warrant officers of the navy of the United States., etc. If the United States declined to accept the trust, he gave the property, on the same trusts, to the

state of Virginia. The executors of L. instituted a suit in equity, in New York, asking the instructions of the court in the administration of the estate; and in that suit the United States was a party, and appeared to maintain the devise and bequest. In this suit the court held the trust void. In a suit in Virginia, by the heirs of L., for the partition of Monticello, Virginia is made a party. Held, the United States represented the trust in the New York suit; and the decree in that suit is conclusive upon Virginia, though she was not a party. *Com. v. Levy*, 23 Gratt. 21.

Remaindermen.—"In *Giffard v. Hort*, 1 Schoales & L. 409, Lord Redesdale uses this language, which is quoted by Judge Lee in *Baylor v. Dejarnette*, 13 Gratt. 152: 'Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the right that appears, without fraud, its decision must, of necessity, be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred.'" *Burlingham v. Vandevender*, 47 W. Va. 804, 35 S. E. 835.

In *Baylor v. Dejarnette*, 13 Gratt. 162, the court said: "It is well settled that it is not necessary that remaindermen, after the first estate of inheritance, should be made parties; and where real estate is in controversy which is subject to an entail it is sufficient to make the first tenant in tail in esse, in whom an estate of inheritance is vested, a party with those claiming prior interests without making those parties, who may claim in reversion or remainder after such estate of inheritance. And a decree against such tenant in tail will bind those in reversion or remainder although by the failure of all the previous estates, the estates in remainder or reversion might afterwards

become vested." See also, *Faulkner v. Davis*, 18 Gratt. 651, 688.

Construction of Wills.—Where the circuit court construes a will as giving a life estate, which construction is not drawn in question on appeal, and which is approved by the appellate court, the question as to what estate passed by the will is *res judicata*; and the fact that the remaindermen are not parties to that suit is immaterial. *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241.

Where a court below construed a will as giving a life estate (the said rule not applying to executory limitations), and the construction, on appeal, was not drawn in question, but was approved by the appellate court, the question as to what estate passed by the will is *res judicata*, and the fact that the remaindermen were not parties to that suit is immaterial. This is on the ground of representation. *Baylor v. Dejarnette*, 13 Gratt. 162. "The appellees, however, contend that the doctrine of *res judicata* has no application, on the ground that the appellants were not parties to the suit when the case was before this court. But to this there are several answers. The first is that although they were not parties originally, they are bound by all the decrees in the case, because, until the death of the life tenants, their interests were altogether contingent, and 'in no case is it necessary to make those persons parties who are entitled only to future and very uncertain and contingent interests.' 4 Min. Insts. 1246. Thus it has been repeatedly determined in England that if there be a tenant for life, remainder to the first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remainder may be barred. Story Eq. Pl., § 792. This is on the ground of representation, upon which ground *Baylor v. Dejarnette*, 13 Gratt. 152, proceeded." *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241.

Executors, Agents and Heirs.—A decree establishing a debt, rendered by a

court which has jurisdiction of the subject and of the parties, is a complete bar, so long as it remains in force, to any suit assailing the debt instituted by any party to the former suit. "Neither did it err in dismissing it as to Mrs. Harrison, although she failed to appear and made defense. The defense of the executor, her codefendant, was not personal to him. It went to the foundation of the appellant's right to recover upon the case stated. The bill did not make a case entitling the appellants to relief. It showed that the validity of Mrs. Harrison's debt had been established in the case of *Harrison and wife v. Wallton's Exor.*, to which suit they were all parties. The court having jurisdiction both of the subject and the parties, the decrees in this case were a complete bar to a recovery against Mrs. Harrison as well as the executor as long as they remained in force. See *Cartigne v. Raymond*, 4 Leigh 579; *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743; *Aiken v. Connelley*, 2 Va. Dec. 383." *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372.

When a suit in equity is brought in the names of several heirs, all having the same interest, if one of them is dead at the time the suit is brought in his name, and his heirs, or their agent, is connusant of the fact that the suit is so brought, and make no objection, but intend to claim the benefit of the decree, they will be bound by the decree dismissing the bill. *Doggett v. Helm*, 17 Gratt. 96.

Agents.—Herm. Estop., § 155, says: "An action is between the same parties, so as to be within the principle of *res judicata*, not only when the same persons are parties, but when they have appeared by their agents and representatives." *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859, 860.

Real Estate Agents.—Receiver of insolvent bank employed agent to sell real estate upon commissions of ten per cent. It was not agreed whether

commissions should be paid out of cash payment or out of entire price when paid. Agent sold for \$85,000, whereof \$10,000 was paid and default made as to residue. Receiver reported sale to court stating agreement as to commissions, and procured a decree for payment thereof, "whenever whole price should be fully paid." Agent, who was no party to the suit, drew an order on receiver for a sum out of any funds payable to him as commissions under the court's decree. Held, the order did not estop agent from denying correctness of the decree. *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974.

Contingent Interests.—The equitable doctrine of representation by persons similar and prior in estate, for the purposes of convenience and justice, applies, of necessity, in all cases where possible heirs or devisees contingently interested are physically or legally not in being, or nonascertainable. *Burlingham v. Vandevender*, 47 W. Va. 804, 35 S. E. 835.

"The general rule certainly is, that no person is bound by a judgment or decree except those who were parties or standing in privity with others who were parties. But there are exceptions to the rule of equal authority with the rule itself. *Baylor v. Dejarnette*, 13 Gratt. 162, 164. It would certainly be unreasonable and unjust that a party having a charge upon an estate affecting the whole fee should be delayed or embarrassed in enforcing his claim because of limitation by way of remainder to persons to whom it might be impossible or improper to make parties to the cause. To obviate this difficulty the doctrine of virtual representation has been introduced by which certain parties before the court are regarded as representing those coming after them with contingent interests." *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372.

Section 20, ch. 71, W. Va. Code, relating to the sale of contingent estates, in requiring all persons then living and contingently interested to be made de-

fendants, includes only known persons in interest, and not unknown heirs, either nonascertainable or not in being. A decree rendered for the sale of real estate subject to contingencies is binding on all those who are remotely interested, and whose identity is legally nonascertainable, when their possible contingent interests are represented by proper parties to the suit, holding similar estates, prior in right. *Burlingham v. Vandevender*, 47 W. Va. 804, 35 S. E. 835, citing *Baylor v. Dejarnette*, 13 Gratt. 162.

34. Parties to Negotiable Instruments.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 401.

In an action against the maker and accommodation endorser of a negotiable note by one who held the note as collateral for a debt, the plaintiff, having received satisfaction of his debt from the original debtor, dismissed the action at the defendants' costs, with the knowledge and acquiescence of the endorsers. The collateral notes had, at that time, been transferred by the owner to the defendant in error, who was not a party to the action on the notes, and had no notice or knowledge of the pendency of the action. Held, not an adjudication of the principles of the case, nor the rights of the parties. *Tate v. Bank*, 96 Va. 765, 32 S. E. 476.

Endorsers.—A judgment obtained against a subsequent endorser is not conclusive against a prior endorser; but in order to make him responsible, where the subsequent endorser has paid the debt, his liability must be fixed as though no judgment had ever been obtained. *Conaway v. Odbert*, 2 W. Va. 25.

W. assignee in blank of M. the payee of a promissory note, endorsed it in blank to R. T. H. & Co., under a special agreement. H. one of the partners, filling up the blank endorsement to himself, brought suit against the maker, obtained judgment, and issued a *fi. fa.*, which was returned "No ef-

fects." Whereupon he sued W. as endorser. The record of the suit against the maker was not proof of a suit upon the note assigned by the defendant; because that record stated an assignment from M. to H.; who individually had no title to the note. If there be two endorsers of a promissory note; and the last endorsee strikes out the second endorsement, and fills up the first to himself, he can not, upon nulla bona returned to an execution against the maker, charge the first endorser; because there is no privity between them. *Hooe v. Wilson*, 5 Call 61.

35. Parties to Creditors' Suits.

See the title CREDITORS' SUITS, vol. 3, p. 810.

Winding Up Banking Institutions.—

The bank of P. was ruined by the late war; and no officers of the bank have been elected nor has there been a meeting of the board since April, 1865, and it has done no business since, and in fact it has been abandoned and ceased to exist. In April, 1866, H. and M. suing as well for themselves as for all the other stockholders, creditors and depositors, etc., filed their bill against the bank and the president, for a settlement of its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June, 1866, there was a decree for an account. Held, in an action by the receiver against a debtor of the bank, the record in the chancery cause is evidence for the plaintiff. "They were in effect parties to that suit, and conclusively bound by it." *Finney v. Bennett*, 27 Gratt. 365.

Suit to Set Aside Fraudulent Conveyance.—Bill filed by a creditor in 1874 to set aside as fraudulent deed made by J., before he became a bankrupt (if ever he was one) to W., was taken for confessed as to grantor, but answered by grantee, who denied the fraud but made no reference to the bankruptcy of J. or to his assignee. After long litigation, the fraud has

been established and plaintiffs' rights fixed by this court, and the land, one subject of controversy, sold and sale confirmed, and the value of the personality (the other subject) has been ascertained by a commissioner and the cause awaits the action of the court on exceptions to his report. The defense actually set up in that answer is a plea of res judicata. That plea is of no effect, because the plaintiffs in this case were not parties in the case wherein the decree relied on was rendered. *Elder v. Harris*, 76 Va. 187.

Lien Creditors.—The owner of land condemned for the purposes of a railroad company, and who has a lien on the land for the damages assessed, is in no way bound or affected by the proceedings in a lien creditor's suit against the company to which he was no party, and of which he knew nothing, except what he had casually heard or read in the newspapers, and, in a suit to enforce his lien, the record of the creditor's suit can not be used in evidence against him. "Mr. Barton, in discussing the effect of decrees in creditors' suits, says: 'The rule has not been carried to the extent of holding that the lien creditors of a living man who has not been made a party, or proved his claim before the commissioner, will be bound by the proceedings in the suit.' 1 Bar. Chy. Pr. (1st Ed.), 177, note. See also, 1 Bar. Chy. Pr. (2d Ed.), 364." *Southern R. Co. v. Gregg*, 101 Va. 308, 318, 43 S. E. 570.

Distributees.—In a creditor's suit against administrator, to which distributees are not parties, a master stated and reported an account of the sums collected by administrator, which report was confirmed. Later, distributee filed a bill against administrator and his sureties for an account of sums previously collected by him and for payment of the whole. Held, the former report did not preclude account of the sums last aforesaid, especially where (as in this case) the sums collected, and the dates when, and persons from

whom, they were collected, are specified in the bill. *Hurt v. West*, 87 Va. 78, 12 S. E. 141.

Widow of Intestate.—G. died early in 1849, leaving a widow, T., and three infant children and in March, 1849, D. qualified as his administrator. In March, 1851, D. settled his account, and had for distribution \$5,090.63; and having qualified as guardian of the children, he retained in his possession two-thirds of the sum as their guardian. He had in 1850 executed his bond for the balance due to T., as widow. There is some uncertainty as to the provisions of the bond, whether given to her as payment of the third due to her as widow, or as a mere acknowledgment of what was due to her; and whether it provided only for the payment to her of the interest during her life, and then of the principal to her children. In April, 1875, T. instituted a suit in equity against the administrator and sureties of D., to recover the amount of her interest in the estate of her husband, G., and the sureties answered, insisting that T. had accepted the bond of D. in satisfaction of her claim, and pleading the statute of limitations. At the time said suit was brought by T., there was pending in the same court a creditor's bill against D.'s administrator and heirs, and in that case T. had filed her petition claiming a share of the estate of one of her sons, who had died intestate, and this claim had been reported as a fiduciary debt; but she did not claim in her petition her share as widow of G. In this case there was a final decree directing the payment of the fiduciary debts reported, and a distribution of the funds of D.'s estate in the hands of the receiver, or which he should afterwards collect, pro rata among the general creditors. After this decree, T. filed her bill to subject a fund in the hands of said receiver, not yet paid out to the creditors, to the payment of her claim as widow of G. Held, that T. having made herself a party in said creditor's suit, without

setting up this claim, she is concluded by the final decree in said suit, and can not set up a claim to the fund in the hands of the receiver. *Tilson v. Davis*, 32 Gratt. 92.

In a suit by an administrator to convene creditors of a decedent under § 7, ch. 86, W. Va. Code, 1899, one claiming a demand against the estate under a contract with the decedent binding one to maintain dams to supply water to a mill, presents it in such suit for allowance, and it is resisted by the administrator and heirs of the decedent on the ground that the covenant was broken, and that the party was not entitled to compensation for maintaining such dam for that reason, a decree allowing such demand is conclusive to show that such agreement was not broken in the lifetime of the decedent, as between the covenantor and an assignee of the land benefited by the covenant to show compliance with the covenant in the lifetime of the decedent. *Hurxthal v. St. Lawrence, etc., Lumber Co.*, 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954.

In a suit by an administrator under § 7, ch. 86 W. Va. Code, 1899, to convene creditors of a decedent, when a creditor presents his demand before a commissioner taking an account of debts for allowance against the estate, a decree allowing or disallowing such demand is res judicata as to the creditor, and also the representatives of the estate and a party purchasing land of the estate under the decree. *Hurxthal v. St. Lawrence, etc., Lumber Co.*, 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954.

36. Parties to Consolidated Actions.

See the title CONSOLIDATION OF ACTIONS, vol. 3, p. 125.

Where two suits are heard together, if the proper parties are made to either suit, the judgment or decree will be binding upon all, though all were not made parties to each suit. *Waggoner v. Wolf*, 28 W. Va. 820, citing *Shenan-*

doah Valley Nat. Bank *v.* Bates, 20 W. Va. 210.

Where two suits are heard together, and it appears from the orders and decrees entered therein, that the proper parties were before the court either in one or both of the suits, and it is proven that the file of papers in one of the suits is lost, such orders and decrees may be read in evidence, although it does not appear from the bill in the other suit, that all such persons were parties to it. *Waggoner v. Wolf*, 28 W. Va. 820.

Negotiable Instruments.—A., a judgment creditor, suing on behalf of himself and all other judgment creditors of C., D., E., and the estate of B. against the said C., D., E., and the administrator of B., defendants, filed his bill, in which he avers, that his judgment is founded on a note drawn by B. and endorsed successively by C., D. and E.; that a creditors' bill is pending in the same court against the administrator, widow and heirs of B. and also separate suits against C. and D. to subject the lands of said B., C. and D. to the payment of their respective debts; that said B., C., D. and E. each own lands in the county, against which it is believed there are judgment liens; and prays, that said liens and their respective priorities be ascertained and said lands sold to pay said liens. The defendants demurred to said bill as follows: The heirs of said B. deceased are not made parties. Held, the creditors' bill pending in the same court against the heirs of B. can be heard with this cause, and thus the necessity of making said heirs parties to this suit may be obviated. "If the heirs are made parties here, they could make no other defense to this debt than they have made, or had an opportunity to make, in said creditors' suit, because they and this plaintiff being all parties to that suit and the amount and priority of said debt having been therein determined, the same is as to all other suits *res judicata*. It seems to me,

then, that, if the two suits are heard together, after they have been matured, and a decree entered upon such hearing, both said heirs and this plaintiff would be bound thereby, and no injustice could result to any of the parties. This course is certainly more convenient in practice and less expensive than to have the same proceedings against the same parties carried on in two suits in the same court at the same time." *Shenandoah Valley Nat. Bank v. Bates*, 20 W. Va. 210.

37. Settlement of Administration Accounts.

See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 635.

Where, in a bill filed to enjoin the sale of the trust property, on the ground that the debt in the deed of trust was merged in the judgment, a resettlement is prayed of the accounts of defendant's testator as administrator *de bonis non*, on the ground of the recent discovery of receipts showing assets unaccounted for, and it appears that all the parties to said bill were parties to a former suit against the decedent's administrators, in which it was charged that decedent had not fully accounted for the assets; held, the matters set up in the bill as to the assets are *res judicata*, the parties to the two suits being the same. *Gibson v. Green*, 89 Va. 524, 16 S. E. 661.

38. Election Contests.

N. was elected judge of P. W. county for six years, commencing 1st of January, 1874. He died 10th of March, 1878. W. was elected 13th of March, 1878, to fill the judgeship made vacant by N.'s death. H. was elected 21st of January, 1880, to that judgeship for six years, commencing 1st of January, 1880. W. and H. each essayed to exercise the functions of the office. Former arrested W. G. H. for contempt; latter arrested E. E. M. for contempt. Both applied to this court for writs of habeas corpus. The real controversy was between W. and H. for the judgeship.

This court decided that W. was elected, and was entitled to hold that judgeship for the full term of six years from the 10th of March, 1878. See *Ex parte Meredith and Ex parte Harrison*, 33 Gratt. 119. Before the expiration of that term, H. filed his petition to this court for a mandamus to compel W. to surrender to him the said judgeship. Held, if not actual parties to the controversy decided by this court in *Ex parte Meredith and Ex parte Harrison*, supra, W. and H. were privies thereto, and however erroneous, that decision not having been reversed, is binding and conclusive on them, and can not be collaterally assailed. The mandamus must be denied. *Howison v. Weeden*, 77 Va. 704.

39. Will Contests.

See the title WILLS.

Executor offers will for probate, J. enters himself as contestant, and afterwards withdraws, and the will is probated; J. then brings a bill in equity to impeach the will. Executor pleads that J. was party to the "proceeding" of probate, and consequently, under Va. Code, 1873, ch. 118, § 34, debarred from again contesting the will. To support plea of *res judicata*, parties alleged to be concluded must have been parties or privies to the judgment, whereby the matter in controversy was determined. *Dillard v. Dillard*, 78 Va. 208.

40. Suits for Freedom.

See the title SLAVES.

A judgment deciding in favor of the freedom of a person held in slavery, has no effect against any party, except the defendant and those claiming under him, posterior to the judgment. *Kitty v. Fitzhugh*, 4 Rand. 670.

In an action for freedom, a former verdict which found the mother of the plaintiff to be free, or a slave, is conclusive evidence, where the defendant in the second action claims under the defendant in the former suit. *Shelton v. Barbour*, 2 Wash. 64. Bue see *Talbert v. Jenny*, 6 Rand. 159.

41. Attachment Proceedings.

A proceeding upon attachment under Virginia statute, as to the parties bound by it, has the effect of a suit in equity to enforce a trust or lien, rather than a proceeding in the English exchequer or admiralty against personal property, without specified parties, to which however all persons are deemed parties. The attachment and subsequent proceeding holds and disposes of the rights of the parties who have appeared, absolutely, and of those who have not appeared, but against whom publication has been made, subject to their appearance and the assertion of their rights as authorized. To this extent it concludes the parties and all persons claiming through or under them by right or apparent right acquired afterwards; but it does not impair or prejudice the right of a stranger to the proceeding. *Houston v. McCluney*, 8 W. Va. 135, 156.

42. Bankruptcy Proceedings.

See the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

A bankrupt, at a sale of his effects by the assignee, became the purchaser of land formerly owned by him. His wife paid the purchase money out of her separate estate. There was a decree for a deed to him, but he gave a written request for the deed to be made to his wife, and the bankrupt court so decreed. Thereupon the assignee in bankruptcy conveyed the land to his wife for life, with remainder in fee to the children of the wife by her then husband, reported the facts with the deed to the bankrupt court, which in all respects confirmed and approved the deed, and gave liberty to the wife to withdraw the deed for recordation. The wife withdrew and recorded the deed, at no time making any objection thereto, and, after two years, died, surviving her two children by the marriage above mentioned, and the descendants of another child by a former marriage. Suit was brought by the latter, claiming an undivided third interest in

the land, and asking for partition. Held, the wife did not take a fee simple in the land, nor, upon the facts stated, did any trust result in favor of the wife, or her heirs general. The wife, by her purchase, became a quasi party to the proceedings in bankruptcy and bound by the decree confirming the deed to her, and every question now sought to be raised here is concluded by the decree of the bankrupt court which can not be collaterally assailed. *Trumbo v. Fulk*, 103 Va. 73, 48 S. E. 525.

In March, 1867, G. recovered a judgment against P. and Q., which was duly docketed; and on the 8th of February, 1869, he instituted a suit in chancery in a state court to subject the lands of the judgment debtors to the payment of the judgment. Prior to the institution of the said suit P. and Q. filed petitions in bankruptcy, and were declared bankrupts by the district court of the United States for the district of Virginia. In the bankruptcy proceedings the lands of P. and Q. were sold and bought by themselves—and in those proceedings they were finally duly discharged as bankrupts. To those proceedings G. was never made nor in any wise became, a party. After the proceedings in the bankrupt court were ended, the state court proceeded with the chancery suit, and after a reference, and a report from a commissioner showing the liens, and that the rents of the land would not satisfy the same in five years, decreed a sale of the lands of P. and Q. for the payment of the liens thereon. On appeal, it was held, the state court had jurisdiction of this suit. G. never having been a party to the proceedings in the bankrupt court, was not bound thereby. "It is a conceded principle accepted everywhere, that no one is bound by the judgment of a court in any case in which he is not a party, and the decree of a bankrupt court is no exception to this general principle, but in the single instance of the right to discharge the debtor from the payment of his debts

upon the general publication and notice, whether the creditors appear or not." *Powell v. Gilbert*, 1 Va. Dec. 218.

Decree Discharging Bankrupt Conclusive upon Creditors.—A decree discharging a bankrupt from his debts under the act of congress of August 19th, 1841, is conclusive upon all his creditors in all suits which may be brought against him in any court, except where the discharge is impeached for some fraud or willful concealment by the bankrupt of his property, or rights of property, contrary to the provisions of that act. *Tichenor v. Allen*, 13 Gratt. 15, cited in *Beall v. Walker*, 26 W. Va. 741, 746.

43. Parties to Ejectment.

See post, "Particular Judgments, Actions and Proceedings Considered." V.

44. Decree upon Report of Commissioners.

See the title REFERENCE.

The report of commissioners, and a decree thereupon, is not conclusive evidence against one who was not a party to the suit. *Loop v. Summers*, 3 Rand. 511.

45. Trials De Novo.

"On retrial de novo, a party may introduce new evidence and establish an entirely different state of facts from that shown on the former trial, and to conform its judgment to the changed state of facts is no violation of principle in a court even if thereby it sets aside its former decision as inapplicable, and adopts a new one suited to the new phrase of the controversy. But where the evidence is substantially identical on the two trials, and the relation of the parties thereto the same, as in the case at bar, the judgment on the first trial is conclusive." *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. 899, citing *Wells on Res Adjudicata* and *Stare Decisis*; *Carper v. Norfolk, etc., R. Co.*, 95 Va. 43, 45, 27 S. E. 813.

46. Existence, Justice and Amount of Debt.

General Rule.—A judgment or decree for a debt in favor of A against B is conclusive, both between the parties and as to strangers, of the existence, justness and amount of the debt, and can be impeached by a party or a stranger only for fraud or collusion. It can be impeached therefor, not collaterally, but only by a direct proceeding to set it aside by original bill or cross bill or answer. *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 1079, 29 Am. St. Rep. 774; *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878.

"My own conclusion, on an examination of the many cases bearing on the subject, is that a judgment for a debt is, as between the judgment creditor and other creditors, conclusive to establish the relation of debtor and creditor, and the justness and amount of the debt, and can not be attacked, except for fraud or collusion; and also that such judgment is evidence to the same extent against those claiming property that may be affected by the judgment derived from the judgment debtor, for the reason that parties claiming property under the judgment debtor are his privies in estate, since they claim under him the property affected by the judgment; and it is a cardinal rule applicable to judgments that they bind parties and privies, whether in blood, law or estate. This rule is modified by our own statutes requiring docketing of judgment, etc." *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 1082, 29 Am. St. Rep. 774.

"Every person embodies, represents and controls whatever title and right is vested in him. Generally, his statements and acts, and judicial proceedings and other transactions to which he is a party, are evidence against himself or any person claiming to acquire a title or right from him after such state-

ment or transaction; but they are not evidence against a person having acquired such title or right before. Whether, however, a judgment in favor of a party against another who has been served with process for a debt, proves either conclusively or presumptively, the relation of creditor and debtor, so as to destroy the prior equitable right of a third person, which but for that relation would be valid, is a question as to which the authorities may not be very clear and satisfactory. But this question does not arise here." *Houston v. McCluney*, 8 W. Va. 135, 156.

A judgment against an executor is conclusive, both as to the validity and amount of the demand, on both executors and legatees. *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937.

A decree against an executor, finding a sum of money in his hands from assets, is prima facie evidence against the sureties in his bond. A judgment or decree against an executor in favor of a creditor, payable out of assets, is conclusive evidence upon the executor and his sureties as to the existence and justness of the demand. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

In a suit in equity to enforce a judgment lien against the real estate of the judgment debtor, the judgment, as between the judgment creditor and other judgment creditors, is conclusive of the justness and amount of the debt. Such judgment, valid on its face, can not be impeached by such other creditor except for fraud; and that can not be done otherwise than in a direct proceeding brought to set it aside on that ground. *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878, citing *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; *McNeel v. Auldridge*, 34 W. Va. 748, 12 S. E. 851; *Garland v. Rives*, 4 Rand. 282, 15 Am. Dec. 756.

A decree under § 7, ch. 139, W. Va. Code, 1887, upon a report of a commis-

sioner after notice to lienholders, adjudging liens on the lands of a debtor, is conclusive as between the various lienors proving liens, though not formal parties, as to the existence and amounts of their debts for the purposes of that cause as to the lands of the debtor; and if there be a personal decree against the debtor for such liens, not merely because of the statute, but on general principles of law, the decree would be conclusive generally as between, not only the creditor and debtor, but also conclusive as between the various lienors, as to the existence and amounts of their respective debts. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

Corporation and Stockholders.—In a suit involving, among other things, a debt between two corporations, a decree is rendered for a certain sum in favor of the one against the other, ascertaining the amount of the liability on the basis of the amount of paid-up stock of the creditor company. That decree is *res judicata* and estoppel between the companies as to the amount of recovery, and also as between the creditor company and its stockholders, and also between such stockholders as regards the amount of the recovery, but not as to the amount of paid-up stock in settling the rights of stockholders in the distribution of the fund arising from the debt so recovered. *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627, 22 S. E. 90, cited in *Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 291, 292.

The early Virginia cases held the judgment to be *prima facie* evidence only, but the later cases seem to be in accordance with the general rule just stated.

In all cases where the question is, whether a person be a debtor or not, a judgment against him or his legal representative seems to be *prima facie* evidence of the fact, liable to be controverted upon the ground of fraud, or upon any other just ground, by any one

a stranger to the judgment except, in the case of a real and personal representative of the same person, in which case either the one or the other might have been sued in the first instance. *Chamberlayne v. Temple*, 2 Rand. 384, 396.

Upon the question, whether one is or is not a debtor, an adversary judgment against him is *prima facie*, that he is a debtor, even as against strangers, who claim, under him, property affected by the judgment. If they attempt to impeach the judgment, it must be done on the ground of fraud, or by showing that a full defense was not made, and producing new proof, showing that the debt is not due. *Garland v. Rives*, 4 Rand. 282, 316, 15 Am. Dec. 756.

In the absence of fraud or collusion, a judgment for money conclusively establishes the relation of debtor and creditor; not only as respects the parties themselves, but all other persons. It is not meant to assert there may not be cases in which the act of the debtor in confessing judgment, or in permitting it to go by default, for what he plainly does not owe, may not amount to such gross negligence as would be of itself conclusive of fraud, and entitle a creditor to relief against the judgment. The rule is, however, settled that unless there is good reason to impute fraud or collusion, a judgment is conclusive of the existence and amount of the debt, and can not be impeached collaterally either by parties or strangers. *Bigelow on Estoppel*, 81, 82; *Freeman on Judgments*, §§ 163-512; *Christmas v. Russell*, 5 Wall. U. S. R. 290; *Mattingby v. Nye*, 8 Wall. U. S. R. 370; *Stovall v. Banks*, 10 Wall. U. S. R. 583; *Johnson v. Gill*, 27 Gratt. 587, 596, 597. *Gentry v. Allen*, 32 Gratt. 254.

L. made his will in 1852. He devised 104 acres to his son, S., at \$3,600, whereof \$1,500 was advancement, balance payable in twelve annual payments; and 103 acres to his son, B., at

\$3,800, whereof \$1,500 was advancement, balance payable in thirteen annual payments. Soon after he put devisees in possession. In 1855, S., with consent of L., conveyed his 104 acres to B., who paid him for same. L. had previously conveyed land to his son, J., of the price whereof \$1,500 was advancement, and held J.'s bonds for balance. By will L. directed that his wife have \$100 a year out of the money payable by his three sons on said lands. Testator also directed that after advancements of \$1,500 to each of his five children, and allowance to his wife, remainder, including back payments on land devised and deeded, and proceeds of personalty remaining, to be equally divided between his five children. Testator further directed that, if S. and B., or either, be unwilling to take said lands on said terms, then his executor should sell same. L. died in 1862. S., who had been appointed executor, qualified as such, giving bond with D. and G. as sureties. The bond had been destroyed. S. proceeded to collect and disburse estate, including back payments from B. and J. In 1869, A., husband of a daughter of L., brought suit to construe will and settle estate. All the heirs and the sureties were parties. Decree was rendered construing will, and directing executor to retain \$1,666.66 during widow's lifetime, in order to raise her annuity, and ratifying executor's receiving payments on the land. Widow died in 1877. Then executor brought suit against B. and his vendee, R., for \$1,155, balance of back payments, claiming that sum as due on the 103 acres, nothing on the other tract. Commissioner reported balance due as \$888, for which a decree was entered against R., who paid the money, and against executor and his sureties for \$1,034, balance of the \$1,666.66 retained to raise widow's annuity, but the decree was set aside as to the sureties. P., a fourth son, and others, in 1880, brought suit against B., R., S., in his own right and as exec-

utor, and his sureties, to recover amount for which executor was in default. In 1882, decree was entered releasing sureties, and holding that the balance due on the 104 acres, after deducting the distributive share of S. therein, was \$894, and that same was a charge, under the will of L., on said land. From this decree R. appealed. Held, both the evidence and the admissions of record show that the entire back payments on both the 103 and the 104 acre tracts, had passed into the executor's hands. If the evidence and the admissions of record did not show this, yet the decree in the suits to which the executor, his sureties and the heirs were all parties, establish the liability of the executor for the money, and the question must be regarded, for the purposes of this case, as *res adjudicata*. *Reherd v. Long*, 77 Va. 839.

A judgment rendered against an administrator upon the bond of his intestate, is conclusive evidence of the validity of the debt as against the administrator. *Montague v. Turpin*, 8 Gratt. 453.

47. Joint and Joint and Several Obligations.

a. At Common Law.

At common law a judgment recovered against one of two or more persons on their joint contract was a bar to an action against the others. The entire cause of action was merged in the judgment, and the joint liability of those not sued, or against whom the judgment was not rendered, was extinguished. And upon a joint and several contract the action had to be brought against all jointly, or against one of them singly, and could not be brought against any intermediate number. *Ammonett v. Harris*, 1 Hen. & M. 488; *Moss v. Moss*, 4 Hen. & M. 293; *Moffett v. Bickle*, 21 Gratt. 280, 281; *Steptoe v. Read*, 19 Gratt. 1, 9; *Rohr v. Davis*, 9 Leigh 30; *Baber v. Cook*, 1 Leigh 606; *Munford v. Overseers of the Poor*, 2 Rand. 313; *New*

York, etc., *R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444.

It is a general rule of the common law that in an action against several defendants upon contract, judgment must be either for or against all the defendants; and the rule is the same whether the contract is joint or joint and several. 1 Rob. (old) Pr., 400; *Steptoe v. Read*, 19 Gratt. 1; *Moffett v. Bickle*, 21 Gratt. 280; *Muse v. Farmers' Bank*, 27 Gratt. 252. *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. 785.

It is a well-established rule of the common law, that the plaintiff upon a joint contract, must sue all the joint contractors, and bring all of them before the court, and mature his cause against all, or if any could not be brought before the court he must proceed to outlawry against such defendants before he could obtain a judgment against any of them; and that he must recover a joint judgment against all the defendants, except such as may be discharged from liability by a defense personal to themselves such as infancy, bankruptcy or any other matters which do not go to the foundation of the action, or against none of them; and this result followed in every joint action, whether brought upon a joint, or upon a joint and several obligation, for the plaintiff having elected to treat it as joint, he took his joint remedy subject to all the incidents of a joint contract. *Taylor v. Beck*, 3 Rand. 316; *Baber v. Cook*, 11 Leigh 606; *Peasley v. Boatwright*, 2 Leigh 195, 196; *Jenkins v. Hurt*, 2 Rand. 446; *Early v. Clarkson*, 7 Leigh 83; *Hoffman v. Bircher*, 22 W. Va. 537, 542, cited in *Roanoke Grocery, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612.

Confession of Judgment.—By the common law the plaintiff, in his joint action against joint obligors, was entitled to a joint judgment against all of them or none of them. He could not, without his consent, be deprived of this right by part of the defendants appearing in court, and confessing a

judgment in his favor, for even the whole of his demand. *Hoffman v. Bircher*, 22 W. Va. 537, 544.

Joint Parties.—Though the statute in relation to joint obligations, gives an action against the personal representative of a deceased joint obligor, 1 Rev. Va. Code, ch. 98, § 3, p. 359; Va. Code, ch. 144, § 13, p. 582, it does not affect the principle that the defect of the remedy against one joint obligor upon a ground not personal to himself, defeats it as to all of the obligors. *Brown v. Johnson*, 13 Gratt. 644. The court in this case further said: "If a verdict and judgment for the plaintiff against one of several who are jointly bound may be admitted in evidence in an action against another as a bar, it would seem to be a necessary corollary (if the deduction be not a fortiori) that a verdict and judgment against the plaintiff in the former action upon an issue going to the merits and ascertaining that the plaintiff never had any cause of action against the defendant, would be admissible as a bar to a subsequent action against another so jointly bound. For the joint obligation would clearly be at an end as to the former, and therefore, as we have seen, as to all the others."

Covenant by One Joint Obligor.—A covenant by the obligor in a bond with one of three joint obligors, that if after judgment against all the parties the money is not paid by the other two, he will relieve him from the payment of it, is not a release, and will not bar an action on the bond against all the obligors. *Brown v. Johnson*, 13 Gratt. 644.

b. Under the Statute.

But this rule has been changed by the statutes in Virginia and West Virginia. *Petticolas v. Richmond*, 95 Va. 456, 28 S. E. 566, 64 Am. St. Rep. 811; *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. 225.

In West Virginia the statute provides that in an action founded on contract,

against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover, if he had sued them only, on the contract alleged in the declaration. *W. Va. Code, 1906, § 3989, cited in McCung v. Seig, 54 W. Va. 467, 46 S. E. 210; Roanoke Grocery, etc., Co. v. Watkins, 41 W. Va. 787, 24 S. E. 612.*

In Virginia the statute provides that, in an action, founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants, against whom he would have been entitled to recover if he had sued them only. *Va. Code, 1904, § 3395.*

"In an action ex contractu against several defendants, the common-law rule was that all should be summoned actually, or constructively by prosecution to outlawry, before judgment could be had against any. *Code, 1873, ch. 167, § 50,* changes this for another rule, whereby judgment may be had against one defendant served with process, and a discontinuance as to the others, or at the plaintiff's election, subsequent service of process and judgment, in the same suit, against the other defendants. *Bush v. Campbell, 25 Gratt. 408, 430. Beazley v. Sims, 81 Va. 644.*

This section was first enacted in Virginia at the revival of 1849-50.

And it first came before the court of West Virginia in *Urton v. Hunter, 2 W. Va. 83, 86*, but the court only passed on the manner of taking advantage of a failure to join, and forbore in express terms to discuss it.

General Construction.—The act was passed to avoid unnecessary delay and expense produced by a mere technicality; and the language of the judges, when this section first came up for consideration, indicated a manifest dis-

position to give the statute an enlarged and liberal interpretation. See *Step-toe v. Read, 19 Gratt. 1; Moffett v. Bickle, 21 Gratt. 280.*

But Judge Edmiston, in construing this section in *Snyder v. Snyder, 9 W. Va. 420*, says: "Under this statute, there may be had as many several judgments on a joint obligation as there are parties to the obligation, dependent wholly upon the service of process." That is to say that the plaintiff, notwithstanding the judgment taken against *S. H. Smith & Bro.*, had the right in the same suit to sue out summons against *J. G. Harmon*, and, when the process was returned executed, could take a separate judgment against him, without regard to the judgment already taken against the other joint obligors. The statute, being in derogation of the common law, must be construed strictly, and its meaning can not be so extended as to authorize separate actions on a joint contract against each of the obligors. To hold this would be to entirely destroy the distinction between joint and several contracts, and make all contracts several. *Armentrout v. Smith, 52 W. Va. 96, 43 S. E. 98.*

Variance.—By § 19, ch. 131, of the Code of West Virginia, it is enacted, "that in an action founded on a contract against two or more defendants, although the plaintiff may be barred as to one or more of them, he may have judgment against any other or others of the defendants against whom he would have been entitled to recover, if he had sued them only." "It is difficult to determine just how far the legislature intended, by this enactment, to relax the rigid rule of the common law which we have been considering. It certainly was never intended to abolish the rule, and with it to destroy the distinctions between joint and several contracts, and joint and several actions thereon; nor are we at liberty to presume that it was intended to destroy the rule that the allegata and probata

must agree and permit the plaintiff to set up one contract in his declaration, and recover upon a wholly different contract proved at the trial. Such a construction of this statute would destroy the securities thrown around legal proceedings whereby a man is entitled to be plainly informed of the character of the claim preferred against him, in order that he may know how to make his defense." *Hoffman v. Bircher*, 22 W. Va. 537, 551.

Obligors Not Served with Process.—

Section 52, ch. 125, W. Va. Code, so far changes the common law as to permit a plaintiff to take several judgments against several joint obligors, as they are served with process in the same suit. It does not authorize more than one suit against all or any of the obligors, whether served with process in the first suit or not. As to the bringing of more than one suit on the same joint cause of action, the common-law rule remains unchanged. *Armentrout v. Smith*, 52 W. Va. 96, 43 S. E. 98.

A judgment against two joint obligors served with process is no bar to a subsequent judgment against a third obligor in the same suit who was not served with process or before the court at the time the first judgment was rendered. "In the present case a second separate suit is brought against all the obligors, although judgment has already been obtained against two of them. This judgment at common law was a bar to any further proceedings against any of the obligors on the same cause of action. The bar has not been changed by the statute except as against further process and judgment in the same action as to obligors not before summoned. *Beazley v. Sims*, 81 Va. 644. This case is exactly in point, and since it was decided, the Virginia legislature to obviate the effects thereof had added to the section these words: 'Such discontinuance of the action as to any defendant shall not operate as a bar of any subsequent action which may be brought against him for

the same cause.' This clause has not been added to the section of the statute under consideration, by the legislature of the state. Whether it is wisdom to do so future legislators must determine." *Armentrout v. Smith*, 52 W. Va. 96, 43 S. E. 98.

Joint and Several Contracts.—It is a well-settled rule that where the contract was several, and not joint, each of the persons severally bound, could be sued separately; and so where the contract was several as well as joint, the plaintiff was at liberty to treat it as a several contract, and in that case also, he could sue the parties so bound severally, and in both cases, recover against them separate judgments. And this course upon a joint and several contract was preferable to a joint action against all, for if one of the joint obligors died before suit brought or during the action or after judgment, all remedy at law, against the estate of the decedent was lost, and the legal remedy for the recovery of the demand could only proceed against the surviving obligors, or the administrator of the last survivor. Therefore, where the contract is joint and several, and the debt considerable in amount, it is most advisable to proceed separately, so that the creditor may thereby retain all his legal remedies against each, in case of the death of one or more of the parties. *Hoffman v. Bircher*, 22 W. Va. 537, 542.

Where the action is joint against all the joint obligors, all of whom have been served with process, or have entered a general appearance to the action, and the plaintiff's declaration shows that the obligation sued on is joint and several, the plaintiff may, at his election on the trial, treat the action as several against each because it appears to the court by the record that the plaintiff might have recovered separate judgments against some of the defendants, if he had sued them only. In such a case the defendants would have no right to complain if the plain-

tiff took separate judgments against those who were severally liable, as he might have done so if he had sued them separately. *Hoffman v. Bircher*, 22 W. Va. 537.

H. brought his joint action of debt against B. and S., in which both were served with process, and appeared and jointly pleaded nil debent. B. in open court confessed judgment, and the cause was continued for three terms as to S., when the issue as to him was tried by the court with his consent, without a jury, and a separate judgment without objection was entered against him, for the same amount as was entered against B. The declaration showed, that the obligation sued on was several as well as joint, and that the plaintiff might have recovered against either, even if his action was barred as to the other—if he had sued either of them alone. Held, that the court did not err in entering such separate judgment against S., instead of a joint judgment against B. and S. *Hoffman v. Bircher*, 22 W. Va. 537, 538.

The plea of non est factum to an action on a joint and several bond for the payment of money, when sustained, bars the action only as to the defendant who pleads it, and does not affect the liability of the other defendants. *Rocky Mount Loan, etc., Co. v. Price*, 103 Va. 298, 49 S. E. 73, citing *Bush v. Campbell*, 26 Gratt. 403.

Judgment for Money on Motion.—At common law a judgment recovered against one of two or more persons on their joint contract was a bar to an action against the others. The entire cause of action was merged in the judgment, and the joint liability of those not sued, or against whom the judgment was not rendered, was extinguished. And upon a joint and several contract the action had to be brought against all jointly, or against one of them singly, and could not be brought against any intermediate number. These rules have been essentially changed by stat-

utes enacted by the Legislature. Sections 3395, 3396, 3212, Va. Code. Section 3212 provides as follows: "A person entitled to obtain judgment for money on motion, may as to any, or the personal representatives of any person liable for such money, move severally against each, or jointly against all, or jointly against any intermediate number; and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice; provided, that judgment against such personal representatives shall, in all cases, be several. Such motions may be made from time to time until there is judgment against every person liable, or his personal representative." *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. 225.

Thus, in a proceeding by motion against an ex-treasurer and his sureties, to recover a balance of county levies left in his hands, a confession of judgment by the principal does not merge the cause of action against the sureties, and judgment may be rendered against the latter at a succeeding term of the court. "Under § 3212, contrary to the rule of the common law, a judgment may be rendered against one of two or more obligors on their joint bond, without the cause of action being merged in the judgment, and the judgment becoming thereby a bar to a recovery in a future motion against the other obligors. And so a judgment may be rendered on a joint and several bond against any number of the obligors intermediate between one and all, without the cause of action being merged in the judgment, and such judgment being thereby made a bar to a recovery in a future motion against the other obligors. Separate motions may be made and judgments rendered, from time to time, against one or more of the whole number of obligors, whether the obligation be joint, or joint and

several, without the cause of action being merged in any or all of such judgments as to the other obligors, until there is a judgment against every person liable, or his personal representative. The statute declares, in effect, that there shall be no merger of the original cause of action until there has been a judgment against every person liable to a recovery upon it." Nor are the rights of the plaintiff in any wise affected by suffering a nonsuit, but he may, at a subsequent term, renew his action or motion on the same cause of action against any or all of the parties against whom he has not already obtained judgment. *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. 225.

Joint Liability of Partners.—A judgment against one of several partners, where there is a joint liability, merges the original cause of action, and is a bar to another suit against the remaining parties. *Pitts v. Spotts*, 86 Va. 71, 9 S. E. 501.

In joint action against partners, judgment is confessed by one, and later, during the same term, is rendered against the other; held, cause of action was not merged by the confession, and the judgment rendered is valid, though the rule is, that a judgment against one of a firm on a joint liability, merges the original cause of action, and bars another suit against the remaining partners. *Pitts v. Spotts*, 86 Va. 71, 9 S. E. 501.

Copartners.—Where a part of the copartners only are sued, or other parties improperly included, it is matter to be pleaded in abatement for nonjoinder or misjoinder, and if so pleaded will defeat a recovery against those who only are embraced in the action, or where improper parties are included as copartners, notwithstanding the provision of the law found in the West Virginia Code, 1860, ch. 177, § 19. *Urton v. Hunter*, 2 W. Va. 83.

Mingling Joint and Several Claims.—"It is obvious from the wording of this section that it was not intended

to authorize a plaintiff to sue two defendants on a joint demand, and in the same declaration to include a distinct demand against one of the defendants severally, and to have a verdict and judgment in the suit against the two defendants jointly for what they might be proven to owe, and against the one defendant severally for what he might be proven to owe, and if the two defendants proved, that they had fully paid what they owed, to permit the plaintiff to recover what he might prove, that the one defendant owed him individually. In such a case this statute would obviously have application; and the case would be tried and judgment rendered on the principles of the common law and the jury could only find a verdict against the two defendants jointly for what they jointly owed, and could not render any verdict on the separate claim against the one defendant individually, though the items of this claim might have been mingled with those against the two defendants jointly in the bill of particulars." *Enos v. Stansbury*, 18 W. Va. 477.

If a declaration in assumpsit be filed against two defendants jointly containing the common counts, and a bill of particulars be filed purporting to be an account against both defendants jointly, but on the trial of the case on the plea of non assumpsit the evidence shows, that only a part of the items in the bill of particulars are charges against the two defendants jointly, and that the other items are charges against one of the defendants individually; the jury can only find a verdict on the items in the account, which are charges against the two defendants jointly, and can render no verdict against one of the defendants severally on the items of the account, which are charges against him severally; such a case not being within the 19th section of ch. 131 of the Code of West Virginia permitting in certain cases a judgment against one defendant in an action

against two jointly. *Enos v. Stansbury*, 18 W. Va. 477.

As Dependent on Right of Recovery against Others.

In Virginia.—In *Bush v. Campbell*, 26 Gratt. 403, 426, in a learned opinion delivered by Judge Staples, it was decided that under the operation of this provision the plaintiff in a joint action on a contract against several defendants, may have judgment against part of them, although the others are acquitted upon grounds which go to the denial of the joint contract stated in the declaration; and that there was nothing in the language of the statute warranting the construction given to it by the counsel for the defendant, contending that it did not apply to a case in which the right of action never existed as to a part of the defendants. This case is cited and approved in *Muse v. Farmers' Bank*, 27 Gratt. 252.

According to the view taken by this court, this statute changed essentially the rule of the common law requiring in actions on joint or joint and several contracts one final judgment for or against all the defendants. The effect of that change is to relieve a plaintiff, who proves a good cause of action against part of the defendants, but not against the others, from being put to the expense and delay of a new action against those who are bound. If, therefore, the plea of one of the defendants is of such a character that the plaintiff might have recovered against the others, had he sued them only, he is entitled to judgment in the pending action against those who are liable. This is the construction given by the New York courts to a statute from which ours was probably taken, and is very similar in its provisions. *Muse v. Farmers' Bank*, 27 Gratt. 252, citing *Bush v. Campbell*, 26 Gratt. 403.

Distinction between Nature of Defenses.—"Where a defendant pleads matter which goes to his personal discharge, such as bankruptcy, infancy, or

any matter that does not go to the nature of the suit, or pleads or gives in evidence a matter which is a bar to the action as against him only, and of which the others could not take advantage, judgment may be given for such defendant and against the rest. *Snyder v. Snyder*, 9 W. Va. 415, 419; *Hoffman v. Bircher*, 22 W. Va. 537. Such, I take it, was the rule at common law." *Roanoke Grocery, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612.

The opinion in *Stephoe v. Read*, 19 Gratt. 1, shows the distinction between a defense which goes to the foundation of the entire contract, and a defense which is merely personal to him who pleads it, and does not touch the liability of the other defendants. The former necessarily defeats the action as to all, and is therefore not within the influence of the statute. Such is the defense of illegality or failure of consideration, or a release to one of several joint contractors, and the like. On the other hand, the latter bars the action only as to him who pleads it; as for example the plea of infancy, bankruptcy, non est factum, and the like. These pleas operate to the discharge of the party pleading them; but do not necessarily affect the liability of the other defendants. Whenever the defense of one of several defendants is of such a character that the plaintiff might recover against the other, if the suit was against that other only, there the statute applies. In other words, if notwithstanding the discharge or acquittal of one of the defendants, the plaintiff might at common law commence a new action and recover against him who is liable, he is entitled under the statute to a judgment against that defendant in the pending action. *Bush v. Campbell*, 26 Gratt. 403, 428.

The act, Va. Code, 1849, ch. 177, § 19, applies to actions on contract against two or more defendants, where the defense of some of the defendants is personal to themselves, though that

defense is, that they were never parties to the contract sued on, as non est factum. *Bush v. Campbell*, 26 Gratt. 403.

In a joint action ex contractu against several defendants, some of whom are discharged by the verdict of the jury, upon grounds which show they were not parties to the contract, the plaintiff can have judgment against those who are parties under the Virginia Code of 1860, ch. 177, § 19, providing that in an action founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only. *Bush v. Campbell*, 26 Gratt. 403.

In an action of debt upon a bond against five persons, upon one of whom the process is not served by direction of the plaintiff, the four plead usury in the bond, and three of them plead severally non est factum. On the trial the jury find in favor of the three defendants, on the plea of non est factum; but can not agree on the plea of usury. There is a judgment in favor of the three, and the case is continued as to the fourth. Afterwards there is a verdict against the fourth; and he moves in arrest of judgment. Held, under the statute, Virginia Code of 1849, ch. 177, § 19, there may be judgment in favor of the three at one time, and a judgment in favor of the plaintiff against the fourth defendant at another time. *Bush v. Campbell*, 26 Gratt. 403.

In *West Virginia*.—But the West Virginia court has taken a somewhat different view from the Virginia, as to this point.

In *Choen v. Guthrie*, 15 W. Va. 100, 106, the question was raised as to what was the meaning to be given to the word "barred" as used in this act. The court said: "The apparently most natural construction of this language is,

that it means that the plaintiff, though barred or defeated in his action as to some of the defendants, may nevertheless have a judgment against those of the defendants against whom he would have been entitled to judgment, had he sued them only on the contract alleged in the declaration." This language was cited and approved in *Enos v. Stansbury*, 18 W. Va. 477, 483. The court said that these views differ from those expressed by Judge Staples in *Bush v. Campbell*, 26 Gratt. 403. His opinion is, that the true meaning of this section is to be found by construing its concluding words, "if he had sued them only," as if they meant "if he had sued them only on the contract proven by the evidence on the trial."

By § 19, ch. 131, of the Code of West Virginia, the legislature only intended to relax the rule of the common law, which requires the judgment in a joint action to be entered jointly against all the defendants or none of them, so far, as to permit a plaintiff who brings his joint action against all the joint obligors, to recover against one or more of them, although his action may be barred as to some of them, where his declaration shows, that he could have recovered against such defendants, if he had sued them only, and where at the trial he proves the contract as alleged in his declaration. *Hoffman v. Bircher*, 22 W. Va. 537, 538.

The cases of *Bush v. Campbell*, 26 Gratt. 403, and of *Muse v. Farmers' Bank*, 27 Gratt. 252, 254, so far as they construe § 19, ch. 177, of the Code of Virginia, which is identical with § 19, ch. 131, of the Code of West Virginia, beyond the construction thereof hereinbefore laid down, disapproved. "Nor are we, in the absence of any binding authority compelling us to do so, willing to follow the construction placed on § 19, ch. 177, of the Code of Virginia, which is exactly similar to said § 19, ch. 131, of the Code of West Virginia, by the court of appeals of that state in the cases of *Bush v. Campbell*,

26 Gratt. 403, and *Muse v. Farmers' Bank*, 27 Gratt. 252, 254, and hold that a plaintiff may bring his joint action against defendants alleged to be jointly bound, and recover against some of the defendants, although his joint action as to others of said defendants is barred by a defense which showed that no such joint contract with said defendants ever in fact existed." *Hoffman v. Bircher*, 22 W. Va. 537, 552.

"It seems to us that by the enactment of § 19, ch. 131, of the Code of West Virginia, the legislature only intended to relax the rigid rule of the common law, which we have been considering so far, as to permit a plaintiff who brings his joint action against all the joint contractors, to recover against one or more of them, although the action may be barred as to others, where the plaintiff's declaration shows that he could have recovered against any of them separately, if he had sued them only, and where he proves at the trial the contract as alleged in his declaration. *Step toe v. Read*, 19 Gratt. 1; *Moffett v. Bickle*, 21 Gratt. 280; *Choen v. Guthrie*, 15 W. Va. 100, 111." *Hoffman v. Bircher*, 22 W. Va. 537, 552.

"The 52d section of ch. 125, of the Code of West Virginia makes no other change in this principle, than to provide 'that in a joint action if the process be executed as to some, and not as to all, the plaintiff may proceed to judgment against those upon whom the process has been served, and discontinue as to others, or proceed against them successively.' But even in that case, if in any of the successive trials, the action should be defeated by any of the defendants upon grounds, which went to the foundation of the whole action, all of the successive judgments would be invalidated. 4 Min. Inst., §§ 615, 650, 872. But as this question does not arise in the case under consideration, we do not undertake to decide it." *Hoffman v. Bircher*, 22 W. Va. 537, 550.

The difference between these two

constructions is, that by the first, the operation of the 19th section of ch. 131, of the West Virginia Code, page 628, would be confined to cases, where the declaration set out a contract, on which the plaintiff could in a proper suit recover either jointly or severally against the defendants, as a negotiable note endorsed, or a joint and several contract; while by the second view this section would be construed as applying to a declaration, which stated only a joint contract. *Enos v. Stansbury*, 18 W. Va. 477.

Nature of Defenses.—The act, Va. Code, 1860, ch. 177, § 19, applies only to cases in which some of the defendants are discharged upon the grounds of defense merely personal; and where the ground of defense goes to the foundation of the entire contract, the case remains as at common law. *Step toe v. Read*, 19 Gratt. 1.

In both *Choen v. Guthrie*, 15 W. Va. 100, 107, and *Bush v. Campbell*, 26 Gratt. 403, there is a discussion of the decision of *Step toe v. Read*, 19 Gratt. 1, as to the construction of this statute. In each of these cases, the court said that if the word "barred" in the act is to be confined to personal defenses by one of the defendants, then this act is a mere affirmation of the common law and the statute is of no avail. They suggest that "non assumption" and non est factum" are both pleas in bar, and that, if the defendant makes good his defense under either of these, the plaintiff is "barred of his action" as to him. Therefore, under the statute, it would seem that the plaintiff may have judgment against one defendant, though the other defendant be discharged on a defense that "goes to the foundation of the contract," and not on a mere personal defense as at common law, though *Bush v. Campbell*, 26 Gratt. 403, seem to class "non est factum" as a personal defense.

But in *Hoffman v. Bircher*, 22 W. Va. 537, 552, the court citing *Step toe v. Read*, 19 Gratt. 1, said: "It seems to

us that by the enactment of § 19, ch. 131, of the Code of West Virginia (precisely same as ch. 177, § 19, Va. Code, 1860), the legislature only intended to relax the rigid rule of the common law, which we have been considering so far, as to permit a plaintiff who brings his joint action against all the joint contractors, to recover against one or more of them, although the action may be barred as to others, where the plaintiff's declaration shows that he could have recovered against any of them separately, if he had sued them only, and where he proves at the trial the contract as alleged in his declaration."

Nature of Endorsement.—Where one of several joint endorsers of a promissory note, has a defense personal and peculiar to himself, namely, that he put his name on the back of a note with the understanding known to the agent of the payee having the matter in hand, that he was not to be bound as an original promisor, but only by an agreement, whether subsequent or contemporaneous, collateral to the making and delivery of the note, that if the payee would give the makers an indulgence of 78 days, he would put his name on the back as an irregular endorser or guarantor, the court said, that it would seem from the West Virginia cases that there ought not to be two judgments under § 19, ch. 131, of the Code. *Roanoke Grocery, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612, citing *Snyder v. Snyder*, 9 W. Va. 415; *Hoffman v. Bircher*, 22 W. Va. 537.

In an action of debt by the holder of a negotiable note, against the maker and four endorsers, upon the plea of usury by the endorsers, the jury found that the note was endorsed by the first three endorsers, for the accommodation of the maker, and was sold by him to the fourth endorser, at a usurious rate of interest; who afterwards and before it became due, endorsed it to the holder for value. Upon this ver-

dict the court should render a judgment in favor of the maker and the first three endorsers, and against the fourth endorser, under the act, Va. Code, ch. 177, § 19, p. 733. "If the statute does not apply to this case, it is difficult to conceive one to which it will apply, and the statute will be of no value. There is no need of applying it to the case of a joint action or contract against several defendants, one of whom is entitled to his personal discharge on the ground of infancy, bankruptcy, etc. Cases of this kind, we have seen, constituted exceptions to the general rule requiring judgment to be rendered against all or none of the defendants in a joint action *ex contractu*." *Moffett v. Bickle*, 21 Gratt. 280.

Joint Plea of Non Assumpsit.—This rule (the common-law rule), it is true, has been modified by our statute, which provides that "in an action founded on contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only." Code, § 3395. But this statute has no application to the present case, because here the only plea that was filed was a joint plea of non assumpsit, and there is nothing in the record (the material portions of which have been already stated) which shows expressly, or from which it can be inferred, that the defense relied on was merely personal to Jackson, and did not concern his codefendant. So that, for aught the record shows, the plaintiff was not entitled to proceed in the present action against Beveridge after the suit was dismissed as to Jackson, and hence there is no error in the record to his prejudice. *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. 785.

The common-law test seems to have been the validity of the plea in abatement for nonjoinder. *Roanoke Grocery*,

etc., *Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612, citing 1 Freem. Judgm., § 222.

Right to Discontinuance as to Part.—

In debt, on a note signed with a partnership name, the declaration charged, that the defendants, being partners, made the notes, and subscribed their partnership name thereto. Some of the defendants, upon whom process had been served, appeared and pleaded nil debet; and some filed with their plea affidavits denying such partnership. One of the defendants, upon whom process had been served, never appeared to plead to the action; and the office judgment was not set aside as to him. On two of defendants, process was never served. After the filing of the said pleas and affidavits, the plaintiff, on his own motion, discontinued his action as to several of the defendants; and other defendants, who had pleaded, withdrew their pleas. The case was then submitted to the court, and proof heard; and the court rendered judgment against all the defendants, who had withdrawn their pleas, except three, and except also the defendant, against whom the office judgment had been found and not set aside, but included in said judgment the two, on whom process had not been served on. Five of the defendants appealed from the said judgment; but the two, upon whom the process had not been served, moved the court which rendered the judgment, during the pendency of said appeal, to reverse and correct the judgment. Upon that motion, said court corrected the judgment and remanded it to rules as to them, and also remanded it to rules as to the defendant, as to whom the office judgment had not been set aside. At the hearing of said motion, certain others, against whom the judgment had been rendered, appeared and asked leave to file certain pleas, and also affidavits denying the partnership; but the court refused to permit the same to be filed. Held, that under the stat-

utory provisions, and the principles laid down in *Snyder v. Snyder*, 9 W. Va. 415, the plaintiff had the right, even without the consent of the defendants, to dismiss his action as to any of the defendants, whom he thought he had improperly joined in his action. Upon such discontinuance of the action as to part of the defendants, the remaining defendants would then have the right, if they wished, to put in a plea in abatement puis darrein continuance, that those persons, as to whom the action had been discontinued, were jointly bound with them. Then the plaintiff would have the right, if he did not wish to try that issue, to make those persons again defendants, either by having the order of discontinuance set aside, if at the same term it was entered, thus leaving the declaration intact as to such defendants. *Carlton v. Ruffner*, 12 W. Va. 297.

In 1866, S. sues M. and B. on their joint bonds. M. confesses judgment that day. Suit is suffered to abate as to B., who had never been summoned. S. having died, his administrator in 1879 brings a second suit on the bond against both obligors. They plead the former judgment in bar. This plea the court below rejects as to B., but admits as to M., and causes the action to proceed as a separate one against B., and renders judgment against him. Upon error, held, the bond is merged in the judgment against M., and the second action is barred by the recovery in the first. *Beazley v. Sims*, 81 Va. 644.

"The defendant, in support of the special plea, relies upon *Beazley v. Sims*, 81 Va. 644. But that case is not in point. The rule, moreover, announced in that case has been changed by the new Code. That was an action against two joint obligors, in which process was served on one of the defendants only, and there was a judgment against that one, and a discontinuance as to the other. And in

a subsequent action against both, it was held, that the cause of action was merged in the judgment recovered in the first suit. Afterwards, however, the present Code was adopted, § 3396 of which, after providing that where, in an action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against all, goes on further to enact that 'such discontinuance of the action as to any defendant shall not operate as a bar of any subsequent action which may be brought against him for the same cause.'" *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98.

Effect of Agreement of Parties.—Two defendants, jointly sued on a contract, having agreed that a verdict might be rendered against either or both liable, and a verdict and judgment having been rendered against one and in favor of the other defendant, on a writ of error to the judgment against the defendant held liable, this court can not inquire which of said defendants is primarily liable, as the other defendant is not before the court. "It is a well-established common-law rule that in all actions of contract the plaintiff must prove his contract against as many persons as he alleged it; and he must recover against all or none. This principle has been modified by statute. Code, § 3395. We are not however, called upon to decide whether or not the case at bar comes within the provision of the statute," as the parties have taken it from under the operation of the common law by the preceding agreement. *New York, etc., R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444.

The Judgment.—In a joint action, on a joint, or on a joint and several obligation, with process served on all of

the defendants before judgment against any, there must be a joint judgment against all of the defendants, or against none, except where some of the defendants are discharged upon matters of defense personal to themselves, which do not go the whole ground of the action; and also except, in the case provided for in § 19, ch. 131, of Code of West Virginia. *Hoffman v. Bircher*, 22 W. Va. 537.

Confession of Judgment.—If in a joint action on a joint, or a joint and several contract, where all the defendants are alive and served with process therein, or have entered a general appearance thereto, and pleaded to issue, one of said joint defendants appears in open court and confesses the plaintiff's action, even where such confession is accepted by the plaintiff and a formal judgment is rendered upon such confession, and the action is not discontinued as to the other defendants, but is continued for the trial of the issues as to them, such confession, and formal entry of judgment thereon, have not the force or effect of a final judgment, but are to be taken as the mere *cognovit actionem* of such defendant, and await the final judgment to be rendered upon the verdict found upon the trial of the issues as to the other defendants. *Hoffman v. Bircher*, 22 W. Va. 537.

In such a case the judgment upon such verdict (except in said excepted cases) must be rendered jointly against all of said defendants, or none of them, and it is error to enter a separate judgment, upon said verdict against the defendants as to whom such issues were tried. *Hoffman v. Bircher*, 22 W. Va. 537.

In such a case it is immaterial whether the issues as to the other defendants be tried, and judgment rendered thereon, at the same term at which said confession and formal judgment thereon were entered, or at any subsequent term. *Hoffman v. Bircher*, 22 W. Va. 537.

48. Judgments in Suits against Joint Tortfeasors.

Rule in Virginia.—The rule in Virginia and in England is that a judgment against one of several joint trespassers, whether satisfied or not, is a bar to any action against the cotrespassers. *Petticolas v. Richmond*, 95 Va. 456, 28 S. E. 566, 64 Am. St. Rep. 811, citing and following *Wilkes v. Jackson* at pages 458, 459, 460.

In *Switzer v. McCulloch*, 76 Va. 777, it was held, the former judgment did not bar the parties because of a compromise after the judgment at law, which had the effect of remitting the parties to their original rights.

Pleading.—A judgment recovered in an action against one trespasser may be pleaded in bar to an action brought against another for the same trespass, although there is no averment in the plea that the judgment had been satisfied. To this effect, *Ammonett v. Harris*, 1 Hen. & M. 488, was cited with approval in *Wilkes v. Jackson*, 2 Hen. & M. 355, 360; *Petticolas v. Richmond*, 95 Va. 456, 28 S. E. 566, 64 Am. St. Rep. 811. In this last case the only point decided was that a judgment against one of several joint trespassers is a bar to an action against the cotrespassers. The decision is based upon *Ammonett v. Harris*, 1 Hen. & M. 488, and *Wilkes v. Jackson*, 2 Hen. & M. 355. Judge Buchanan, who delivered the opinion of the court, in referring to these cases, said: "In each case all of the judges delivered opinions, which, when the two cases are considered together, show that the question of the right of a plaintiff to recover more than one judgment for a joint trespass, whether his action be joint or several, was examined with much care and learning, and the conclusion reached that only one final judgment could be rendered in a joint action, although there were several verdicts, and that a judgment against one trespasser may be pleaded in bar to

an action brought against another for the same trespass, although there was no averment in the plea that the judgment had been satisfied."

Assault and Battery.—In a joint action of assault and battery, a judgment against one of the defendants is a bar to the recovery of additional damages against the rest. *Ammonett v. Harris*, 1 Hen. & M. 488; *Wilkes v. Jackson*, 2 Hen. & M. 355; *Brown v. Johnson*, 13 Gratt. 644, 651.

A finding in a special verdict, that T. and B. were concerned in the same affray at the same time, and that it was the same affray for which a judgment was rendered against B., is a sufficient finding that T. and B. were jointly guilty of the same assault and battery. *Wilkes v. Jackson*, 2 Hen. & M. 355.

In a joint action of assault and battery against twelve defendants, the process having been served on two only, and they having appeared and pleaded not guilty, the jury found them guilty in general terms and assessed damages against them jointly. The plaintiff, in consequence of an order of the court, released a part of the damages to those defendants (saying nothing of the others), and took judgment for the others. After this, he could not proceed to obtain additional damages against any of the other defendants. But if he had not taken judgment, he might have had damages assessed, on other issues or writs of inquiry, against the other defendants, and finally taken judgment against any one of them pro melioribus damnis. "Would the case have been otherwise, if the first verdict had only apportioned, upon the then defendants, their quota of the damages?" *Ammonett v. Harris*, 1 Hen. & M. 488.

A judgment for damages, in a separate action against one of several persons who were guilty of a joint assault and battery, is a bar to an action against the rest. *Wilkes v. Jackson*, 2 Hen. & M. 355.

Right to Appeal.—A plaintiff can not appeal from a judgment in favor of all the defendants, except one, in a joint action of trespass, until the suit has been abated, dismissed, or decided as to that one. *Wellş v. Jackson*, 3 Munf. 458.

Continuing Trespass.—See the title DAMAGES, vol. 4, p. 219.

Where a plaintiff has already recovered damages against the defendant for erecting a dam, thereby causing his land to overflow, in a second suit he can only recover for damages occasioned by the continuance of the dam subsequently. *Ellis v. Harris*, 32 Gratt. 584.

Rule in West Virginia.—But the rule in West Virginia, and this is the prevailing rule, is that a judgment against one joint trespasser is no bar to a suit against another for the same trespass; nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. *Griffie v. McClung*, 5 W. Va. 131; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1.

A party injured by cotrespassers may sue either one against whom the action may be brought. He is not bound to prosecute all, and neither the omission to sue all, nor if all are sued the dismissal of one of them from the suit, can be pleaded by the others in bar. *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752.

A plaintiff in action of trespass may sue all, or any, or either of the alleged trespassers, and he is entitled to full satisfaction, but to only one satisfaction; and if the damages have been in part satisfied by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record. *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752.

Where a city and a property owner are sued jointly for an injury resulting from an alleged negligence in obstructing a street, and the case is not heard on its merits, but goes off under an in-

struction of the court on a plea of the statute of limitations, the judgment in the first action is not conclusive. *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879.

49. Judgment as Evidence of Rendition.

Even as to those who are no parties, a judgment or decree is always evidence and conclusive of the fact that it was rendered. But it is not so as a medium of proof of ulterior facts upon which it was founded or which may be recited in the record. *Early v. Garland*, 13 Gratt. 1, 12, citing 1 Stark Ev., § 191; 1 Greenl. Ev., §§ 527, 538.

As already explained, a judicial record is admissible to prove those matters of fact recited in it only in subsequent proceedings between the same parties or their representatives in privity. But where only the fact of the rendition of a judgment is to be proved, a different rule is recognized. The record of a judgment is the evidence of a public transaction, and it is conclusive evidence in any subsequent proceedings between any persons whatsoever where the point in issue is, was a certain judgment rendered or not. *Underhill on Ev.*, § 157, citing *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

"Where the fact of such verdict and judgment having been rendered is proper and relevant evidence, as they can only be proved by the record, it may be admitted for that purpose, but when so admitted it can not be used as evidence to prove any fact or allegation however material or traversable, upon which they must be supposed to have been rendered. *Greenleaf Ev.*, § 538, 539, 527; 1 Stark. Ev. 213." *Stinchcomb v. Marsh*, 15 Gratt. 202, 205.

50. Facts Provable by Hearsay and Reputation.

See the title HEARSAY EVIDENCE.

In General.—It is a well-settled rule

of evidence that a verdict and judgment in an action at law can not be received in evidence upon the trial of an action between others not parties to the first, nor standing in privity with those who were, for the purpose of proving any fact upon which such verdict and judgment were founded and which being essential to their rendition, is to be regarded as established by them. The party in the second action had no opportunity of cross-examining the witnesses in the first, nor of confronting them with others by whom the facts deposed to by them might have been effectually disproved. But to this general rule there are some exceptions, as in the class of cases known as proceedings in rem, such as judgments of condemnation of property as forfeited, a prize in the exchequer or admiralty courts, and adjudications upon the personal relations of a party such as marriage, divorce, settlement and the like. 1 Greenleaf Ev., §§ 525, 541 and n., § 544 and n., § 545. *Stinchcomb v. Marsh*, 15 Gratt. 202, 204.

The general rule as to giving verdicts and judgments in evidence is, that they are not to be admitted but between parties, privies. But there are exceptions to this as well as to all other general rules. Among others, it is said, that where the fact to be proved is such, whereof hearsay and reputation are evidence, a special verdict between other parties, stating a pedigree, would be evidence to prove a descent; for, in such case, what any of the family who are dead have been heard to say, or the general reputation of the family, entries in family books, etc., are allowed. *Pegram v. Isabell*, 2 Hen. & M. 193; *Shelton v. Barbour*, 2 Wash. 64.

"The general rule as to giving verdicts and judgments in evidence (a) is, that they are not to be admitted but between parties, or privies; to which general rule there are some few exceptions, one of which is that, where a fact to be proved is such whereof

hearsay and reputation are evidence, a special verdict between other parties stating a pedigree would be evidence to prove a descent; for, in such a case, what any of the family, who are dead, have been heard to say, or the general reputation in the family, entries in family books, etc., are allowed. (b) But this is not such a case; hearsay was never yet permitted as evidence to prove a promise, or the consideration upon which a deed was made. The general rule, then, must prevail." *Chapman v. Chapman*, 1 Munf. 398.

In a suit for freedom, if the jury find a verdict for the plaintiff, subject to the opinion of the court, upon a question whether the record of another suit, in which the plaintiff's mother recovered freedom (not against the defendant but another person), is conclusive evidence (as between the parties to the present action), that the plaintiff's mother was a free woman; but do not state that the plaintiff was born after her mother was entitled to freedom, or that her mother was born free; the verdict is uncertain and insufficient, and a venire de novo ought to be awarded. *Pegram v. Isabell*, 1 Hen. & M. 388.

How far, in a suit for freedom, can the record of a previous recovery of freedom by a female ancestor of the plaintiff (not against the defendant, but another person) be given in evidence? *Pegram v. Isabell*, 1 Hen. & M. 388. In *Preston v. Harvey*, 2 Hen. & M. 55, 67, it is said that, in *Pegram v. Isabell*, 1 Hen. & M. 388, the doctrine in *Shelton v. Barbour*, 2 Wash. 64, seems admitted, as between parties and privies, by the counsel on both sides.

The record of the verdict and judgment, upon a writ of inquiry, in a suit by the mother of the plaintiff, against a third person, in which record the ground of the judgment does not appear, may be given in evidence to prove, that the mother had recovered her freedom; not that she was entitled to it. But the questions, upon what ground

the judgment in that suit was rendered, and whether the decedent was born after the mother acquired her right to freedom or not, ought to be left open. *Pegram v. Isabell*, 2 Hen. & M. 193.

In an action for freedom, a former verdict which found the mother of the plaintiff to be free, or a slave, is conclusive evidence, the defendant in this action claiming under the defendant in the former suit. In *Pegram v. Isabell*, 2 Hen. & M. 193, 204, the court, citing the principal case, said: "That although liberty is to be favored, the court can not, on that or any other favored subject, infringe the settled rules of law. In that case," meaning the principal case, "it was held, in conformity to this principle, that a verdict between parties and privies, finding the mother of the plaintiff to be a slave, was conclusive evidence against him, as much as a verdict finding her to be free would have operated in his favor. This decision" (i. e., the decision in the principal case), "therefore, shuts out the pretence that we can, in this case, take a greater latitude in relation to the rules of evidence, than in any other." In this connection, the principal case is cited with approval in *Preston v. Harvey*, 2 Hen. & M. 55, 67; *Pegram v. Isabell*, 2 Hen. & M. 193, 210; *Gregory v. Baugh*, 4 Rand. 615; *Shelton v. Barbour*, 2 Wash. 64.

Customs.—"Another exception it is said has been made in the case of verdicts and judgments upon subjects of a public nature, such as matters of reputation, customs and the like. 1 Greenleaf, § 526. Whether the latter class of exceptions can have any place in this state at this day, it is deemed not very material to inquire. For the verdicts and judgments offered in this cause can be brought within the range of neither of these classes." *Stinchcomb v. Marsh*, 15 Gratt. 202, 204.

In an action of ejectment, the record of another action of ejectment between other parties, is not competent evidence

upon a question of boundaries or the location of the land in controversy. Nor could these records have been admitted upon the principle which admits, in certain cases, evidence of hearsay, reputation, tradition. It is true the principle of the admissibility of such testimony in cases of a public nature has been extended by our courts to questions of private boundary; but it is difficult to perceive how this can render admissible the verdicts and judgments in cases between others, although the same boundary may have been the subject of dispute. Such verdicts and judgments may have been founded upon the hearsay or tradition given in evidence, or upon evidence of a totally different character. The identity of the boundary as claimed on the ground with that described in the muniments of title relied on, may have been established by the conformity of natural objects actually found with those called for. It may have been made out by artificial monuments shown to exist as marked trees of the kind called for, the annulations on which were found to agree with the years elapsed since the date of the survey relied on. It may have been deduced from a connection with one or more adjoining surveys, the location and boundaries of which were sufficiently proven or undisputed. Or it may have been determined from several of these different sources of evidence, or all, combined. Again, the proofs of hearsay or tradition, or whatever they were, were from the mouths of witnesses who might or might not be competent to give testimony in the particular case; but the party had no opportunity to show their incompetency to testify against him, or to cross-examine them or to meet their statements by opposing proofs." *Stinchcomb v. Marsh*, 15 Gratt. 202, 206.

51. Parties in Writ of Right.

See the title WRIT OF RIGHT.

A record of a suit in chancery to

which neither the demandants in a writ of right nor the tenants was a party, is not even *prima facie* evidence against the tenant that the grantor in the deed to the demandant was heir at law of the grantee in the patent under which the demandant claimed title. *Duncan v. Helms*, 8 Gratt. 68.

52. Improper or Unnecessary Parties.

Improper or unnecessary parties to a suit or proceeding, are not estopped by a prior judgment or decree. *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.

Improperly Made Parties.—Proceedings by the commissioner of school lands, under ch. 134 of the West Virginia acts of 1872-73, for the sale of forfeited lands for the benefit of the school fund, were never designed to settle the title to land between opposing claimants; and if they are improperly made defendants in such a proceeding, the circuit court has no jurisdiction, in such a case, to adjudge which of such claimants has the better title to the land so as to bind any of such improper parties by such adjudication in any controversy which they might thereafter have, involving the question, who had the better title to the land. *McClure v. Manperture*, 29 W. Va. 633, 2 S. E. 761.

IV. Matters Concluded.

A. IN GENERAL.

It is settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question, in another suit between the same parties. *Corprew v. Corprew*, 84 Va. 599, 5 S. E. 798; *Withers v. Sims*, 80 Va. 651, 658; *McComb v. Lobdell*, 32 Gratt. 185; *Tilson v. Davis*, 32 Gratt. 92; *Foster v. City of Manchester*, 89 Va. 92, 15 S. E. 497; *Fishburne v. Ferguson*, 85 Va. 321, 324, 7 S. E. 361; *Deihl v. Marchant*, 87 Va. 447, 449, 12 S. E. 803.

A judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between

the same parties. *Corprew v. Corprew*, 84 Va. 599, 602, 5 S. E. 798, citing *McComb v. Lobdell*, 32 Gratt. 185; *Tilson v. Davis*, 32 Gratt. 92.

General Extent and Scope.—"An adjudication is final and conclusive, not only as to the matters determined, but as to every other matter which might have been litigated and have been decided as incident to or essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to the matters of claim and of defense." It is not essential, he says, "that the matters should have been distinctly put in issue in a former suit to make it an estoppel. It is sufficient if it be shown to have been tried and settled in a former suit." *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633.

It is well settled in Virginia that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. And it is also settled that all matters presented and received, or presentable to sustain the particular demand litigated in the prior suit, and all matters presented or presentable under the issue to defeat such demand, are concluded by the judgment or decree in such former suit. But to this operation of the judgment or decree, it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If by the record there be any uncertainty in this respect—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment or decree may have passed, without indicating which of them was thus litigated, and upon which the judgment was founded—the whole subject matter of the suit will be at large and open to a new contention, unless such uncertainty be re-

moved by extrinsic evidence showing the precise point involved and passed upon. And to apply the judgment or decree, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. *Russell v. Place*, 94 U. S. 608; *Chrisman v. Harman*, 29 Gratt. 499; *New York Life Ins. Co. v. Clemmitt*, 77 Va. 366; *Frazier v. Frazier*, 77 Va. 775; *Blackwell v. Bragg*, 78 Va. 529; *Wells on Res Adjudicata*, § 282; *Freeman on Judgments*, § 256; *Packet Co. v. Sickles*, 5 Wall. 580; *Legrand v. Rixey*, 83 Va. 862, 3 S. E. 864.

A point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied on as an estoppel in any subsequent collateral suit in the same or any other court at law or in equity, when either party or his privies allege anything inconsistent with it; and that, too, whether the subsequent suit is upon the same or a different cause of action; nor is it necessary that precisely the same parties should have been plaintiffs or defendants in the former suit, provided that the same subject matter in controversy between two or more of the parties to the two suits, respectively, has been in a former suit directly in issue and decided. The conclusiveness of the judgment or decree extends, beyond what may appear on its face, to every allegation which has been made on the one side, and denied on the other, and was in issue and determined, in the course of proceedings. If it appears by the record that the point in controversy was necessarily decided in the first suit, whether upon the law on demurrer, or upon the facts in issue, it can not be again considered in any subsequent suit between any of the parties or their privies. *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809.

"A decree or judgment concludes not only what is in fact adjudicated, but all questions in issue, whether formally

litigated or not. Every point decided, and, by necessary implication, every issue which must have been decided in order to support the judgment or decree is concluded. In the case in judgment, the parties were not the same as in the former suit, the land sought to be subjected was not the same, and the relief sought in this suit could not have been granted in the former suit, in the condition in which it was when the decree sought to be set up as a bar was pronounced. *Quære*: Does a demurrer lie to a plea or answer in chancery?" *Kelly v. Hamblen*, 98 Va. 333, 36 S. E. 491.

Where the matters involved in a second motion were not submitted to the jury on the trial of the first motion, or if submitted could not have been legally adjudicated by them, no question of estoppel can arise. *Allebaugh v. Coakley*, 75 Va. 628.

Grounds of Decision Shown by Record.—Where the record leads to the ground of decision, that decision is no farther a bar to a second suit than as to that ground, except as to defenses which the party is bound to plead. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650, citing *Saunders v. Marshall*, 4 Hen. & M. 455, 458.

The law is, that by matter of record all parties are estopped, so that a man shall not be allowed to make an averment contrary to a record; and, if a deed be enrolled of record, the party is estopped to say that it is not his deed, or that it was not acknowledged by him; but when the truth is apparent on the record, the adverse party shall not be estopped to take advantage thereof, for he can not be estopped to allege the truth when it appears of record. So that where the record is general, and does not disclose the ground of decision, the bar created thereby is as general; but where the record leads to the grounds of decision, it is no farther a bar, than as to that ground; for that is all that has been decided, and so far, and no farther, it

is a bar; as for example; if the law was, as decided by the county court, that in no case could the assignor be sued, without a suit first against the maker, and a return upon a *feri facias* of nulla bona, this decision would be a bar to another action against the assignor, before a suit against the makers; but it would be no bar to a suit against them, nor afterwards to a suit against the assignor; and, therefore, if the plaintiff's remedy was not at law, his bill might be entertained in equity, notwithstanding the judgment. *Saunders v. Marshall*, 4 Hen. & M. 453.

A decree is conclusive, as to the existence or nonexistence of every fact on which it depends, upon the parties to the suit and those claiming through them. *Bodkin v. Arnold*, 45 W. Va. 90, 20 S. E. 154.

Suit for Freedom.—The record of the verdict and judgment, upon a writ of inquiry, in a suit by the mother of the plaintiff, against a third person, in which record the ground of the judgment does not appear, may be given in evidence to prove that the mother had recovered her freedom; not that she was entitled to it, "by reason of being descended in the maternal line from an Indian ancestor, imported into this state since the year 1705." But the questions, upon what ground the judgment in that suit was rendered, and whether the descendant was born, after the mother acquired her right to freedom, or not, ought to be left open. *Pegram v. Isabell*, 2 Hen. & M. 193.

B. CERTAINTY OF ESTOPPEL.

In General.—"According to Coke, an estoppel must be 'certain to every intent'; and if upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." *Chrisman v. Harman*, 29 Gratt. 494.

"It is undoubtedly settled law that a judgment of a court of competent juris-

diction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." *Russell v. Place*, 94 U. S. R. 214, 4 Otto 606, approved in *Chrisman v. Harman*, 29 Gratt. 494, and note, 26 Am. Rep. 387; *Withers v. Sims*, 80 Va. 651, 658; *Le-grand v. Rixey*, 83 Va. 862, 3 S. E. 864.

A verdict in one suit will be conclusive in every other between the same parties, where the cause of action is the same; upon the ground that what has once been judicially determined shall not again be made the subject of controversy. But it has been settled by numerous cases, that to make such verdict available as an estoppel, or conclusive as evidence, it must appear not only that the same matter was in controversy, but that it was actually decided; and that where the verdict of the jury may have been founded upon one of the two points, it will not operate as an estoppel as to either. 2 *Smith's Leading Cases* 374. Although the testimony may have been sufficient to establish a particular fact, and that fact may have been involved in one of the issues to be tried, yet if it be

doubtful whether the verdict was based upon such fact, it will not operate as an estoppel. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

If, upon the pleading and the evidence, it is merely doubtful upon what ground the jury rendered their verdict in the first action, such verdict will not operate as an estoppel, according to the authority of adjudicated cases. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

Inference or Argument.—In order that a former decision shall operate as res judicata, it must be certain and clear that the precise question was definitely and finally determined; it can not be made out by inference or argument. *Windon v. Stewart*, 48 W. Va. 488, 37 S. E. 603.

It is only by inference that it is sought to make the decision operate as allowance of those receipts, and the law says that a decision can not be made to operate as res judicata by mere uncertain argument or inference. *Bigelow on Estop.* 165. *Rowan v. Chenoweth*, 55 W. Va. 325, 47 S. E. 80.

C. MATTERS COLLATERALLY INVOLVED.

A fact which has been directly tried and decided by a court of competent jurisdiction can not be contested again between the same parties in the same or any other court. It is res judicata. But to make it res judicata it must have been directly and not collaterally in issue in the former suit, and then decided. *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. 806; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913, 914; *Henry v. Davis*, 13 W. Va. 230; *Houck v. Kerfoot*, 99 Va. 658, 39 S. E. 590; *Picket v. Morris*, 2 Wash. 255; *Cockran v. Street*, 1 Wash. 79, 80.

Even as against a party, a judgment or decree is held to be conclusive only upon what was brought directly in issue and not upon a matter incidentally

brought into controversy. *Duchess of Kingston's Case*, 20 How. St. Tr. 353, 538; *Early v. Garland*, 13 Gratt. 1.

It must distinctly appear, that the matter was in issue and was adjudicated. It is not sufficient that it was incidentally cognizable by the court, and that the adjudication be inferred by argument from the decree. 7 Rob. Pr. 5; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250. *Houser v. Ruffner*, 18 W. Va. 244.

"It is also claimed that the decree must be direct upon the precise point, and if the matters pleaded, as an estoppel, only came before the court collaterally in the former suit, that they can not have the effect of an estoppel in the latter. This proposition is also true. 1 Greenl. on Ev., § 528; 1 Starkie on Ev., 265; *Smith v. Sherwood*, 4 Conn. 276; *Hopkins v. Lee*, 6 Wheat. 109." *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250, 284.

D. APPLICATIONS OF GENERAL RULE.

Municipal Securities.—In suit whereto county issuing the bonds and company executing the mortgage are parties, it was decreed that the bonds were valid and the mortgage the first lien, and the decree was, on appeal, affirmed. Held those questions are res judicata. *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433.

In the case of *Gallagher v. City of Moundsville*, 34 W. Va. 730, 734, 12 S. E. 859 (decided at the last term), it was held, that where a suit had been brought to impeach the validity of bonds issued by a municipal corporation before they were put upon the market, and a decision reached in the circuit court favorable to their validity, no further suit could be brought or maintained by the same parties (no matter what particular form it might take) to test the validity of the bonds so long as the former decision and decree remained in full force, unreversed.

and unappealed from. *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66.

"The question, of ownership, and right to the possessor of the interlock under the title derived from Wm. M. Peyton, and all questions of controversy as to the interlock between the parties to this injunction suit under said title, and involved therein, are settled and adjudicated, in the suit in chancery between substantially the same parties decided in 8 W. Va. 412." *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250.

Right of Free Ferriage.—A former adjudication by a court of competent jurisdiction in 1810, wherein the question of the right of the ancestor of the plaintiff in the suit, his heirs and tenants, to free ferriage across a stream, and the construction of the deed on which the right was based, was decided in his favor, is binding and conclusive in a subsequent suit involving substantially the same question, not only on the original parties to the deed in the former suit, but also on all those in privity with them. *Williams v. Tomlin*, 2 Va. Dec. 565; *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249.

Set-Off of Judgment.—M. recovered against C. a judgment for \$41 with interest and costs, which for value received he assigned to E., who afterwards became indebted to C. \$48.90, who, to recover the same, sued E. before a justice. E. pleaded to C.'s demand said judgment as a set-off. To this plea C. replied that E. had procured said assignment with the fraudulent intent of depriving him of his legal right to exempt \$200 of personalty, which right he said he had claimed against M. Upon the trial of the issue on this replication, C. demanded a jury, who found in his favor a verdict for the whole of his demand. On motion of E., this verdict was set aside, and a new trial granted. Upon this new trial, C. again demanded a jury, who found a verdict in favor of E. for \$5.79, for which he had judgments, with costs.

C. afterwards presented his bill of complaint to the judge of the circuit court setting up the foregoing facts, but alleging no other grounds for equitable relief; praying that E. might be perpetually enjoined from collecting said judgment of \$5.79, and from suing said assigned judgment as a set-off against his demand of \$48.90, and that he may be compelled to pay to C. his demand of \$48.90, and for general relief. E. answered the bill, and pleaded the trial and judgment as *res adjudicata*; but, upon final hearing, said judge perpetually enjoined E. from collecting said judgment of \$5.79, and decreed that E. pay C. the whole amount of his demand, with the costs of his injunction, and also all costs incurred by him in prosecuting his unsuccessful civil suit before the justice. Upon a petition filed by E. alleging the foregoing facts, and praying that a writ of prohibition might issue against C. and the said judge, prohibiting them from proceeding in said chancery cause, it was held, that the judgment for \$5.79 rendered in favor of E. by the justice upon the verdict of the jury, on said new trial, was final and irreversible, and was conclusive between the parties thereto as to all matters involved in that controversy. Held, that the facts involved in the issue in said cause, having been tried by a jury, can not be otherwise re-examined than according to the rules of the common law. *Ensign Mfg. Co. v. Carroll*, 30 W. Va. 532, 4 S. E. 782.

Payments or Set-Offs.—This court affirmed decree of court below adjudging, in suit to correct a mutual mistake, that payments of certain incumbrances on land by the grantee thereof, should be treated as payments on the price; held, on second account taken by direction of this court, it is *res judicata* that the payments of the incumbrances should be treated as payments, and not as set-offs. *Stuart v. Heiskell*, 86 Va. 191, 9 S. E. 984.

Paramourty of Homestead—Where,

in the court in which the judgment was rendered, the question of the paramountcy of a defendant's homestead has been raised and decided adversely, the same question can not be raised a second time in another suit brought to ascertain priorities of liens on the defendant's realty, and the defense of failure of consideration must be set up either in the suit wherein the judgment is rendered, or by a chancery suit brought by the defendant for that purpose. *Spotts v. Com.*, 85 Va. 531, 8 S. E. 375.

Commissioners in Chancery.—In *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433, it is held, that exceptions to the commissioner's report recommitted will not be considered in hearing the case on a second report, unless such exceptions be made to the second report. This applies to cases only where matters are recommitted to the commissioner to be reported upon by him where such matters to be reported are for the information of the court and not in those particular matters which have been solemnly adjudicated by decree of the court. *Findley v. Findley* does not apply to such matters as have been fully adjudicated by order or decree of the court, leaving nothing on the particular matter to be reported by the commissioner for the information of the court. *Hopkins v. Prichard*, 51 W. Va. 385, 41 S. E. 347.

Mala Fide Purchaser.—Where a decree was reversed in the appellate court, and the title of a purchaser declared void, and it was decided that the "purchase was made in bad faith," and the court remanded the case for an account to be taken of rents and profits, and, notwithstanding such bad faith, to offset such rents and profits by the "value of any permanent improvements he may have put upon it," and such account is taken and a balance struck, and decree rendered against the defendant for such balance, such decree will not be reversed because he was charged rent on lands that he had

cleared while in such possession. "Now, in this case, as we have seen, Cox was a mala fide purchaser. This court solemnly held, that 'in making the purchase he acted in bad faith.' See the opinion of Green, J., in *Cain v. Cox*, 23 W. Va. 594, 613. Then it is res judicata that Cox was a mala fide purchaser, and, both under the statute and the authorities we have cited, he was not entitled to be compensated for his improvements under such circumstances made; but it is also res judicata that he should be, in the account to be taken, allowed, as offsets to the rents and profits, 'any taxes he has paid on the land, and the value of any permanent improvements he may have put upon it.' *Cain v. Cox*, 23 W. Va. 594, 616." *Cain v. Cox*, 29 W. Va. 258, 1 S. E. 298.

Construction of Wills.—Upon bill and answers in former suit, court of competent jurisdiction pronounced a decree adjudging the instrument set up in the pleadings to be the will of testator and construing it in accordance with the prayer of the bill. Such decree is conclusive against same complainant seeking, in another suit against same parties, to have said will decreed not to be the testator's will. "The question at issue in this case has been fully and squarely adjudicated. The parties to the suit are the same—the same complainant in both—the same defendants in both—the point in controversy presented in this suit was before the court in the former suit and was necessary for its determination. The court, in that suit, was informed by the bill and the answers, that the will probated was the will of the testator, and it was so adjudged to be, and was construed by a court of competent jurisdiction. 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question, in another suit between the same parties.' *Withers v. Sims*, 80 Va. 651, 658; Mc-

Comb v. Lobdell, 32 Gratt. 185; *Tilson v. Davis*, 32 Gratt. 92, 103; *Chrisman v. Harman*, 29 Gratt. 494." *Corprew v. Corprew*, 84 Va. 599, 5 S. E. 798.

Cloud on Title.—A purchaser of land, having applied for and obtained an injunction in a circuit court restraining the trustee from selling on account of an alleged cloud upon the title, and this court having on appeal reversed the circuit court, and decided that the alleged cloud and defect did not constitute sufficient ground for an injunction and dismissed the bill, the plaintiff can not bring a second and precisely similar suit against the same parties for the same purpose and cause of action; and on a plea of *res judicata* the plea was properly sustained. *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66.

When a purchaser of land enjoins the sale under a deed of trust securing the deferred purchase money, and the circuit court upon a plea of *res judicata* sustains the plea and dissolves the injunction, that court may either dismiss the bill entirely or it may order the sale to be made under its own supervision by the trustee, or by special commissioners appointed for the purpose. *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66.

Forfeiture of Lease.—When it has been determined that a senior lease has been forfeited by a failure of the lessee to comply with the condition therein, the senior lessee can not afterwards file a bill against the landlord and junior lessees praying for relief against such forfeiture, because the fact of forfeiture of the senior lease is *res judicata*, and can not be brought into question and again litigated in a suit in equity. *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544; *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901.

A junior lessee brought an action of unlawful detainer against the senior lessee of an oil and gas lease for a tract of land of 30 acres. It was held,

that the senior lease was forfeited by its own terms by reason of the failure of such lessee to comply with the conditions thereof; that the execution of the junior lease by the lessor was a sufficient declaration of such forfeiture; that the senior lease was thus avoided by the execution of the junior lease, which was good against the senior lease; that the junior lessee could maintain an action of unlawful detainer against the senior lessee in possession; and a judgment in such action in favor of the junior lessee against such senior lessee for the possession of the tract of 30 acres for oil purposes was affirmed. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754. Afterwards the senior lessee files his bill in equity against the landlord and the junior lessees, praying, among other things, relief against such forfeiture. Held, the fact of the forfeiture of the senior lease is *res judicata*, and can not be brought into question and again litigated in the suit in equity. *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544.

The question of usury in the debt having been made in the chancery cause and decided, the defendant is concluded by that decree and can not set it up in this action. *Nichols v. Campbell*, 10 Gratt. 560.

Where Administrator Estopped to Deny Assets.—If a judgment be rendered against an administrator for a debt of his intestate, and, after his death, an action of debt suggesting a devastavit to have been committed by him in his lifetime, be brought against his administrator, such defendant is estopped, by the judgment, from pleading that no assets of the estate of the original intestate ever came to the hands of the said original administrator. *Eppes v. Smith*, 4 Munf. 466.

Action on Injunction Bond.—The plea of *damnificatus* is only proper when the condition of the bond declared on is to idemnify and save harmless. In an action on an injunction bond it can not be filed, for the con-

dition of the bond is to pay costs and damages, affirmative acts. In such action, a plea "that if the plaintiff was damaged and injured in any wise by reason of any matter or thing in the said declaration complained of, it was by reason of its own wrong and default," is bad; for that the injunction was wrongfully or improperly sued out is then *res judicata*. *State v. Corvin*, 51 W. Va. 19, 41 S. E. 211.

Facts on Which Judgment Is Based.

—One who relies upon an adjudication as an estoppel can not dispute the truth of a material fact on which such adjudication was founded. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854.

A decree is conclusive, as to the existence or nonexistence of every fact on which it depends, upon the parties to the suit and those claiming through them. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

E. MATTERS NOT ADJUDICATED.

1. In General.

A judgment or decree is not *res adjudicata* as to matters which were not decided in the former cause. *Legrand v. Rixey*, 83 Va. 862, 3 S. E. 864; *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768, 37 S. E. 318; *Pettus v. Atlantic Savings, etc., Ass'n*, 94 Va. 477, 26 S. E. 834; *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978; *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491; *Renick v. Ludington*, 16 W. Va. 378 (attorney's lien); *Early v. Garland*, 13 Gratt. 1 (purchaser pendente lite); *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142; *Poole v. Dilworth*, 26 W. Va. 583.

The judgment in the former suit must be directly on the point which is in question in the subsequent suit to make it a bar when pleaded, or conclusive when relied on in evidence. If it neither appears upon the face of the record nor by parol evidence that the question or claim for which he brought this suit was embraced in the former judgment, the prior judgment is no bar.

Kelly v. Board of Public Works, 25 Gratt. 755.

"It is also true that *res judicata* applies, except in special cases, not only to points upon which the court was actually required, by the parties, to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. *Diamond State Iron Co. v. Rarig*, 93 Va. 603, 23 S. E. 894, and authorities cited. But it can not be applied to a matter not adjudicated in a former action and which could not have been brought forward for adjudication upon the pleadings in the cause; nor to a matter arising after the former adjudication, even in a second suit between the parties to the former, or their privies, if the causes of action are not the same. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Tate v. Bank*, 96 Va. 765, 32 S. E. 476, 7 Rob. Pr. (new) 172. Therefore, when it is said that *res judicata* applies "to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time," it is not meant that a judgment concludes parties as to a matter not covered by it and the facts necessary to uphold it. If the real merits of the second action have not been decided in the first, the prior judgment is no bar. *Kelly v. Board of Public Works*, 25 Gratt. 755, 760." *Southern R. Co. v. Washington, etc., R. Co.*, 102 Va. 483, 46 S. E. 784.

The general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this; that, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,

that is, that the verdict could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter. *Withers v. Sims*, 80 Va. 651.

Injunction Suit.—If the matters relied upon by the plaintiffs, in the injunction suit, did not come directly and not collaterally before the court in the former suit, and if they were not adjudicated in said suit, the plaintiffs here are not concluded by the former adjudication. *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250, 284.

Where the matters involved in a second action were not submitted to the jury on the trial of the first action, or if submitted could not have been legally adjudicated by them, no question of estoppel can arise. *Allebaugh v. Coakley*, 75 Va. 628.

Matters left open on the former case and not decided, and for the first time brought to issue in the case at bar, are not res adjudicata. *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879.

2. Applications of General Rule. Condemnation Proceedings.

Maintenance of Dam.—The contention that a judgment in a condemnation proceeding, which authorized the construction of a dam, established the fact that the dam was lawful, which will defeat an estoppel arising from a subsequent judgment finding it to be legal, can not be sustained, where the former judgment only authorized its construction, and did not find that the dam actually constructed was lawful. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

"The condemnation proceedings only adjudged that the James River and Kanawha Company might erect a dam in a lawful manner, but it did not determine that it had done so. In the

Stillman and Ashlin suit, the character of the dam, after it was erected, was put in issue, and it was determined that the company had not done so. The argument and inference may be very strong that the James River and Kanawha Company would and did erect the dam in a lawful manner, but there is no adjudication that it did, which can be pleaded as an estoppel to the adjudication that it did not. See *Mersereau v. Pearsall*, 19 N. Y. 111." *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

Deposits on Lands of Another.—Although a railroad company may have purchased from the owner a right of way over his land, for the purpose of constructing its roadbed, yet if, in constructing its roadbed, it deposits on other lands of such owner, without his consent, earth, stone, gravel or other matter, and allows it to remain there, the company is liable to the owner for the injury thereby sustained. Compensation for such injury is not included in assessing damages for right of way, and the plaintiff is not barred of his right to recover such compensation by the conveyance of the right of way to the defendant. *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517, citing *Southside R. Co. v. Daniel*, 20 Gratt. 344, 375.

Obstructing Watercourse.—A verdict for the defendant in an action at law for obstructing the flow of water to the plaintiff's mill, on a plea of not guilty, and a specification of defense denying both plaintiff's right and any injury thereof, are not a bar to another suit for the same matter, unless it appear either by the verdict or extrinsic evidence, that the defendant prevailed because the jury found that the plaintiffs had not the right which they claimed. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

Two actions on the case are brought in the same court at the same time, by the same plaintiff against the same de-

fendant. The same act of defendant is charged as the cause of the damage in each case; but the damage in one case is charged to be to the plaintiff's land, and in the other to the crops grown and growing upon it. The case as to the crops is the first tried, and the evidence is as to the crops, and there is a verdict and judgment for the defendant. This verdict and judgment can not be set up as an estoppel to the plaintiffs in the other action for damages to the land. *Southside R. Co. v. Daniel*, 20 Gratt. 344, cited in *Allebaugh v. Coakley*, 75 Va. 628, 637.

Mills and Milldams.—A gives and conveys to his son B a lot of land on which is a millseat. B then applies to the county court for leave to build a mill and dam, and when the inquest meets on the land A attends, and when the jury propose to level the stream to ascertain how high B may be permitted to build his dam, A tells them he had leveled it, and that B may be permitted to build a dam twelve feet high without flowing the water back on the land of any person but A; that such a dam will hurt no one but himself, and he does not believe it will hurt himself. The jury act upon his opinions and information, and allow B to build a dam twelve feet high, and report that it will inflict no damage on any person; and this inquisition is confirmed by the court and leave is given to build the dam. B builds his dam ten feet high. Afterwards he raises the water about six inches by putting boards on the top of the dam; and of this A complains, and B takes them off; and in the ten years B keeps the mill he does not attempt to raise the dam. A becoming embarrassed. B determines to sell the property to relieve him; and A adds twenty acres to that owned by B and they join in the conveyance of the whole to C. After C takes possession of the mill he ascertains that the inquisition authorized the dam to be built twelve feet high, and he elevates it eight inches, which

seriously injures the land of A which lies immediately above on the stream, whereupon A sues B for the damages occasioned by the raising of the dam. Held, that the inquest and judgment of the court is no bar to an action for damages sustained by A which were not actually foreseen and estimated by the inquest. *Calhoun v. Palmer*, 8 Gratt. 88.

An inquisition on a writ of *ad quod damnum* in a mill case, having found that lands of T. R., deceased, would be overflowed, and a summons having issued to T. C. acting executor and trustee of the decedent, to show cause why leave should not be given to erect the mill; and T. C. having appeared and contested the motion on its merits, he was precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. If the jury find that a certain number of acres of land will be overflowed, "together with all other damages to the value of a specified sum," it is special enough, and will not bar an action for any damages not foreseen and estimated by them. *Coleman v. Moody*, 4 Hen. & M. 1.

Question of Adversary Possession.—

In 1809, C. T., assuming to act as the agent of M. T., sold to M. a lot in the town of Lynchburg, and L., from whom M. T. purchased the lot, conveyed it to M. M. T. then filed a bill to set aside the sale, and in 1819 the court made a decree setting the sale aside, and directing M. to convey the lot to M. T. This decree was affirmed in the court of appeals as far as it went, but the court held, that there should have been a decree over in favor of M. against C. T., and sent the cause back for this purpose. Pending these proceedings, M. conveyed twenty feet of the lot fronting on Main street to P. and ten feet to C., and C. purchased the remainder of the lot from R., who had verbally acquired M.'s right in the subject; and C. had enclosed the ten feet first acquired and twenty feet ad-

joining that part which he bought of R. as an alley leading from the street to his house. After the case went back, M. T. filed an amended bill making C. a party, and C. filed a cross bill to obtain the benefit of M.'s rights against C. T. In 1834, C. died, and the suits were revived in the name of his administrator; and in 1836 there was a decree in the first suit directing a commissioner to convey that part of the lot obtained by C. from R. to M. T., which was done. In 1837, M. T. conveyed that part of the lot conveyed to him to L., and L. conveyed it to G., who died, having devised it to his son, the plaintiff. In 1835, in a friendly suit between the widow and heirs of C., the alley was allotted to the widow, and, after her death, to C.'s daughter, H. In an action of ejectment brought in 1849 by the son of G. against the trustee of H. for the twenty feet included in the alley; held, there being nothing in the amended bill or any other part of the proceedings having special reference to the part of the lot bought of R. by C., the decree does not ascertain that C. was a purchaser of the lot pendente lite; and the defendant is not thereby estopped from setting up an adversary possession anterior to its date. *Early v. Garland*, 13 Gratt. 1.

Personal Injuries.—Where a city and a property owner are sued jointly for an injury resulting from alleged negligence in obstructing a street, and there is judgment in favor of the property owner on his plea of the statute of limitation, and against the city for damages, in a subsequent action by the city against the property owner to recover the damages it has been compelled to pay, the property owner is not estopped from showing that the accident happened through no fault of his. The judgment in the first action is only conclusive of the injury of the plaintiff therein, the negligence of the city and the amount of the recovery against it. Those questions were left open, and are now for the first time brought to

issue. *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562.

Report of Commissioners and Decree.—Two special commissioners are directed by a decree in a cause to collect a fund, and loan the same, requiring them to take from the loaners bonds with good security. They subsequently report that they have loaned the fund to a number of persons, giving the names and amounts loaned to each, among which are the names of the commissioners themselves. The court enters a decree reciting the substance of what appears in the report, and directs the commissioners to hand over to the party entitled thereto the bonds for the fund so loaned. This report is not excepted to, nor is it in terms confirmed by the decree. The commissioners turn over bonds for the whole fund, except the amounts reported as loaned to themselves. In a suit afterwards brought by the party entitled to the fund for the amount so reported loaned to one of the commissioners, held, the plaintiff is not estopped or concluded by said report and decree in said former suit from recovering said fund, and holding the commissioners and the sureties on their bond liable therefor. "That portion of the decree which relates to the report is a mere recital of what appears upon the face of the report. It repeats the substance of the report correctly, but it neither adjudicates nor decides anything in respect to said recitals. It does not approve, verify, or affirm them in any manner. It merely adjudges and orders the commissioners to hand over 'the bonds held by them as aforesaid (that is, the bonds shown by their report to be in their hands), of the parties to whom the rents of 1870 have been loaned as aforesaid,' and that they also pay over the remainder of said rents, if any, in their hands. This is all that was adjudged or decided by said decree." *Brooks v. Miller*, 29 W. Va. 499, 2 S. E. 219.

Where a debt is presented before a commissioner taking an account of debts or liens, and his report is silent as to it, and no decree is made upon the report, though the creditor did not except for the failure to report his debt, he is not barred from afterwards asserting it. *King v. Burdett*, 44 W. Va. 561, 29 S. E. 1010.

Land devised to Mrs. McG. was sold to her husband to pay testator's debts, and C. and others were sureties for the purchase money. He failed, and a commissioner ascertained those debts to be \$3,038.63, and that husband was entitled to the balance of \$1,812.04, "in right of his wife." Report was confirmed, and the land decreed to be resold, unless husband pay the \$3,038.63 in a stated period. He did not comply. The land was resold, with the sureties' knowledge, for enough to pay the debts. Mrs. McG. afterwards obtained an absolute divorce, and judgment was rendered in her behalf against the sureties for the \$1,812.04, with which husband had been credited "in right of his wife." It was held, husband, as tenant by the curtesy, was entitled only to the use of the surplus of \$1,812.04 during the marriage, because that surplus continued impressed with the character of realty, and the decree relied on as an adjudication that the \$3,038.63 was all the sureties were liable for was only an adjudication of the amount necessary to discharge the testator's debts. *Cleek v. McGuffin*, 89 Va. 324, 15 S. E. 896.

Question Whether a Person Was a Purchaser Pendente Lite.—In 1809, C. T., assuming to act as the agent of M. T., sold to M. a lot in the town of Lynchburg, and L., from whom M. T. purchased the lot, conveyed it to M. M. T. then filed a bill to set aside the sale, and in 1819 the court made a decree setting the sale aside, and directing M. to convey the lot to M. T. This decree was affirmed in the court of appeals as far as it went, but the court held, that there should have been a

decree over in favor of M. against C. T., and sent the cause back for this purpose. Pending these proceedings M. conveyed twenty feet of the lot fronting on Main street to P. and ten feet to C., and C. purchased the remainder of the lot from R., who had verbally acquired M.'s right in the subject; and C. had enclosed the ten feet first acquired and twenty feet adjoining that part which he bought of R. as an alley leading from the street to his house. After the case went back, M. T. filed an amended bill making C. a party, and C. filed a cross bill to obtain the benefit of M.'s rights against C. T. In 1834, C. died, and the suits were revived in the name of his administrator; and in 1836 there was a decree in the first suit directing a commissioner to convey that part of the lot obtained by C. from R. to M. T., which was done. In 1837, M. T. conveyed that part of the lot conveyed to him to L., and L. conveyed it to G., who died, having devised it to his son, the plaintiff. In 1835, in a friendly suit between the widow and heirs of C., the alley was allotted to the widow, and after her death to C.'s daughter, H. In an action of ejectment brought in 1849 by the son of G. against the trustee of H. for the twenty feet included in the alley, held, though the decree was conclusive evidence that such a decree had been rendered, it was not conclusive against the heirs of C. that he was a pendente lite purchaser. *Early v. Garland*, 13 Gratt. 1.

Railroad Crossings.—The board of public works had, when this case was determined, exclusive jurisdiction to determine whether one railroad in this state should be permitted to cross another, and the terms upon which it might cross, and its adjudication on that subject was final and conclusive, and the courts had no power to interfere with its order by injunction or otherwise; but the grant simply of permission to cross does not carry with it the right to lower the elevation of the

road crossed to its detriment, and where it appears that such change in the elevation was not passed on by the board of public works, and no adjudication was invited thereon by either party, courts may, on the application of the injured party, grant an injunction to stay the hand of the party threatening the injury until such time as he shall have the right to change the grade determined by the state corporation commission, which now alone has jurisdiction of the question. "It is true that the bill shows on its face that the ground on which the injunction is asked arose out of the crossing of one railroad by another, pursuant to the adjudication of its right to do so by the board of public works, to which tribunal § 1094 of the Code, as amended, delegates the power to determine whether one railroad in this state shall be permitted to cross another; and it is also true that the adjudication of such a question by the board is final and conclusive as to any question adjudicated by it, or which it was the duty of either party interested in the proceedings before the board to have brought forward for adjudication." *Southern R. Co. v. Washington, etc., R. Co.*, 102 Va. 483, 46 S. E. 784.

Settlement of Decedent's Estates.—"The decree of November, 1883, does not adjudge that the complainant has no claim against the estate of Edward M. Tidball. It confirms the report and nothing more. The report must be read with the decree to ascertain what was confirmed. The report was, 'the only debt produced to the commissioner to be audited is' the judgment in favor of the Union Bank of Winchester. The matter confirmed was that no other debts were produced to the commissioner. In *Coleman v. Stone*, 85 Va. 387, *Coleman* proved one debt against a commissioner and withheld another. The report was confirmed and the proven debt paid from a sale of real estate. Ten years afterwards, he was permitted to prove the debt he had

withheld. If the confirmation of the first report was an adjudication that *Coleman* had no other claim, he could not have been allowed to prove the last claim." *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768, 37 S. E. 318.

Application of Separate Estate.—

Obligor of bond, secured by trust deed on certain land, filed his bill, alleging that the security was not sufficient to pay his debt that was then overdue, and praying that the separate property of a married woman, one of the obligors of the bond not embraced in the trust deed, be applied to its payment. This prayer was denied and the injunction dissolved. Held, this question, of his right to have her separate property applied, was the only point that was adjudicated in that suit. "It was this extraordinary claim asserted by *Rixey* in the former suit, and this only, that was in issue, and it was this that the court refused, and nothing else. Hence it was that the court dissolved the injunction and dismissed the bill." "It must be kept in view that *Rixey*, the trust creditor, did not bring this suit. On the contrary, when after long indulgence, he sought to enforce the trust—as was clearly his right—he was enjoined, and hence this protracted litigation; and, as we have shown, the sole obstruction in his path is the utterly untenable defense of *res judicata*." "The rule, *res judicata*, has no application to the case in hand. *Rixey* has brought no second suit to litigate matters passed upon in a prior suit. The deed of trust to secure him has never been adjudged to be invalid or satisfied. Hence, he is not estopped to enforce it. Hence, too, if any one is amendable to the charge of seeking to litigate matters once passed upon, it is not *Rixey*, but his adversaries." *Legrand v. Rixey*, 83 Va. 862, 3 S. E. 864.

Construction of Deed.—Whether a deed, absolute on its face, which conveys an undivided interest in land is a deed of gift, or upon a secret trust agreed on between the parties, is not

involved in a subsequent suit for partition between several joint tenants of land in which the interest of the grantor is assigned to the grantee, and the grantor is not precluded by such suit from asserting the trust in a subsequent suit against his grantee. *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978.

Recovery of Rent.—Where rent is payable by the month, and a distress warrant is sued out for rent in arrear, and three months before and two months after suing out such warrant, actions of unlawful detainer are sued out by the landlord against the tenant to recover possession of the leased premises, and there is judgment in both in favor of the defendant, these judgments, although between the same parties, are not evidence that no rent was due at the time the distress warrant was sued out. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

Title to Lands.—In a suit brought in the state of Maryland to enforce the vendor's lien on a contract for the sale of real estate, lying partly in Maryland and partly in Virginia, a decree of the Maryland court, directing a sale of the Maryland lands only, and when neither the court nor the parties to the suit contemplated a sale of the Virginia lands, such decree neither determines nor concludes anything respecting the title to the lands in Virginia, nor does the Maryland decree operate as an estoppel to inquiry in a subsequent suit by a Virginia court into the question of title to the lands in Virginia. *Piedmont Coal and Iron Co. v. Green*, 3 W. Va. 54, 98 Am. Dec. 799.

Payment of Taxes.—A will directs executors to sell certain land to pay—First a certain debt; next, a legacy to Mrs. Dunn; next, a legacy to Mrs. McNeal; and the residue of proceeds to be equally divided between them and two other children. The executors have a naked power to sell, and the legal title descends to those four children, as heirs. The land sells for only enough

to pay the debt and the principal of Mrs. Dunn's legacy. Taxes on the land subsequent to testator's death are paid by the executors, and in this court, by a former decree before sale, they are held to "be entitled, as against the residuary legatees of a portion of the proceeds of said real estate, to credit for the taxes so paid." One of those children (John Dunn) is given a specific devise and legacy. Held, the former decree is not res adjudicata to fix upon any of the four residuary legatees, receiving nothing as such from the land, a liability to contribute to the payment of such taxes, either as residuary legatees, heirs, or persons. *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66.

Support and Maintenance.—A former adjudication, in a suit brought for that purpose alone, that the language, in a conveyance of real estate, "The said grantors to have their life maintenance out of the following described land or its proceeds," does not create a specific lien or charge on the land, will not estop the grantors in such conveyance from setting up a personal claim for such maintenance against the grantees or their estates, when such question was in no wise involved in or adjudicated in such former suit. *Brown v. Squires*, 42 W. Va. 367, 26 S. E. 177.

Claim for Improvements.—Right of evicted claimant of land to compensation for permanent improvements. *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260.

3. Matters Not Involved in Issue.

In General.—A fact necessarily involved in an issue, on which there has been a judgment, is thereby conclusively settled in any suit thereafter between the same parties and their privies, but the facts in controversy on the trial of an issue, but not necessarily involved in the issue, though ever so important in its determination, are not settled by a judgment on the issue, but are open to controversy in any other suit between the same parties and their privies. *Beckwith v.*

Thompson, 18 W. Va. 103; Houser v. Ruffner, 18 W. Va. 244; Doonan v. Glynn, 28 W. Va. 715; Coville v. Gilman, 13 W. Va. 314; Biern v. Ray, 49 W. Va. 129, 38 S. E. 530.

The general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, is substantially this: that, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined, that is, that the verdict could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence consistent with the record, that the verdict and judgment necessarily involves the consideration and determination of the matter. *Withers v. Sims*, 80 Va. 651.

A claim made in the defendant's answer, which has no connection with the relief sought in the bill, is not necessary to be decided in deciding upon the case so made in the bill, and though the court in its decree expresses an opinion in favor of the defendant, this decree does not conclude the question when it is afterwards set up by the defendant by a cross bill in the cause. *Niday v. Harvey*, 9 Gratt. 454.

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Partition.—A judgment in a partition suit decreeing that the defendant is entitled to the plaintiff's share of the

property under a deed by the defendant to the plaintiff, the validity of which was not then in issue, is not res judicata against the plaintiff's right in a subsequent action to set aside the deed on the ground that it was made without consideration, and with the understanding that the defendant would reconvey the property to the plaintiff on request. *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978.

After the death of the testator, one of the devisees brings a suit to obtain a partition of real estate and distribution of the personal estate, the court assigns to the widow one-third of the real estate "for and during the term of her natural life" and decrees payment to her of one-third of the personal estate by the executor without words of qualification. Held, as it was not necessary in that case to determine, what estate in the personalty the widow took under the will, she being entitled to the possession of it in any event, such decree is not res judicata of the quantity of estate in the personalty she took under the will. *Houser v. Ruffner*, 18 W. Va. 244.

Condemnation Proceedings.—A railroad company has the land of R. condemned for its road, and the commissioners assess the damages, and their report is confirmed, and the company pay the amount of the damages assessed to R. R. sells the land to D. In such cases the assessment of damages is only a bar to an action for such injuries as could properly have been included in such assessment. The commissioners are bound to presume the company will construct its work in a proper manner, and they have no right to award damages upon the supposition that the company will negligently and improperly perform its work. A failure to do so by the company will, therefore, impose a liability on any one who may sustain any loss or injury by reason of such negligence. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

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trust deed, and in this case the court decrees the sale and distribution of the trust subject among the creditors provided for, except one, who is excluded under the provisions of the deed, because he sued out execution on his judgment. This creditor then files a bill to set aside the trust deed, on the ground that it is fraudulent on its face. Held, that the question whether the deed was fraudulent was not put in issue in the first case, and therefore could not be decided, and the decree in that case can not be a bar to the second. *Quarles v. Kerr*, 14 Gratt. 48.

Matters Relating to Partnership.—In *Coville v. Gilman*, 13 W. Va. 314, where A. sued B. in an action of assumpsit for damages for the proceeds of an oil well pumped by B., which proceeds A. claimed were his—the plea was non assumpsit. One of the questions in controversy before the jury, as it appears from an instruction given them by the court, was, whether B. was not a partner with A. in this oil. If he was, then, as the court instructed the jury, they must find for the defendant as for the balance, which might be due on the settlement of the partnership, and which could not be recovered in an action at law, till such settlement had been made by the parties. The jury found for the plaintiff a certain amount, and judgment was rendered therefor. In a chancery suit brought by B. for a settlement of their alleged partnership in the pumping of this oil extending over a time prior to as well as subsequent to this judgment, A. insisted that there never was by this contract any partnership between him and B., and relied on this verdict and judgment as conclusive evidence, that no partnership ever did exist. It was decided by this court, that this verdict and judgment was not only not conclusive evidence, but was not even admissible evidence on the question, whether there was or was not a partnership, though it was conclusive evidence, that none of the items of ac-

count specified in the bill of particulars and in the offsets filed in the action of assumpsit were items in any partnership account, if any partnership was proven to exist. This court held, that the question of partnership or no partnership was not a question either directly or indirectly involved in the pleadings in the action of assumpsit; and though it was proven, that it was a fact controverted before the jury, yet that such a fact was not concluded by the verdict of the jury. The conclusion reached in that case by this court is sustained by the weight of authorities elsewhere.

Suit to Subject Land.—"The evidence in this cause does not sustain the plea of res judicata set up by the defendant. The bill in the first suit was filed to subject a tract of sixty acres of land. The present suit relates to a tract of thirty-four acres of land, which is not shown to be a part of the larger tract, and there is nothing in the record of the former suit to show that the smaller tract was involved in that suit, or that the parties thereto could have litigated, or were called upon to litigate, therein any right or question with respect thereto." *Shufflebarger v. Blanchard*, 101 Va. 690, 44 S. E. 951.

A decree in a debtor's suit, to which creditors are not parties, directing the payment of a certain fund to the attorney by virtue of an assignment thereof made to him by the debtor, is no bar to a suit of such fund by the attorney as made with intent to delay, hinder and defraud the creditors of such debtor. "There is nothing in this record to show that the question of the fraudulent receipt of such money by Rucker was ever involved in the litigation in McDowell county or in anywise passed upon or could have passed on in such litigation. But this question is presented for the first time by the bill in this cause. It, therefore, could not be a question of res adjudicata nor can its adjudication be avoided by sending the parties to McDowell county to

litigate it." *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420.

Report of Commissioners.—Two special commissioners are directed by a decree in a cause to collect a fund, and loan the same, requiring them to take from the loaners bonds with good security. They subsequently report that they have loaned the fund to a number of persons, giving the names and amounts loaned to each, among which are the names of the commissioners themselves. The court enters a decree reciting the substance of what appears in the report, and directs the commissioners to hand over to the party entitled thereto the bonds for the fund so loaned. This report is not excepted to, nor is it in terms confirmed by the decree. The commissioners turn over bonds for the whole fund, except amounts reported as loaned to themselves. In a suit afterwards brought by the party entitled to the fund for the amount so reported loaned to one of the commissioners, held, the plaintiff is not estopped nor concluded by said report and decree in said former suit from recovering said fund, and bond given by the commissioners and the sureties on their bond liable therefor. "That portion of the decree which relates to the report is a mere recital of what appears upon the face of the report. It repeats the substance of the report correctly, but it neither adjudicates nor decides anything in respect to said recitals. It does not approve, verify, or affirm them in any manner. It merely adjudges and orders the commissioners to hand over 'the bonds held by them as aforesaid (that is, the bonds shown by their report to be in their hands), of the parties to whom the rents of 1870 have been loaned as aforesaid,' and that they also pay over the remainder of said rents, if any, in their hands. This is all that was adjudged or decided by said decree." *Brooks v. Miller*, 29 W. Va. 499, 2 S. E. 219.

Liability on Bond.—"The difficulty in

regarding the chancery decree above set out as an estoppel in the case before us is, that the plaintiff below does not 'allege anything inconsistent with this decree.' The trouble is, that the question, whether John Dilworth and John J. Dilworth were personally liable on the bond held by the plaintiff and described in the bill, the bond sued on in the case before us, to the plaintiff Poole, was not at issue and was not determined in the course of the proceedings in the chancery cause. It does not appear by the chancery record, that the point in controversy in the case now before us was necessarily decided in this chancery cause upon the demurrer. On the contrary it seems to me clear, that this point now in controversy was not decided in the chancery cause upon the demurrer. And it is still more clear, that it was not decided or considered in either of the other two chancery causes referred to in the bill above copied, and the proceedings in these two chancery causes are correctly stated in the bill." *Poole v. Dilworth*, 26 W. Va. 583.

4. Matters Not Put in Issue by Pleadings.

In General.—To render a former decree a bar as *res judicata* in a second suit about the same matter, not mere matter of defense, the matter of the second suit must have been actually in issue in the first. The pleadings of the first suit must be such that the party could have proven and had it passed on. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650; *Spotts v. Com.*, 85 Va. 532, 8 S. E. 375.

"A judgment or decree upon the merits of the case is a bar or estoppel against the prosecution of a second suit upon the same demand, and only as to every matter which was offered and received to sustain or defeat the claim, but also any other admissible matter which might have been used for that purpose." The authorities cited in that case show conclusively that the prin-

ciple is not so broad as is claimed by counsel for appellee. Matters are not adjudicated which have never been pleaded, or which the party asserting them was not bound to plead in the former suit by way of defense or in support of his claim as plaintiff." *Dent v. Pickens*, 50 W. Va. 382, 40 S. E. 572.

"Where there is no pleading, there can be no recovery. Allegation and proof must correspond. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366. Every fact necessary to make out a case must be positively and certainly alleged as the court bases its decree upon allegations. *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911. The plea of res judicata applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it. *Aurora City v. West*, 7 Wall. 82. Her bill did not charge the fact. Therefore Mrs. Nuzem could not have proven or gotten relief from the fact that the lot had been sold to the state, and she is not barred by the first decree." *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

It is the verdict and judgment on the issue actually made, which is thus conclusive, and while it establishes the right conclusively, it does not establish the facts, on which that right depends, unless they are set forth definitely in the record. *Beckwith v. Thompson*, 18 W. Va. 103.

Matters Not Submitted on First Motion.—Where the matters involved in a second motion were not submitted to the jury on the trial of the first motion, or if submitted could not have been legally adjudicated by them, no question of estoppel can arise. *Allebaugh v. Coakley*, 75 Va. 628.

Nonnegotiable Bonds.—In *Cleaton v. Chambliss*, 6 Rand. 86, the court by Carr, J., said, in regard to unnegotiable bonds which were given but not paid, and judgment was obtained upon them, that: "Here the foundation of the ac-

tion is the promise, there the foundation is the bond. The issue there, was upon non est factum; that was the point decided, the allegation taken and found; an allegation not put in issue, and which could not possibly be put in issue, in the case before us. If then, the judgment on the bonds had been pleaded, the plea could not have availed; for, if it had stated the record correctly, a demurrer would have lain; and if incorrectly, the replication of nul tiel record would have overthrown it."

Chancery Pleadings.—When a person is properly made a defendant to a bill, he is bound to respond to all the allegations of the bill, and he will be concluded as to all the matters affecting him which are necessarily involved in the suit, whether he answers or not. But he is not required to do more than respond to the allegations of the bill. He is not bound to go further, and bring in matters not mentioned in the bill, and not necessary for his defense. He may be intrusted in the subject matter of the suit in more than one capacity; and, if the bill charges him in one capacity only, he can not be concluded in any other capacity simply because he failed to assert his rights in such capacity. Any interests which he may have which are neither directly nor indirectly alleged or referred to in the bill will remain unaffected by the suit. If the bill is taken for confessed, the only matters that can be so taken are those alleged in the bill. So whether a suit is decided upon bill taken for confessed, or upon full answer by the defendants, the adjudication can properly embrace and conclude the parties only as to matters comprehended in the general or special allegations of the bill. These will be held to be res judicata. *Moseley v. Cocke*, 7 Leigh 224; *Rickard v. Schley*, 27 W. Va. 617; *Doonan v. Glynn*, 28 W. Va. 715; *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328.

Illustrative Cases.—In a suit by a surety to recover for amounts paid by

him on behalf of his principal, the defense of *res judicata* will not be sustained when it appears that the claims brought forward in the present suit were not put in issue in the former litigation, nor were they there made the basis of any prayer for relief, nor mentioned in the decree of the court. *Tarter v. Wilson*, 95 Va. 19, 27 S. E. 818. See *Niday v. Harvey*, 9 Gratt. 454.

Upon a bill by L. against M. and others setting up a contract of partnership between them, it appears that in a previous suit the matters alleged in that bill were sufficient to put in issue the fact of such a contract as is alleged in this case, and in that case it was held, that the contract was not valid. Held, the decree in the first suit is a conclusive bar to the second. *McComb v. Lobdell*, 32 Gratt. 185.

Enforcement of Deed.—Where a trustee files a bill to enforce a trust deed, and a decree is entered accordingly, and he afterwards files a second bill to set aside the trust deed, on the ground that it is fraudulent, the decree in the first suit is not a bar to the second, because the question whether the deed was fraudulent was not put in issue in the first case, and therefore could not be decided. *Quarles v. Kerr*, 14 Gratt. 48.

Where two deeds of trust are given on land by husband and wife, the fee belonging to her, with a life estate in the husband as husband, and a part of it is afterwards conveyed by them to a third party, and there is a chancery suit to enforce the said trusts against the entire tract and sell it outright, and the purchaser of such part is a party and his rights set up therein, and there is a decree exonerating that part from liability for one of the trusts, such decree is *res judicata* to bar another suit to sell the life estate of the husband in such part for that debt. "There was no matter in the bill about the Knisley deeds of trust, and a decree can not be a bar as to matters not mentioned in it, even though parties interested in

those matters are parties as to still other matters. *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482." *Pickens v. Love*, 44 W. Va. 725, 29 S. E. 1018, 1020.

Impeachment of Tax Deed.—"McEldowney pleads that the decree of this court upon the bill of Mrs. Nuzum against him as a bar to any relief from her said answer in this suit, as *res judicata*. In the former suit Mrs. Nuzum's bill assailed McEldowney's tax deed on certain grounds, namely; defect in the sheriff's affidavit to the sales list and defect in the heading of the list; but did not impeach the deed on the ground that there was no authority to sell by reason of the fact that the land was vested in the state under its purchase for taxes; the fact that it had been purchased by the state for taxes before 1891 was not mentioned in the pleadings, and was not in issue, and therefore the decree is no bar as to this. A judgment will bar 'only upon the matter actually at issue and determined in the original action; and such matter when not disclosed by the pleadings must be shown by extrinsic evidence.' *Davis v. Brown*, 95 U. S. 23. It must have been directly in issue. *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Dooan v. Glynn*, 28 W. Va. 715; *Cleaton v. Chambliss*, 6 Rand. 86; 1 Greenl. Ev. 528." *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

Matters Mentioned in General Way.—In a second suit between the same parties or their privies, a complainant, who was a defendant to the first suit, will not be estopped from asserting a claim which, though mentioned in a general way in his answer in the first suit, was not put in issue by the pleadings in that suit, and was not passed upon in that suit, and could not have been properly passed upon therein. Proving a case not made by the pleadings does not authorize the court to pass upon such extraneous matter, ex-

cept by consent. "In the case of *Niday v. Harvey*, reported in 9 Gratt. 454, a claim was made in the defendant's answer, which had no connection with the relief sought in the bill, and was not necessary to be decided in determining the case made by the bill. Though the court in its decree expressed an opinion in favor of the defendant, this decree, it was held, did not conclude the question when it was afterwards set up by the defendant in a cross bill in the cause. See also, *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361; *Mundy v. Vawter*, 3 Gratt. 518, 528." *Tarter v. Wilson*, 95 Va. 19, 27 S. E. 818.

Construction of Will by Court.—In 1871, testator willed property to be held by his executors in trust for G. and E., until they respectively arrive at twenty-one, or marry; if either die without lawful issue, then the whole to be held for the survivor until twenty-one; and if survivor be twenty-one at time of such death, then the whole to go to him; but should both die without lawful issue, then the whole to revert to testator's estate. Executors declining, B. qualified as administrator c. t. a. In 1872, G. and E., still minors, brought their bill against administrator c. t. a. and testator's children, reciting the will and praying the court to decide if the trusts in the will devolved on the administrator c. t. a., and if not, to appoint a trustee to execute those trusts, and to direct him to pay G. and E. a reasonable sum for their maintenance. The court decided that G. and E. each had a vested estate, subject to be divested, and if either died under twenty-one, the whole to go to survivor; that the estate being vested, G. and E. each was entitled to maintenance out of it; and that each was entitled to the possession of his portion when he attained twenty-one, or married. G. and E. both attained twenty-one and died without lawful issue. In 1881, testator's children brought their bill against G. and E.'s representatives for construc-

tion of the will and recovery of the property. Defendants answered, citing the decree of 1872, as having properly adjudicated the issues raised by the bill last mentioned. Held, the matters put in issue by the bill of 1881, were not embraced in the issue presented by the bill of 1872, and are not res judicata. *Withers v. Sims*, 80 Va. 651.

F. MATTERS NECESSARILY IN ISSUE.

In General.—A fact necessarily involved in an issue, on which there has been a judgment, is thereby conclusively settled in any suit thereafter between the same parties and their privies. *Beckwith v. Thompson*, 18 W. Va. 103; *Tracey v. Shumate*, 22 W. Va. 474; *Blake v. Ohio River R. Co.*, 47 W. Va. 520, 35 S. E. 953.

"All the authorities agree, that if it appears from the record, that a point in controversy was necessarily decided in the first suit, it can not be again considered in any subsequent suit." *Beckwith v. Thompson*, 18 W. Va. 103.

The doctrine of res judicata embraces not only what was in point of fact adjudicated, but the judgment or decree is conclusive as to all questions in issue, whether formally litigated or not. It is not necessary that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. Every point which has been specifically decided, and, by necessary implication, every issue which must have been decided, in order to support the judgment or decree, is concluded. But where one of the parties to the second suit was not a party to the former suit, and the land which ought to be subjected in the second suit was not the same as in the former, the plea of res judicata is not available. *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491; *Diehl v. Marchant*, 81 Va. 447, 12 S. E. 803.

An adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of, on its merits. An erroneous ruling of the court will not prevent the matter from being res judicata. *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

The point decided must arise from a given state of facts, put in issue by the pleadings, and which was decided expressly, or which must have been decided in some way as involved in the decision reached. *Atkinson v. Beckett*, 36 W. Va. 438, 15 S. E. 179.

Either party plaintiff or defendant is estopped from alleging in a suit at common law or in chancery anything inconsistent with any point, which has been before adjudicated by a court of either common law or chancery of competent jurisdiction; and the conclusiveness of any judgment or decree extends beyond what may appear on the face of the judgment or decree to every point, which was at issue and determined in the course of the proceedings. *Poole v. Dilworth*, 26 W. Va. 583.

Where a claim is made in the defendant's answer, but has no connection with the relief sought in the bill, and is not necessary to be decided in passing upon the case so made in the bill, then the decree does not conclude the question when it is afterwards set up by the defendant by a cross bill in the cause, though the court in its decree expressed an opinion in favor of the defendant. *Niday v. Harvey*, 9 Gratt. 454.

Matters Assumed True.—A proposition assumed or decided by the court

to be true, and which must be so assumed or decided in order to establish another proposition, which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided. *Blake v. Ohio River R. Co.*, 47 W. Va. 520, 35 S. E. 953.

Applications of General Rule.

Condemnation Proceedings.—The O. R. R. Co. instituted proceedings under § 14, ch. 52, Code, for condemnation of gravel, stone, etc., the property of B. Commissioners reported \$950 as just compensation, etc. Applicant paid same to the clerk of the court in vacation. B. excepted to the report on ground of inadequacy of compensation, and demanded a jury, which was impaneled, and rendered a verdict for \$2,500. Judgment was rendered in favor of B. for "the sum of \$1,550, being the amount of \$2,500 aforesaid, less the \$950 heretofore paid into court by said railroad company," etc., to which judgment the O. R. R. Co. obtained a writ of error to the supreme court, and the judgment was affirmed. The clerk without paying over the \$950, died insolvent. B. brought her action of assumpsit against the O. R. R. Co. for the \$950. Held, that B.'s judgment was res adjudicata as to the fact of the payment of the \$950 into court, and B. is estopped from prosecuting a claim for the same against the O. R. R. Co. *Blake v. Ohio River R. Co.*, 47 W. Va. 520, 35 S. E. 953.

Right of Widow in Personalty.

Where after the death of the testator, one of the devisees brings suit to obtain a partition of real estate and a distribution of the personal estate, the court assigning the widow dower in one-third of the real estate and decreeing payment to her of one-third of the personal estate by the executor without words of qualification, it is not necessary to determine what estate in the personalty the widow took, she being entitled to the possession of it in any event, and such decree is not res judicata of the

quantity of estate in personalty she took under the will. *Houser v. Ruffner*, 18 W. Va. 244.

Action for Obstructing Watercourse.—"There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision.' * * * 'The principle underlying and supporting all these decisions is that a judgment necessarily affirming or denying a fact is conclusive of its existence whenever it becomes a matter in issue between the same parties, or between parties in privity with them. Therefore, a judgment for the defendant in an action for obstructing a watercourse, if based upon the ground that there was no watercourse to be constructed, is, in subsequent actions, conclusive of the nonexistence of such watercourse; but, if the judgment had been for the plaintiff, it would necessarily have been conclusive in other actions of the existence of the watercourse, and of its obstruction.' *Freeman on Judgments*, § 249. This principle has been frequently recognized and applied in this state (*Shelton v. Barbour*, 2 Wash. 64; *Preston v. Harvey*, 2 Hen. & M. 55, 63; *Douglass v. Fagg*, 8 Leigh 588. See also, 7 Rob. Prac., pp. 237, 240, et seq.), and has been fully recognized in cases where it has been held not to apply. *Chrisman v. Harman*, 29 Gratt. 494, 500; *Blackwell v. Bragg*, 78 Va. 529, 540." *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

Reasonableness of Rent.—The assignees of the lessees of the salt works hold under the lease by the court to P. at \$22,000 per annum, which terminated January 1st, 1861; and in 1859 P.

leases to the assignees for ten years, commencing in 1859, at \$20,000. The assignees hold over after January, 1861, until 1869. In the suit by the assignees to enjoin the part owner from interfering with their possession, on appeal to the special court of appeals at Abingdon, that court, after reinstating the injunction, and directing the cause to be heard with the case between the joint owners, says that the circuit court may determine whether the assignees shall be charged according to the lease to P. or P.'s lease to them, or hold them responsible for such other reasonable rent for the property as the court may determine to be the right. Held, the decree of the special court of appeals not having been appealed from, the parties are bound thereby; and the circuit court may direct a commissioner to ascertain and report what would be a reasonable rent of the property from January 1st, 1861, to January 1st, 1869. *Stuart v. White*, 25 Gratt. 300.

Settlement of Decedent's Estates.—In suit in a court of general jurisdiction over subject and parties for sale of intestate's property, and distribution of proceeds, and "for all equitable relief in the premises," settlement of administrator's accounts is also decreed and made, and amounts thus ascertained as due to distributees are decreed to be paid and are paid, the matter therein passed on is *res judicata*, and can not be reopened, save as to parties then under disabilities, as provided by statute—the doctrine applying to all matters which the parties had opportunity to bring before the court, and extending to all facts involved in the decree as necessary groundwork therefor. *Blackwell v. Bragg*, 78 Va. 529.

Caveat.—What facts or matters are directly or necessarily involved in the issue between a caveator and a caveatee. For such facts and matters are conclusively settled between the parties and their privies and can not be again controverted in any suit at law or in equity—between such parties and their priv-

ies. But such facts and matter, as were not necessarily involved in the issue between such parties, can not be regarded as adjudicated, though they may have been in controversy before the jury, and though the conclusion reached by the jury on the matters in issue in the case may have been a consequence of the finding of such facts in controversy before them in a particular manner. *Beckwith v. Thompson*, 18 W. Va. 103.

A caveat case rested on the better rights of the caveator to the land surveyed by the caveatee; and the caveatee was entitled to a patent for so much of his survey, as was not by the superior title of the caveator specified in his caveat or specification of title, no matter how defective the survey or claim of the caveatee might have appeared as against the title of any other party, or even as against any title of the caveator not thus specified; and therefore a verdict and judgment in a caveat case in favor of the caveator for apportioning the land surveyed by the caveatee must necessarily definitely specify the location of that portion of the land of the caveator, which interferes with the survey of the caveatee, or for which the caveator has the better right. This definite location of this portion of the caveator's land is a conclusive settlement of its exact location in a suit in ejectment brought by the caveator to recover of the privies of the caveatee the land, for which the caveatee had got a patent by virtue of this caveat case. But the verdict and judgment in such caveat case is not conclusive of the location of a corner of a tract of land adjoining the caveator's land, though it was located on the map, made a part of the verdict, and was so located by the surveyor in order to locate the caveator's land. *Beckwith v. Thompson*, 18 W. Va. 103.

In every case of caveat the caveat rests upon the ground of the better right in the caveator to the land surveyed by the caveatee. Unless the ca-

veator can show such better right, the caveatee is entitled to the judgment, though it might appear, that as against a third party, who could show a better right, his entry and survey were not valid. See *Walton v. Hale*, 9 Gratt. 194. The caveator can not recover on the ground of the weakness of the title of the caveatee. *Harper v. Baugh*, 9 Gratt. 508; *Beckwith v. Thompson*, 18 W. Va. 103.

But the verdict and judgment in such a caveat case is not conclusive or any evidence, that the patent issued on the caveatee's survey is a better title than any title of the caveator excepting only the particular title of the caveator, which he had specified in his caveat in his specification of title, except where there was a failure by the caveator to specify his title in the caveat case. *Beckwith v. Thompson*, 18 W. Va. 103.

Validity of County Bonds.—In a suit whereto county issuing bonds and company executing mortgage are parties, the county, by its cross bill, admits the validity of certain of its bonds, but asks to be relieved from paying same except, as against purchasers for value without notice, because of the failure of the conditions of their issuance, and on demurrer the cross bill is dismissed for want of equity. Such dismissal is, as between the same parties, *res judicata*. "Now, here was not only a solemn admission that the bonds were valid, but the effect of the decree, although rendered on a demurrer, was to adjudge that the county was bound. That was the precise question raised, and necessarily determined. Upon that point the record leaves nothing in doubt. For it is not and can not be contended that the cross bill was defective in form, or that the court was without jurisdiction; nor does it appear that the cross bill was dismissed on any ground not going to the merits, so that the decree must be held to have been rendered on the merits, and not now to be questioned in a subsequent controversy upon the same subject matter

between the same parties. *Goodrich v. The City*, 5 Wall. 566; *Aurora City v. West*, 7 Id. 82; *Freeman on Judgments*, §§ 267, 270." *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433.

Jurisdiction of Court.—If this court take jurisdiction of a judgment and affirm it, the plaintiff in error can not afterwards in any proceeding question such jurisdiction, as it is res adjudicata as to him. *McGraw v. Roller*, 53 W. Va. 75, 44 S. E. 248, citing *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342; *Ferguson v. Millender*, 33 W. Va. 30, 9 S. E. 38; *Renick v. Ludington*, 20 W. Va. 511, 571.

Legality of an Authority to Issue Mandamus.—On a rule issued against a county commissioner to show cause why he should not be fined for contempt in disobeying a peremptory mandamus issued against him and others, directing them to settle and sign a bill of exceptions in the manner therein prescribed, he can not question the legality of the writ, and the authority to issue it, as that matter, as to him, is res judicata. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

G. MATTERS WHICH MIGHT HAVE BEEN LITIGATED.

1. In General.

Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation, in respect of matters which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res adjudicata applies, except in special cases, not only to points upon which the

court was actually required, by the parties, to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894.

It is well settled that an adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated, as incident thereto, and coming within the legitimate purview of the subject matter of the action. It is not essential that the matter should have been formally put in issue, in the former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being res judicata. *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633; *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Diehl v. Marchant*, 87 Va. 447, 12 S. E. 803; *Withers v. Sims*, 80 Va. 651, 661; *Blackwell v. Bragg*, 78 Va. 529; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361; *Davis v. Brown*, 94 U. S. 428; *Cromwell v. County of Sac. Id.*, 351; *Wells, Res Adj.*, § 525; *Stearns v. Beckham*, 31 Gratt. 329, 391; *Durant v. Essex Co.*, 7 Wall. 107; *Malloney v. Horan*, 49 N. Y. 116; *Freem. Judg.* §§ 246, 254; *McCullough v. Dashiell*, 85 Va. 37, 41, 6 S. E. 610; *Beale v. Gordon*, 2 Va. Dec. 35; *Adams v. Shenandoah Valley R. Co.*, 76 Va. 913; *Bradley v. Zehmer*, 82 Va. 685; *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760; *Roller v. Pitman*, 98 Va. 613, 36 S. E. 987; *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60; *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Miller v. Wills*, 95 Va. 337, 354, 28 S. E. 337; 1 *Barton's Law Prac.* (2d Ed.) 553, 554; 7

Rob. Prac. 172; *Findlay v. Trigg*, 83 Va. 539, 543, 3 S. E. 142; *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617; *Corrothers v. Sargent*, 20 W. Va. 351; *Tracey v. Shumate*, 22 W. Va. 474, 475; *Lee v. Smith*, 54 W. Va. 89, 46 S. E. 352; *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530.

All matters presented and received, or presentable to sustain the particular demand litigated in prior suit, and all matters presented or presentable under the issue to defeat such demand, are concluded by the judgment or decree in the former suit. *Withers v. Sims*, 80 Va. 651.

Where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit, and might have been presented at that trial, the matter must be considered as having passed in *rem judicatum*, and the former judgment in such a case is conclusive between the parties. It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. Every point which has been specifically decided, or by necessary implication an issue which must have been decided, in order to support the judgment or decree, is concluded. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the ground work upon which it must have been founded. It is accordable to reason back from the judgment to the basis upon which it rests, upon the obvious principle that when a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. It is not only final as to the matters actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. *Blackwell v. Bragg*,

78 Va. 529; *Fishburne v. Ferguson*, 85 Va. 321, 325, 7 S. E. 361; *Wells, Res. Adj.*, §§ 252; *Stearns v. Beckham*, 31 Gratt. 379, 391; *Durant v. Essex Co.*, 7 Wall. 107; *Freem. Judgm.*, § 246-252. *Diehl v. Marchant*, 87 Va. 447, 449, 12 S. E. 803.

"When a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with very few exceptions, throughout the civilized world. This principle embraces not only what was actually determined, but also extends to every other matter which the parties might have litigated in the suit. *Well's Res Adjudicata*, 220." *Wohlford v. Compton*, 79 Va. 333; *Southern R. Co. v. Washington, etc., R. Co.*, 102 Va. 483, 46 S. E. 784.

Matters Producing by Diligence.—

The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties, to form an opinion and pronounce the judgment, but to every point which properly belonged to the subject matter of litigation and which the parties exercising reasonable diligence, might have brought forward at the time. *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *R. Co. v. Griffith*, 76 Va. 913; *Withers v. Sims*, 80 Va. 651, 660; *McCullough v. Dashiell*, 85 Va. 37, 41, 6 S. E. 610; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361; *Osburn v. Throckmorton*, 90 Va. 311, 316, 18 S. E. 285; *Beale v. Gordon*, 2 Va. Dec. 35; *Campbell v. Campbell*, 22 Gratt. 649, 666; *Findlay v. Trigg*, 83 Va. 539, 543, 3 S. E. 142; *Roller v. Pitman*, 98 Va. 613, 36 S. E. 987; *Bradley v. Zehmer*, 82 Va. 685; *Adams v. Shenandoah Valley R. Co.*, 76 Va. 913; *Legrand v. Rixey*, 83 Va. 862, 3 S. E. 864.

Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent juris-

diction, the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation, in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. *Roller v. Pitman*, 98 Va. 613, 36 S. E. 987.

"Bodkin and Cutlip filed their bill in the circuit court of Braxton county against Rollyson and Moon to correct certain alleged mistakes in addition made in a store account of the defendants against the plaintiffs. Rollyson died pending the suit, and it was continued against Moon as surviving partner and Rollyson's administrator, in whose favor a decree was finally entered dismissing the bill. The facts are as follows: Plaintiffs began to run a store bill with defendants in 1890. In 1891, they made a settlement and plaintiffs executed their note for a balance of one thousand, two hundred dollars. In 1892, they made another settlement, and plaintiffs executed their note for a balance of one thousand, seven hundred and forty dollars and eighty-one cents, including the one thousand, two hundred dollar note. In 1895, in a suit instituted by L. D. Stoustreet to subject the property of Bodkin and Cutlip to the payment of their debts, this note was presented, and on May 1, 1895, a decree was entered for the satisfaction of the balance due thereon. In September, 1897, the present bill was filed seeking, on the grounds of fraud and mistake, to go behind such decree, settlement and notes, and show errors in the page additions of the account on which they were founded amounting to the sum of three hundred and ninety-four dollars and five cents. The defendants insist on laches, the bar of the statute of limitations and res adjudicata. * * * The question now raised

could have been litigated in the chancery suit relied on as a res adjudicata, and the only excuse for not doing so is that plaintiffs, because of their confidence in defendants, neglected a discovery which they might have had by ordinary attention to business, which afterwards came to them by accident or chance. This is not a reasonable nor sufficient excuse, but is a confession of laches and negligence, which deprives them of equitable remedy, either by original bill or bill of review." *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617.

Qualification of Rule.—"It is old law oft repeated that estoppels are odious because they shut out the truth. We can not say that this is applied, in the same sense as once it was; but we can say that the principle yet prevails to deny the right to bar matters never in fact involved in a former trial, at least where it was not admissible under the pleadings. I do not forget the rule given by many cases, among them *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530, that a judgment or decree upon the merits is a bar or estoppel upon the same demand, not only as to every matter which was offered and received to sustain or defeat the claim, but also any other 'admissible matter' which might have been used for that purpose. This has reference to evidence. But notice the rule says 'admissible matter.' Was this matter that the lot had been purchased by the state, and therefore was unlawfully sent out for sale by the auditor and sold by the sheriff in December, 1893, admissible on Mrs. Nuzum's bill? It was not mentioned in the bill, nor in the cause. The bill of Mrs. Nuzum did make the general charge that the tax sale was irregular and void, specifying as grounds only certain facts, they being that there was property on the lot out of which the tax could have been made; that the affidavit to the sales list had specific defects; and that the heading of that list was not such as the law required

There was no mention of the sale to the state, or of illegality of the sale to McEldowney for that reason. This important fact was omitted from the bill. The bill was held not sufficient to avoid McEldowney's deed; but it did not hold that a bill with that in it was insufficient. True, gravamen or demand of suit is the same in both the original bill in *Mrs. Nuzum's* suit, and in her answer in this suit, the demand that the tax deed be held invalid; but the cause for so holding is not the same; the facts touching it are not the same. To bar, the demand must be the same, and the cause of that demand the same. 7 Rob. Prac. 160." *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

While the doctrine of *res judicata* applies, except in special cases, not only to the points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time, it does not apply to a matter not adjudicated in a former action, and which could not have been brought forward for adjudication upon the pleadings in the cause. *Southern R. Co. v. Washington, etc., R. Co.*, 102 Va. 483, 46 S. E. 784.

Suit to Set Aside Fraudulent Deed.—

Where a suit in equity is brought for the purpose of setting aside a fraudulent deed of trust on land, charged by will, probated before the time of the execution of such deed, with payment of a sum of money to the testator's estate, and the bill does not allege payment of the money so charged upon the land, and is dismissed at the hearing in the court below, and the decree is reversed on appeal, and the cause remanded, and no notice is taken in the opinion or decree in the appellate court, of the lien created by the will, the question of the satisfaction of such lien is not *res adjudicata*. "The con-

tention, therefore, that the matter of this two thousand dollar claim is *res adjudicata* is not tenable. No issue was ever made upon it and it is not enough that it might have been set up in the same suit. Nothing charged in the bill made it necessary for the executors to assert said claim by way of defense to the bill. It, therefore, does not belong to that class of things which are deemed to be *res adjudicata* because they might have been litigated. This doctrine of *res adjudicata* is very fully considered in the case of *Biern v. Ray*, 49 W. Va. 129 (38 S. E. 530), where it is held, that the mere fact that the suit was such as might have enabled the parties to have litigated a certain matter which was not in issue, and which was not drawn necessarily into litigation as a legitimate matter of defense is not deemed to have been adjudicated." *Dent v. Pickens*, 50 W. Va. 382, 40 S. E. 572.

2. Cross Bills.

Where one filed a bill attacking a trust deed, and it was adjudged invalid, he can not afterwards be allowed to file a cross bill setting up an interest in the subject matter of the trust deed, which he might have, but did not, set up in his original bill." There would never be an end of litigation, and judicial proceedings are a farce, if a party, who is a defendant to a suit to set aside a deed of trust, can contest the case to the uttermost with every opportunity to present every claim or defense he can, and, after the supreme court of appeals declares the deed of trust fraudulent and void and remands the case, he comes in by a cross bill and says: 'I had an interest in some of the notes secured by way of collateral, and I did not disclose that interest to the court, but I now claim that the said void and fraudulent deed of trust so declared by the final judgment of the ultimate court in the commonwealth, ought to be equitably enforced for my benefit, to relieve me from the restitution of the rents and profits of

the appellants' land and shift the liability over upon my irresponsible and insolvent brother and co-operator in the fraudulent transaction.'" *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760.

A decree of a court setting aside a judicial sale and ordering a resale on the basis of the upset bid, is *res adjudicata* as to a cross bill filed after the said decree had been entered for specific performance of a contract of sale. *National Bank v. Jarvis*, 28 W. Va. 805.

3. Illustrative Cases.

Dismissal of Suit Agreed.—The judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it has been agreed by the parties, is a final determination as to those parties of the matters litigated in that suit, and this principle embraces not only what was actually determined, but also extends to every other matter which the parties might have litigated in the suit. *Wohlford v. Compton*, 79 Va. 333; *Wilcher v. Robertson*, 78 Va. 602; *Hoover v. Mitchell*, 25 Gratt. 387; *Siron v. Ruleman*, 32 Gratt. 215, 223. These cases were cited with approval in *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199.

Federal Court Judgments.—A judgment upon the merits of the case is a bar or estoppel against a prosecution of a second action upon the same demand, and is a finality to the claim or demand in controversy and concludes parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim, but also any other admissible matter which might have been used for that purpose; such demand or claim having passed into judgment can not again be brought into litigation between the parties in proceedings at law upon any ground whatever. These principles apply with equal force as well to judgments of the inferior courts of record of the United States rendered in this state between parties subject to their jurisdiction, as to judgments of

the circuit courts of the state. *Wandling v. Straw*, 25 W. Va. 692; *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. 806.

Validity of Promissory Note.—"It has been held, that the effect of a judgment as a bar or estoppel against a prosecution of a second action upon the same claim or demand rendered on the merits, constitutes an absolute bar to a subsequent action. It is a finality to the claim or demand in controversy concluding parties and those in privity with them not only as to every matter which was offered or received to sustain or defeat the claim, but as to any other admissible matter, which might have been offered for that purpose. Thus, for example, a judgment on a promissory note, is conclusive as to the validity of the instrument, and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed of which no proof was offered, such as forgery, want of consideration or payment. The judgment is as conclusive so far as the future proceedings at law are concerned, as though the defenses never existed." *Wandling v. Straw*, 25 W. Va. 692.

Report of Sale by Commissioner.

When a report of sale, which contains a statement of the commissions charged by the commissioner, has been confirmed by the trial court, and that decree has been affirmed by this court, without objection to the charge made, the question becomes *res judicata*, and the amount of the commission charged is beyond the reach of judicial inquiry. "The question presented in the case at bar could have been raised by an exception to the report of sale in which the commissions were credited to the trustees, and, in justice to all parties, this should have been done. Having permitted the report of sale to be confirmed, and the decree confirming the same to be affirmed by this court, without raising any question as to the propriety of the commissions charged, the rights of the trustees in respect to such

commissions must be regarded as finally settled and beyond the reach of judicial inquiry." *Roller v. Pitman*, 98 Va. 613, 36 S. E. 987.

Right of Wife to Join by Next Friend.—Where a wife, in a suit by the husband, was required to be made a party, but was not allowed to join by her next friend, and upon appeal, and after petition for rehearing, the decree in favor of the plaintiff was reversed, as the question of the wife's right to join by her next friend, might have been presented upon the first appeal, the adjudication is final, and binding upon her, and a bill brought by the wife alone, concerning the same subject matter, should be dismissed. *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. 610.

Where a party files a bill attacking a trust deed as fraudulent and void, and it is so adjudged by the court, he can not afterwards file a cross bill to have the deed equitably enforced for his benefit, which he might have set up in the original bill. If such a thing were allowed there would be no end of litigation, and judicial proceedings would be a farce. *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760.

Partition of Land.—Virginia Code, 1873, ch. 120, § 1, authorizes the court in making partition of land to take cognizance of all questions of law affecting the legal title that may arise in any proceeding. This doctrine applies to all matters existing at the time of giving the judgment or decree, which the party had opportunity to bring before the court. *Adams v. Shenandoah Val. R. Co.*, 76 Va. 913; *Bradley v. Zehmer*, 82 Va. 685.

Title to Property Sold under Trust Deed.—R. conveyed to K. certain real estate in consideration of twelve thousand dollars, of which three thousand dollars was paid in cash and the residue secured by deed of trust. K. then conveyed the land to the St. L. B. & M. Co. and, later, R. caused the trustee to advertise the land for sale, under the

deed of trust. Thereupon K. and the St. L. B. & M. Co. enjoined the sale, alleging in their bill that H. & M. claimed to own 1,632 acres of the land in fee under an older grant than the one under which plaintiffs claimed and had included the same in a survey made by them; that this claim constituted a serious cloud on the title, and that plaintiffs did not know whether said surveys were accurate or said title of H. & M. valid, and praying that the sale be stayed until the title should be settled and quieted and that H. & M. and R. be required to deduce their respective titles. Although made parties and served with process H. & M. made no appearance nor defense to the bill. The circuit court caused the St. L. B. & M. Co. to bring an action of ejectment and enjoined the sale pending the trial of the ejectment suit. R. appealed from this action and the appellate court dissolved the injunction and unqualifiedly dismissed the bill and decreed costs against the complainants. Held, that the decree is an absolute and final adjudication that H. & M. had no valid title to the land and estops them to set up, in the action of ejectment, the said older grant under which they claim, and that the court properly allowed the St. L. B. & M. Co. to introduce, on the trial of said action, the record, and decision of the appellate court, in said chancery cause, as evidence, and instructed the jury that the legal title to the land was in said trustee. "Did the court decide that Holt and Mathews have no title to the land? Was the bill such as called upon them in a legal sense to answer and enabled them to litigate the question of title? If either of these questions be answered in the affirmative, the decision in the chancery suit is a bar to any assertion of title on their part. As to the first, it is so elementary that no authority need be cited. The second is hardly less firmly settled. 'An adjudication by a court having jurisdiction of the subject matter and the parties is

final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto, and coming within the legitimate purview of the subject matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits.' *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Tracy v. Shumate*, 22 W. Va. 474; *Wandling v. Straw*, 25 W. Va. 692; *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530; *Bruen v. Home*, 2 Barb. (N. Y.) 586; *Embery v. Conner*, 3 Coms. (N. Y.) 522; *McDowell v. McDowell*, 1 Bail. Eq. (S. C.) 324; *Davis v. Brown*, 94 U. S. 35; *New Orleans v. Bank*, 167 U. S. 371. In *Sayre v. Harpold*, it was applied to a set-off which might have been, but was not, pleaded in defense." *St. Lawrence Co. v. Holt*, 51 W. Va. 352, 41 S. E. 351.

H. IDENTITY OF SUBJECT MATTER, CAUSE OF ACTION AND ISSUE.

1. In General.

It is settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined. *Chrisman v. Harman*, 29

Gratt. 494; *Cleaton v. Chambliss*, 6 Rand. 86; *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law. Reg. 665; *Tate v. Bank*, 96 Va. 765, 32 S. E. 476; *Martin v. Columbian Paper Co.*, 101 Va. 699, 44 S. E. 918; *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60; *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Miller v. Willis*, 95 Va. 337, 354, 28 S. E. 337; *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523; *Wilcher v. Robertson*, 78 Va. 602, 615; *Sangster v. Com.*, 17 Gratt. 124; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *Currie v. Chowning*, 2 Va. Dec. 25; *Weaver v. Vowles*, 2 Rob. 438; *Beale v. Gordon*, 2 Va. Dec. 35; *Atkinson v. Beckett*, 36 W. Va. 438, 15 S. E. 179; *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650; *Legrand v. Rixey*, 83 Va. 862, 3 S. E. 864; *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. 806.

"The essential conditions under which the plea of *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of demand, and of the parties in the character in which they are litigants." *Herm. Estop.*, § 102. *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859.

A suit in chancery and decree therein, can neither be pleaded in bar, nor given in evidence, in an action at law between the same parties, unless the very same matter of controversy was involved in both suits, and unless the court of chancery had competent jurisdiction to decide the matter. *Pleasants v. Clements*, 2 Leigh 474.

If a judgment of reversal states that it "is not to bar or prejudice any future claim for the appellee, made on fuller proof to the auditor," and the new case does not differ from the former, the first judgment concludes the cause. *Innis v. Roane*, 4 Call 379.

In a suit in chancery, though the defendants are in default, the record of proceedings in another suit *inter alios* is not competent evidence against them. *Frazier v. Frazier*, 77 Va. 775.

Meaning of Identity of Issues.—"It is essential to an estoppel by record that the identical question upon which it is invoked was in issue in the former proceedings. The rule is thus stated in Black on Judgments, § 610: 'There must be an identity of issues, and by this is meant that the issue raised in the second suit, upon which the evidential force of the former judgment is to be directed, must be identical with the issue, or one of the issues, raised and determined in the first action.'" Chesapeake, etc., R. Co. v. Rison, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

"There is a marked difference between the effect of a judgment as a bar or estoppel against the prosecution of a second suit upon the same claim or demand, and its effect as an estoppel in another suit between the same parties, or their privies, upon a different claim or cause of action. In the former case the judgment or decree, if rendered upon the merits, constitutes an absolute bar to a subsequent suit. All those matters which were offered and received, or which might have been offered, to sustain the particular claim or demand litigated in the prior suit, and those matters of defense which were presented, or which might have been introduced, under the issue to defeat such claim, are concluded by the judgment or decree in the former suit. *Cromwell v. Sac Co.*, 94 U. S. 351; *Davis v. Brown*, Id. 428; *Withers v. Sims*, 80 Va. 651. But in order that a judgment or decree may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and be determined on its merits. *Hughes v. U. S.*, 4 Wall. 236; *Cromwell v. Sac Co.*, supra; *Russell v. Place*, 94 U. S. 606; *Chrisman v. Harman*, 29 Gratt. 494; *Withers v. Sims*, supra." *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

Seddon v. Tutop, 6 T. R. 607, it cited and discussed in *Weaver v. Vowles*, 2

Rob. 438; *Kelly v. Board of Public Works*, 25 Gratt. 755.

Identity of Parties.—If the subject matter of two suits be different, though the parties are the same, the decree in the first suit is no estoppel to the proceedings in the second. *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523.

It is not necessary that precisely the same parties were plaintiffs and defendants in the two suits; provided the same subject in controversy, between two or more of the parties, plaintiffs and defendants as to the two suits respectively, has been in the former suit directly in issue, and decided. *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250.

Different Cause.—Where the issues presented in a second suit were involved and determined in a prior suit, the judgment or decree in the first suit is a bar to the second suit between the same parties and their privies not only upon the same cause or demand, but also upon a different cause, if it appears that the issue presented in the latter suit was involved and determined in the former suit. *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372, citing *Shumate v. Supervisors*, 84 Va. 574, 5 S. E. 570; *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

"The language which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in an action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530, distinguishing and explaining *Sayre v. Harpold*, 33 W. Va. 553,

11 S. E. 16. "In the first suit between these parties, the right, the demand involved and the only one, was to have satisfaction of the judgment in whole or in part, according to the amount of its proceeds, out of the thirty-four acre tract; every other matter decided in that case was involved in that issue, and nothing which was not involved in it and necessarily decided in its determination can be *res judicata* in another suit between the same parties. The claim set up in the first suit having failed and the judgment remaining unsatisfied, the demand in this cause is to have satisfaction of it out of Mrs. Ray's interest in another tract of land. This is a different subject matter over which the pleadings in the former suit gave the court no jurisdiction, and as to it there was no adjudication in said suit."

Points Incidentally in Question.—

"There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision. * * *

The principle underlying and supporting all these decisions is, that a judgment necessarily affirming or denying a fact is conclusive of its existence whenever it becomes a matter in issue between the same parties in privity with them. Therefore, a judgment for the defendant in an action for obstructing a watercourse, if based upon the ground that there was no watercourse to be obstructed, is, in subsequent actions, conclusive of the nonexistence of such watercourse; but, if the judgment had been for the plaintiff, it would necessarily have been conclusive in other actions of the existence of the watercourse, and of its obstruction."

Freeman on Judgments, § 249. This principle has been frequently recognized and applied in this state (*Shelton v. Barbour*, 2 Wash. 64; *Preston v. Harvey*, 2 Hen. & M. 55, 63; *Douglass v. Fagg*, 8 Leigh 588. See also, 7 Rob. Prac., pp. 237, 240, et seq.), and has been fully recognized in cases where it was held not to apply. *Chrisman v. Harman*, 29 Gratt. 494, 500; *Blackwell v. Bragg*, 78 Va. 529, 540; *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

Distinctions.—A plea of *res judicata* is good only when the causes of action are the same. It is otherwise with a plea of estoppel by a former verdict. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

Object of Suits Different.—A judgment upon a direct point in a former suit is conclusive upon the same point in a latter suit, though the objects of the two suits be different. *Routledge v. Hislop*, 105 E. C. L. 547. *Shumate v. Supervisors*, 84 Va. 574, 5 S. E. 570.

A judgment is conclusive if on a direct point, though the objects of the two suits are different. *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859; *Winston v. Starke*, 12 Gratt. 317.

Judgment in *quo warranto* determining respondent's right to hold the office, involves an adjudication of his right to receive the salary. "As to the identity of subject matter, there can be no doubt. The judgment determining that the petitioner had no title to the office, necessarily determined that he was no longer entitled to receive the emoluments, though no claim for salary was specifically made, and could not have been regularly made, in that proceeding. An office is defined to be a right and correspondent duty to exercise a public or private trust, and to take the emoluments belonging to it; and as was said in *Blair v. Marye*, 80 Va. 485, 'the salary follows the office as the shadow follows the substance.'

The right to the salary now sought to be recovered was therefore necessarily involved in the adjudication in the former case, and the principle is well settled that a judgment is conclusive if upon the direct point, though the objects of the two suits be different. *Freem. Judg.* (3d Ed.), §§ 249, 254. This was decided in *Routledge v. Hislop*, 2 El. & El. 549 (105 Eng. C. L. 547), where it was held, that varying the form of claim does not affect the application of the rule, where the claim itself is the same." *Shumate v. Supervisors*, 84 Va. 574, 5 S. E. 570.

Tests.—One test to be applied in determining whether the issue involved in the two suits is identical, is to inquire whether the same evidence to support the issue raised by the record in the first suit does not support that raised in this suit. *State v. McEl-downey*, 54 W. Va. 695, 47 S. E. 650; *Weaver v. Vowles*, 2 Rob. 438; *Kelly v. Board of Public Works*, 25 Gratt. 755, 763.

"If it be doubtful whether the second suit is brought for the same cause, it is a proper test to consider whether the same evidence would sustain both actions and what was the particular point or matter determined in the former action." *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859, 860.

To constitute a judgment in the former, a bar in the latter action, it must be shown that the plaintiff could, but for his fault, have recovered in the former action. 7 Rob. Prac. 170. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

2. Illustrative Cases.

Fraud and Breach of Warranty.—A suit in chancery and decree therein, can neither be pleaded in bar, nor given in evidence, in an action at law between the same parties, unless the very same matter of controversy was involved in both suits, and unless the court of chancery had competent juris-

diction to decide the matter. For example, where a plaintiff filed a bill in chancery against the defendant, charging fraud practiced by the defendant, in the sale of a slave, and praying that the contract might be rescinded, and that the defendant might be enjoined from taking measures to recover the purchase money of the plaintiff, and the bill was dismissed on a hearing, and then the plaintiff brought an action against the defendant to recover damages for breach of warranty of soundness of the slave, it was held that the proceedings and decree in the suit in chancery could neither be pleaded by C in bar of the action at law, nor was the record thereof admissible evidence on the trial of the action at law. *Pleasants v. Clements*, 2 Leigh 474.

A suit construing certain deeds and the rights of the parties thereunder will not be considered res judicata of an action of ejectment founded on an alleged breach of the conditions of the deeds. *King v. Norfolk, etc., R. Co.*, 99 Va. 625, 39 S. E. 701.

Validity of Contract.—Upon a bill by L. against M. and others setting up a contract of partnership between them, it appears that in a previous suit the matters alleged in that bill were sufficient to put in issue the fact of such a contract as is alleged in this case, and in that case it was held, that the contract was not valid. Held, the decree in the first suit is a conclusive bar to the second. *McComb v. Lobdell*, 32 Gratt. 185.

Validity of Trust Deed.—Trustee files a bill to enforce the trust deed, and in this case the court decrees the sale and distribution of the trust subject among the creditors provided for, except one, who is excluded under the provisions of the deed, because he sued out execution on his judgment. This creditor then files a bill to set aside the trust deed, on the ground that it is fraudulent on its face. Held, that the question whether the deed was fraudulent was not put in issue in the first

case, and therefore could not be decided. And the decree in that case can not be a bar to the second. "Facts so widely different required different decrees." *Quarles v. Kerr*, 14 Gratt. 48.

A bill to set aside a tax deed, charges that the deed was illegal and was obtained by fraud of the grantee, setting out the facts with sufficient particularity to give the defendant notice. The bill in the first suit was filed to subject a tract of sixty acres of land. The present suit relates to a tract of thirty-four acres of land, which is not shown to be a part of the larger tract, and there is nothing in the record of the former suit to show that the smaller tract was involved in that suit, or that the parties thereto could have litigated, or were called upon to litigate, therein any right or question with respect thereto. *Shufflebarger v. Blanchard*, 101 Va. 690, 44 S. E. 951.

Unlawful Detainer.—It was held, in *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354, in an action for damages occasioned by taking out a distress warrant against the plaintiff for rent due in March, 1891, that a judgment rendered in November, 1890, between the same parties, in an action of unlawful detainer, is no evidence as to whether rent was due at the date of the warrant.

Judicial Sale.—The order of a court of chancery directing a writ to issue to place the purchaser at a judicial sale in possession of lands, made after a full hearing, at which the issuing of the writ was resisted on the ground that the purchase had been made in the trust for the original judgment debtor, and under an agreement entitling him to remain in possession, and to a conveyance of the property on his complying with certain conditions, is conclusive against him in a subsequent suit in equity seeking to enforce the same agreement upon which he relied in resisting the application for a writ of possession. *Bur-*

ner v. Hevener, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

Support and Maintenance.—A former adjudication, in a suit brought for that purpose alone, that the language, in a conveyance of real estate, "The said grantors to have their life maintenance out of the following described land or its proceeds," does not create a specific lien or charge on the land, will not estop the grantors in such conveyance from setting up a personal claim for such maintenance against the grantees or their estates, when such question was in no wise involved in or adjudicated in such former suit. *Brown v. Squires*, 42 W. Va. 367, 26 S. E. 177.

Lands Not the Same in Both Suits.—Moreover a verdict, on which a judgment is rendered, is conclusive evidence in any subsequent suit between the same parties or their privies; the same point coming in question; though the lands or other things in controversy be not the same. *Preston v. Harvey*, 2 Hen. & M. 55, 63; *Shelton v. Barbour*, 2 Wash. 64; *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 321, 6 Va. Law Reg. 665.

In an action by a mill owner against a canal company to recover damages for diverting water from plaintiff's mill, and for failure to maintain a dam, which it is alleged it was the duty of the defendant to do, a plea that a former verdict had been obtained in a suit in which the declaration averred that the company had unlawfully erected the dam in question, whereby the mill was damaged, presents an estoppel over a replication that the wrongs in the declaration mentioned are not the same which are in issue. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

The rule is thus stated in Black on Judgments, § 610: "There must be an identity of issues, and by this is meant that the issue raised in the second suit, upon which the evidential force of the

former judgment is to be directed, must be identical with the issue, or one of the issues, raised and determined in the first action." "The condemnation proceedings only adjudged that the James River and Kanawha Company might erect a dam in a lawful manner, but did not determine that it had done so. In the Stillman and Ashlin suit, the character of the dam, after it was erected, was put in issue, and it was determined that the company had not done so. The argument and inference may be very strong that the James River and Kanawha Company would and did erect the dam in a lawful manner, but there is no adjudication that it did, which can be pleaded as an estoppel to the adjudication that it did not. See *Mersereau v. Pearsall*, 19 N. Y. 111." *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

Action on Official Bond.—In an attachment in equity against B and A, the property of A is taken as the property of B, and being perishable, it is sold under an order of the court, and afterwards the court decrees that the sheriff pay the proceeds of sale to A. The sheriff failing to pay, A moves against him and his sureties in the county court, and judgment is entered for the penalty of his bond, to be discharged by the payment of, etc.; which is paid. Previous to the decision of the court in favor of A, he brought an action on the official bond of the sheriff, against him and his sureties, for the trespass in taking his goods; and the former judgment and its payment was set up in defense. Held, the action is not thereby barred; but A may recover the difference between the value of the goods at the time they were taken under the attachment, and the amount of the proceeds of sale paid to A. *Sangster v. Com.*, 17 Gratt. 124.

Injunction and Sale of Trust Property.—Where in a bill filed to enjoin the sale of trust property, a resettlement is prayed of the accounts of the

defendant's testator as administrator de bonis non, on the ground of the recent discovery of a receipt showing assets unaccounted for, and it appears that all the parties to the bill were parties to a former suit against the decedent's administrators, in which, it was charged that the decedent had not fully accounted for the assets, the matters set up in the bill as to the assets are res adjudicata. "The very matters thus sought to be litigated were in issue in the suit of *Green v. Thompson*, 84 Va. 376, 5 S. E. 507, decided here in January, 1888, to which suit all the parties to the present suit were present." *Gibson v. Green*, 89 Va. 524, 16 S. E. 661.

Special and Common Counts.—A record of a former suit between the parties, in which the declaration consisted of a special count and the common money counts, and where there was a general verdict on the entire declaration, can not be given in evidence as an estoppel in a second suit founded on the special count, for the verdict may have been rendered on the common counts. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

Adverse Possession and Suit for Damages.—To rebut the defendant's evidence of adversary possession for twenty years, under such circumstances as would give him a prescriptive right to a dam across a stream, the record of a suit by the plaintiff against the administrator of a former owner of the premises, under whom the defendant claims, brought within twenty years from the date of the raising of the dam, for the injury sustained by the same, and in which the plaintiff recovered damages, is competent evidence for the plaintiff. *Field v. Brown*, 24 Gratt. 74.

Streets and Sidewalks.—On an appeal from a decree enjoining a town from raising a sidewalk, it was contended that the town was estopped from raising the sidewalk in question by reason of a decree of the circuit court in a former suit between it and

the appellee. It appears from the record that an injunction was awarded the appellee to restrain the town "from prosecuting further the work upon the streets and crossings at the intersection of Main and Bruce streets." The injunction was awarded June 28, 1884, to take effect when a bond in a penalty prescribed was given. The bond was not given until March 22, 1894, nearly ten years after the injunction was awarded. In the meantime the town had gone ahead and executed the work sought to be enjoined. The case was heard and the injunction perpetuated by a decree entered April 13, 1895, years after the completion of the work. The decree in that case can not serve as an estoppel against the town in this suit. Whether, as contended by counsel for the town, the court was without jurisdiction in that case, because the town was never served with process, and did not voluntarily appear, or the court had no jurisdiction over the subject matter, and that its decree was therefore void, it is unnecessary to inquire. It is sufficient to say that the subject matter of the two suits is different—the issues not the same. That suit was to prevent the further prosecution of the work upon which the town was engaged at the intersection of Main and Bruce streets, which was making a fill and raising Bruce street and the crossing at its intersection with Main street. This suit is to restrain and prevent the town from raising and grading the sidewalk on the west side of south Main street in front of the appellee's lot. The two suits present separate and distinct issues. The work enjoined in the former suit was long ago completed, and that controversy ended. This suit is to prevent work since resolved upon by the town, of a different kind, and not at the same place. The doctrine of estoppel is inapplicable. *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523.

Damage to Land and Crops.—Two actions on the case are brought in the

same court at the same time, by the same plaintiff against the same defendant. The same act of defendant is charged as the cause of the damage in each case; but the damage in one case is charged to be to the plaintiff's land, and in the other to the crops grown and growing upon it. The case as to the crops is the first tried, and the evidence is as to the crops, and there is a verdict and judgment for the defendant. This verdict and judgment can not be set up as an estoppel to the plaintiffs in the other action for damages to the land. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

Decree dissolving injunction awarded grantors in trust deed restraining purchaser from taking possession of the land because substituted trustee had been appointed without notice under Code, § 3420, is conclusive on the grantor's rights, who failed to appeal in time, and is a bar to their petition based on same ground for rehearing order of appointment. "The bill in the chancery suit in the circuit court was filed and the injunction asked on the identical ground relied on in the petition in the county court; and the petition filed in the county court is a substantial copy of the bill, the suits are in all material respects identical as to parties and relief sought, and the very grounds upon which the relief is asked are precisely the same, to-wit; a trustee having been appointed without notice to the parties interested, as is required by the statute. *Virginia Code, § 3420.*" *Diehl v. Marchant*, 87 Va. 447, 12 S. E. 803.

Where matters in litigation were submitted to arbitration, and award was in favor of plaintiff, judgment was entered thereon and fi. fa. thereon issued and returned "no property." In a suit to subject debtor's land, this judgment was listed and reported as a lien. Debtor filed his bill to enjoin sale, the matters therein set up being the same embraced in the submission to arbitration. Held, those matters are res

judicata. *Canada v. Barksdale*, 84 Va. 742, 6 S. E. 10.

Contribution between Cosureties.—

"The question as to the right of William Beale's administrator to have contribution from John H. Rixey's estate, his cosurety on Beale the treasurer's bond, was expressly and pointedly raised and put in issue in the first suit referred to, and finally disposed of by this court; and this is identically the same issue made in the case at bar. Hence the decree of the circuit court of Fauquier county sustaining the plea of res adjudicata was clearly right; and, as this conclusion disposes of the case, other matters of defense relied on by the appellees' counsel will not be considered." *Beale v. Gordon*, 2 Va. Dec. 35.

Part of Land and Part Value of Land.—"There is, in substance, very little difference, if any, between the claims set up by appellant against appellee in the first and second suits. In the first bill, the plaintiff prays that the defendant be decreed to pay him twenty-seven hundred dollars, as a just restitution on a part of the value of the property inequitably obtained by Smith from him in excess of the amount due on the debt. In the second suit, plaintiff claims that there is a valuable deposit of oil and gas underlying the New Creek lands, the sale of which, to the defendant, was never intended or contemplated by any of the parties, and he prays in his second bill that the said Smith be required to transfer and convey to him, the oil, gas and other valuable minerals under said tract of land. In the first suit plaintiff demands a part of the value of the property. In the second, he asks a part of the land." *Lee v. Smith*, 54 W. Va. 89, 100, 46 S. E. 352.

Subjecting Land to Payment of Debt.—B. & F., having obtained a judgment against R. March 11, 1890, and docketed it according to law January 7, 1891, instituted a suit in chan-

cery against R. and S. to set aside as fraudulent a deed from R. to S. dated December 17, 1889, after the debt was contracted, but before judgment, conveying from R. to S. a tract of land containing thirty-four acres, in which suit the bill was dismissed at the hearing on the merits; and in September, 1897, B. & F. brought another suit to enforce the lien of said judgment upon the undivided one-half interest of R. in an eighty-six and one-half acre tract of land, as to which there was no allegations in the pleadings in said first suit; and R. tendered a plea of res judicata setting up said former suit as an adjudication of the matters involved in the second suit, and said plea was rejected by the court as insufficient. Held, the plea was properly rejected. "The purpose of the first suit was to set aside a deed conveying a thirty-four acre tract of land, as fraudulent, and subject the land to the payment of the judgment. This suit is instituted by the same parties as plaintiffs against one of the parties who was defendant in the former suit, and the other defendants comes in and is made a defendant in this suit also. The parties are the same, but the subject matter of it is radically different from that of the former suit, although in both, the plaintiffs are attempting to collect their judgment. But here they are not, as in the former suit, attempting to set aside a fraudulent conveyance. They are not seeking here to obtain satisfaction of their judgment out of the thirty-four acre tract, but out of another and different tract containing eighty-six and one-half acres, which was not involved in the other cause. It is the same judgment in both cases but the existence of the judgment was not in issue in the former cause, nor was it there contended that it had been satisfied, released or vacated. The object there was not to obtain a judgment, but to subject a certain parcel of real estate to the payment of a judgment, and it can not

be said that it was there determined that the appellees have no judgment against Mrs. Ray. Nothing was decided in that cause, except the issues there raised and such incidental matters as were necessarily involved in those issues." *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530.

Cloud upon Title.—Where a purchaser of land applies for and obtains an injunction in a circuit court restraining the trustee from selling on account of an alleged cloud upon the title, and the supreme court has, on appeal, reversed the circuit court, and decides that the alleged cloud and defect do not constitute sufficient ground for an injunction and dismiss the bill, the plaintiff can not bring a second, and precisely similar, suit against the same parties for the same purpose and cause of action; and on a plea of res judicata the plea will be sustained. *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66.

Judgment Setting Aside Homestead.—A judgment setting aside a homestead to a debtor is not a bar to a subsequent action by the party to the judgment to subject the homestead to his claim, after expiration of the exemption. *Hanby v. Henritze*, 85 Va. 177, 7 S. E. 204.

Suit to ascertain true location of right of way. *Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407.

Where a bill asks an injunction against the issue and sale of municipal bonds, because of alleged invalidity of the ordinance authorizing their issue, and of the bonds themselves, under the law, and asks no other relief, and such injunction is dissolved on the merits, the order of dissolution will, as regards identity of the subject matter, bar a subsequent bill seeking an injunction against the collection of taxes levied to pay interest on such bonds, so long as the order of dissolution is unreversed. *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859.

Boundaries between States.—"Where there have been two suits upon the same claim or demand, the judgment or decree in the first suit, if rendered on the merits, constitutes an absolute bar to a subsequent suit. All of those matters which were offered or received, or which might have been offered to sustain the particular claim or demand litigated in the prior suit, and those matters of defense which were presented or which might have been introduced under the issue to defeat such claims are concluded by the judgment or decree in the former suit. But in a second suit between the same parties or their privies upon a different claim or cause of action, the judgment or decree in the first suit, in order to bar the second, must have been rendered between the same parties or their privies, and the point of controversy must have been the same and have been determined on its merits. In the case in judgment the issue is the location upon the ground of the compromise line of 1802 between the states and Tennessee, and not the validity of that line which was the issue determined by *Virginia v. Tennessee*, 148 U. S. 503." *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

I. DIVISIBLE AND INDIVISIBLE CAUSES OF ACTION.

See the titles **ACTIONS**, vol. 1, p. 134; **DAMAGES**, vol. 4, p. 219.

1. In General.

It is a general rule that a judgment in an action for any part of an entire cause of action is a bar to another action founded on any other part of the same entire cause of action. *Zetelle v. Myers*, 19 Gratt. 62, 71, citing *Hite v. Long*, 6 Rand. 457, as its authority.

"The principle is settled beyond dispute that a judgment concludes the rights of the parties with respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or any part of the demand constituting the

cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, can not be divided and made the subject of several suits; and if several suits be brought for different parts of such claim the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a plea in the other suits." *Beazley v. Sims*, 81 Va. 644.

2. Actions Ex Contractu.

In General.—A demand arising from an entire contract can not be divided and made the subject of several suits; and if several suits are brought for a breach of such a contract, a judgment upon the merits in either will bar a recovery in the others. *Hancock v. White Hall Tobacco, etc., Co.*, 102 Va. 239, 46 S. E. 288.

In *Clark on Contracts*, at page 705, the author says: "The right of a party to sue for a breach of contract is discharged by the final judgment of a court of competent jurisdiction, either in his favor or against him. In the former case, the cause of action merges in the judgment, while in the latter the judgment estops him." The same author, discussing merger and *res judicata*, at page 71, remarks: "As soon as it (the judgment) is created, the previously existing rights with which it deals merge or are extinguished in it. For instance, when a person sues another for a breach of contract, or for a civil injury, and a judgment is entered by consent or after trial, neither party has any further rights in respect of the cause of action. The judgment conclusively settles their rights, and the matter is said to be *res judicata*." *Hancock v. White Hall Tobacco, etc., Co.*, 102 Va. 239, 46 S. E. 288.

Illustrative Cases.—*G. Co.* held and owned two notes, made to it by *M. & Co.*, one for \$268.74, the other for

\$244, both overdue and unpaid, *G. Co.* brought its action before a justice and recovered judgment for the first note, and afterwards brought its action in the circuit court on the second note. *M. & Co.* pleaded the judgment on the first note in bar of the action, under § 48, ch. 50, W. Va. Code. Held, error to allow plea filed. "Section 48, ch. 50, Code, which provides: 'When the plaintiff has several demands against the same defendant, founded on contract, express or implied, he must bring his action for the whole amount due and payable at the time such action is brought, whether the demands be such as might have been heretofore joined in the same action or not. If he brings his action for part only, the judgment in the suit, whether for or against him, shall bar him from the recovery of the remainder.' Here the plaintiff had two distinct demands and causes of action on two different contracts, the aggregate amount of which was beyond the amount of which the justice had jurisdiction, and hence it could not bring its action for the whole amount due and payable in the justice's court, and therefore § 48 is not applicable to this case." *Flat Top Grocery Co. v. McClaugherty*, 46 W. Va. 419, 33 S. E. 252.

Where a party has two separate demands against another, which together exceed the sum of \$300, judgment recovered upon one before a justice can not be pleaded in bar of an action on the other, under § 48, ch. 50, W. Va. Code. "If the aggregate of the two notes in case at bar had not exceeded the sum of \$300, § 48, ch. 50, Code, would certainly apply, and judgment on one could be pleaded in bar to an action on the second. A party will not be permitted to divide up a demand exceeding in amount the jurisdiction of a justice into sums to bring it within such jurisdiction for the purpose of suing thereon in such court. In *Hale v. Town of Weston*, 40 W. Va. 313, 21 S. E. 742, it is held: 'A person who

asserts a claim to a specific amount of damages for an alleged injury sustained in his business will not be allowed to split up his claim, in order to reduce it to the jurisdiction of a justice, and to bring consecutive suits before a justice for such claim." *Flat Top Grocery Co. v. McClaugherty*, 46 W. Va. 419, 33 S. E. 252.

In 1866, S. sues M. and B. on their joint bonds. M. confesses judgment that day. Suit is suffered to abate as to B., who had never been summoned. S. having died, his administrator in 1879 brings a second suit on the bond against both obligors. They plead the former judgment in bar. This plea the court below rejects as to B., but admits as to M., and causes the action to proceed as a separate one against B., and renders judgment against him. Upon error, it was held, the bond is merged in the judgment against M., and the second action is barred by the recovery in the first. *Beazley v. Sims*, 81 Va. 644.

Ineffectual Suit to Enforce Lien of Judgment.—Although a judgment is an indivisible cause of action in the sense that it may not be divided or split up into several causes of action, nevertheless suit brought to enforce the lien of a judgment and prosecuted in good faith, though ineffectually, is not a bar to a subsequent suit by the same plaintiff against the same debtor to enforce the satisfaction of the same judgment. In such cases it will be the duty of the equity court to see that the creditor does not exercise his right capriciously or oppressively, and make such orders or decrees with reference to the imposition of costs as will protect litigants against unnecessary and vexatious suits. In other words the vitality of a judgment is not exhausted by one action thereon, but the judgment creditor is entitled to pursue successive actions until satisfaction is obtained. *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491.

A judgment assigning damages

jointly, on the breaches assigned in a declaration on an injunction bond payable to several obligees jointly, while it is not a formal ascertaining the damages according to the statute, it is substantially so, and should be held as in full satisfaction and discharge of all the breaches alleged in the declaration and a bar to any other or further recovery for the same breaches. *Peerce v. Athey*, 4 W. Va. 22.

If there be judgment upon a general count in assumpsit; or by confession without a declaration; the plaintiff, in a second action for the same cause, must show two subsisting debts, or he can not sustain his action, if the former recovery is pleaded. *Pickett v. Claiborne*, 4 Call 99.

3. Actions Ex Delicto.

The law seems to be well settled that when a person has a cause of action which he may assert by an action ex contractu for the direct damages or ex delicto for both the direct and indirect damages, if he selects the former, he waives the latter, including all claim for indirect damages. Both actions are regarded as for the same wrong, of which he can have but a single satisfaction, though it in no wise compensate him for the damages sustained. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

Where the damages claimed in two separate actions to wit, assumpsit and malicious prosecution, arise or result from the same acts of abuse or unlawful use of judicial procedure, a final judgment in one is a bar to the further prosecution of the other, although much greater damages might have been recovered in the latter than in the former. Such excess of damages is regarded as waived and the wrong fully satisfied by the judgment obtained in the former, and can not be relitigated in the latter action. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

A plaintiff can not be allowed to sever one cause of action, and carve

two suits out of it; therefore, if the trespass consists in the defendant's stopping the plaintiff's wagon and team, and taking by force from the team a horse claimed by the defendant, the plaintiff might in trespass recover damages for the injury in stopping his team, delaying him, etc., as well as the value of the horse taken; but if he elects to bring trover for the horse taken, he can not maintain trespass for stopping the team, etc., for it was one act. *Hite v. Long*, 6 Rand. 457.

4. Separate and Independent Causes of Action

Where the claims upon which the two actions are brought are not only distinct and separate in point of fact, but properly separable, as for example, where one was a demand for an ascertained sum; the other for an open account, not at all adjusted, a plea of former recovery will be rejected.

If the cause is divisible or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury. 1 Greenl. Ev., § 532; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Kelly v. Board of Public Works*, 25 Gratt. 755; *Packet Co. v. Sickels*, 5 Wall. 580; *Chrisman v. Harman*, 29 Gratt. 494." *Allebaugh v. Coakley*, 75 Va. 628, 629.

If a creditor divides an unascertained indebtedness against his debtor, with his consent, among various creditors of such debtor, and then assigns the residuum of such indebtedness to a trustee for the benefit of all his other creditors, a suit brought by such residuum assignee in his own name does not inure to the benefit of such prior partial assignees nor are they bound by the adjudication thereof; not being parties to such suit, nor privies in interest with such residuum assignee. *St. Lawrence Boom, etc., Co. v. Price*, 49 W. Va. 432, 38 S. E. 526.

"The two claims might have been embraced in different counts in the one

suit. But they are distinct, divisible claims, depending on separate contracts, made at different times and upon different principles; and the evidence to support one is not necessary to support the other, but much of it that would be material to sustain the one would be irrelevant to the other. I do not think, therefore, that the plaintiff was bound to unite both causes of action in one." *Kelly v. Board of Public Works*, 25 Gratt. 755.

"At any rate, if the adverse party was willing to agree a case as to one, and to submit it at once, and without the delay of formal pleading to the judgment of the court, and was not willing to submit the other, his withholding the other claim for subsequent adjustment ought not to debar him from the right of action afterwards to recover it." *Kelly v. Board of Public Works*, 25 Gratt. 755.

Separable Contracts.—In *assumpsit for work and labor done*, care and diligence bestowed, and materials provided, the defendant, besides the general issue, pleaded a former action for not performing the same promises, in which the plaintiff recovered damages for the nonperformance of the same; the plaintiff replied that the promises were not the same identical promises in respect whereof the judgment was recovered, and tendered an issue, which was joined. At the trial, the plaintiff having given evidence on the general issue, the defendant, to sustain his plea of former recovery, gave in evidence of record of the former suit, the declaration in which contained two counts, one for work and labor, care and diligence, and materials, as well as for goods sold, money lent, money paid, and money received; and the other upon an account stated. The defendant also gave in evidence the account filed in that case, which contained credits and charges up to the 24th of October, 1835, "leaving out the building of a large barn, and work done on a new mill." The verdict and judg-

ment in that case being for \$630.53, the plaintiff examined a witness, who proved that an account was settled with the defendant in October, 1835, on which a balance of \$630.53 was struck; that the account filed in the former cause was a copy of the account so settled; and that the settlement did not include the plaintiff's demand for work done on the barn or the new mill, charged in the account in the second case, but that this demand remained for future adjustment. It was farther proved, that on the trial in the former cause, the account not being then filed which was afterwards filed in the second suit, all evidence in regard to that account was excluded, and the plaintiff rested his case on the count upon an account stated, and relied upon the settlement before mentioned, showing the said balance of \$630.53 cents, and recovered upon that ground only. Thereupon the defendant moved the court to exclude from the jury all the evidence offered by the plaintiff in support of the items charged in the account filed in the second case, on the ground that he was precluded from recovering the same in this action by the recovery in the former suit, and the demand of the plaintiff for the said sum of \$630.53 recovered in the former suit, and for the items charged in the account filed in this case, was one entire demand, and could not be made the subject of two separate suits, and therefore the plaintiff was precluded by the recovery in the former suit from recovering in this suit. But the court overruled the motion, and a verdict was rendered for the sum found by the jury to be due upon the account filed in the second case. On a supersedeas to the judgment given on this verdict, the same was affirmed. *Weaver v. Vowles*, 2 Rob. 438.

J. DEFENSES NOT SET UP.

In General.—"When a party is sued he must put in all his defenses, else

he is barred of any defenses omitted because he could have presented them. 24 Am. & Ency. L. (2d Ed.) 782; *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530. "A recovery by the plaintiff necessarily adjudicates that there is no defense. Hence the cases all agree that a judgment bars all defenses which the defendant had opportunity to make." *Van Fleet*, Former Adj., § 159. But not so with the plaintiff. He may file a declaration, and if its facts do not call for judgment, and he loses, he may try again upon facts which do so. He ought to have put all facts in at first, but not doing so, what is the result? He is not barred by res judicata as his second case, differing from the first, has never been tried." *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

In Condemnation Proceedings.—

Where judgment is rendered for city in street condemnation proceedings, the landowner can not, in a prosecution for obstructing the street, defend on the ground that the proceeding was illegal. Defenses allowed by Code, §§ 1074, 1075, must be made, if made at all, in the condemnation proceedings. *Foster v. Manchester*, 89 Va. 92, 15 S. E. 497.

Failure to Set Up Usury.—A person owing an usurious debt, who is a party to a suit in equity and fails to claim, by any form of pleading, the benefit of the statute against usury, before a final decree has been entered as to the amount of the debt, is thereafter barred by the principle of res judicata from setting up the defense of usury. *Snyder v. Middle States Loan, etc., Co.*, 52 W. Va. 655, 44 S. E. 250.

Compromise and Release.—Creditor agrees to accept less than amount due from his debtors in satisfaction of his debt. He then assigns the entire debt. Of this assignment the debtors have notice. They permit decree to be entered against them for the entire debt. Held, the debtors are estopped from falling back upon the compromise and

release. *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142.

Report of Sale by Commissioner.—It has been held, when a report of sale which contains a statement of the commissions, charged by the commissioner, has been confirmed by the trial court, and the decree confirming the report is affirmed by the court of appeals, without raising any question as to the propriety of the commission charged, the question becomes *res judicata*, and the amount of the commission charged, is beyond the reach of judicial inquiry. *Roller v. Pitman*, 98 Va. 613, 36 S. E. 987.

Statute of Frauds.—"In the case of *Barrett v. McAllister*, 35 W. Va. 103, 12 S. E. 1106 (decided during the present term of this court), it was held, where a defendant, upon a hearing in the circuit court, had waived the statute of frauds, and on appeal to this court the case was sent back, and the decree below affirmed, that the defendant could not make a new case by filing and relying upon a plea of the statute of frauds of perjuries. These cases only reaffirm and reassert the doctrine of *res judicata*, as so often held and laid down by this court. *Corrothers v. Sargent*, 20 W. Va. 351; *Tracey v. Shumate*, 22 W. Va. 474, 475; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223." *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66.

Failure to Prove Lien.—"While the debt of a party who ought to, but does not, prove his lien in such proceeding, is barred, as above stated, from participation in the proceeds of the sale, as a lien, yet the debt is not, as a personal debt against the debtor, barred merely from such failure. Nor is a lien on the land of the judgment debtor, created not by him, but by a former owner of the land, barred as to such land by failure of the owner to prove his lien therein, but, to bar him for failure to do so, he must be made a formal party. This is the case even

though the holder of such lien proved in the case another lien on the land created by the judgment debtor himself." *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1079, 29 Am. St. Rep. 774.

Equitable Defenses.—See the title ACTIONS, vol. 1, p. 149.

A party who in an action of debt against him files a plea under the statute, Va. Code, 1873, ch. 168, pp. 1098-1100, of the breach of the warranty in the sale of an animal, and claims to be relieved to the extent of the price paid for the animal—in which he succeeds—can not maintain another action for other damages and expenses he has incurred on account of the breach of said warranty. A party filing a plea under said statute, may claim and recover all the damages he has sustained by the breach of the warranty, which he could recover in an action for a breach of the warranty. If a party filing such a plea only claims and recovers a part of the damages he has sustained, and then brings an action to recover for other damages, a plea of the former judgment is a good plea in bar to the action. *Huff v. Broyles*, 26 Gratt. 283.

Set-Off.—See the title SET-OFF, RECOUPMENT AND COUNTER-CLAIM.

A party may plead or not plead a set-off, as he prefers. If he does not do so, the judgment or decree does not affect it. *Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 291.

If a creditor agree with a debtor that, if a decree shall be rendered for his debt, he will make a settlement with the debtor of demands constituting set-offs against the debt, and allow the debtor credit for the same on the decree, it is only an executory contract to apply the set-offs, and they are not regarded as payments, and the decree is not *res judicata* against them. *Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 291.

"It is contended that as both *Davisson* and *Kennedy* were defendants in

the Robinson suit, and filed answers, and gave their own evidence that Davisson's debt was unpaid, the decree is a bar against the set-offs sought to be enforced by Kennedy, on the principle of *res judicata*. There is no question that the decree is *res judicata* as to the justness and amount of Davisson's debt on its cause of action. It conclusively makes Kennedy Davisson's debtor to its amount. *Lehman v. Hinton*, 44 W. Va. 1, 29 S. E. 984; *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627, 22 S. E. 90. But that is not the question before us." *Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 291.

"The question is whether that decree bars Kennedy's set-offs so that he can not now assert them. They were not pleaded in Kennedy's answer, nor presented before the commissioner, nor was evidence adduced touching them. A party must, when sued on a debt, plead his payments, else they are barred. But while the record would shut out all antecedent payments, total or partial, it does not at all operate upon what are set-offs. A set-off is a distinct demand, the subject of a cross action, not a payment. A man may plead it when sued, or not plead it, and reserve it for a separate suit. If he plead it, the judgment is conclusive upon it. He may withdraw it before trial, but if he does not, and it is disallowed, it is barred by the judgment. 4 Minor's Inst. 707; 1 Bart. Law Prac. 509; 22 Am. & Eng. Ency. Law, 231; Bigelow, Estop. 174." *Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 291.

If a chancery suit be brought in a court of competent jurisdiction in another state, by some members of a copartnership lately doing business therein, against all the other partners, some of whom were residents of this state, to settle all the transactions of the partnership, and to compel the several partners to account with each other, and such defendants appear and file their answers in said cause adopt-

ing the allegations of the bill, and joining with the plaintiffs in the prayer for relief in the bill, and a final decree is rendered therein, decreeing to the several members of said copartnership the amounts due to each of them respectively, the rights of the said parties in regard to the matters embraced in said suit, are concluded by such decree. If one of said resident defendants collect the amount decreed to his codefendant, and he be sued by such codefendant in this state to recover the same, such defendant will not be permitted to set off against said demand any debt or claim held by him before such final decree arising out of such partnership, which was, or might have been settled thereby, and he will be estopped by such decree from alleging or proving that less was due to such codefendant when such decree was rendered, than the sum thereby decreed to him. *Hunter v. Stewart*, 23 W. Va. 549.

Upon settlement in 1857, F. executed his bond to D. for \$950, who signed a writing reciting the bond and agreeing to correct any mistakes in the settlement. Judgment at law was had on the bond in 1871, when the same agreement was entered on the record. Same was also entered in suit in chancery on the judgment in 1875. In 1881, report was recommitted for production of evidence of additional credits. In 1883, the master reported a credit of \$432, as of date of settlement in 1857, and his report was confirmed. Held, the credit was properly allowed. *Danner v. Frederick*, 82 Va. 414, 5 S. E. 537.

V. Particular Judgments, Actions and Proceedings Considered.

A. JUDGMENTS BY DEFAULT, AGREEMENT AND CONFESSION.

As to defaults, see the title JUDGMENTS AND DECREES.

In General.—A judgment by default, agreement, confession or trial is an

estoppel against the relitigation of all such direct questions as were or might have been in issue and determined thereby, in a collateral proceeding in equity between the same parties. *Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407.

The rule as to the conclusiveness and finality of judgments applies as much to a judgment by default as to one rendered on verdict found on issue joined. *Clark v. Perdue*, 40 W. Va. 300, 21 S. E. 735; *Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407.

Whether a judgment be the act of the court, or be entered up by the clerk under the statute, the effect is the same; in either case it is the act of the law, and until reversed by the court which rendered it, or by a superior tribunal, it imports absolute verity, and is as effectual and binding as if pronounced upon a trial on its merits. *Neale v. Utz*, 75 Va. 480.

"But treating it as a bill against *Holt* and *Mathews*, requiring them to answer, without regard to any pleading by *Rawson*, they did not plead to it, and if there be any decree against them by the final decisions of the case, it is a decree pro confesso. This necessitates an inquiry as to how far such a decree is conclusive in a collateral proceeding. 'A judgment by default is conclusive of all that is properly alleged in the complaint, and nothing more.' *Herman on Est. & Res. Adj.*, p. 46, citing *Unfried v. Heberer*, 63 Ind. 67. If by 'properly alleged' is meant that a bill or declaration will not support a judgment or decree in any case, unless it states a complete cause of action in every detail and is proof against a demurrer, this proposition is clearly at variance with the principles of our jurisprudence. If it were true, all the reasons for holding a merely erroneous judgment unimpeachable in a collateral proceeding would fail. Moreover, it is not supported by the better authorities. See *Thompson v. Wooster*, 114 U. S. 104, 111; *Heffner v. N. W. L. Ins. Co.*,

123 U. S. 747." *St. Lawrence Co. v. Holt*, 51 W. Va. 352, 41 S. E. 351.

Ejectment.—Our statute on the action of ejectment (ch. 90, W. Va. Codes, 1868, 1891) abolishes the writ of right, and moulds into the one action called "ejectment," simple, and comprehending all the substantial provisions of former law, with such improvements as were found to be proper to disentangle justice from nets of form, preserve all the benefits of the writ of right and of the action of ejectment, as well as of all other actions, possessory and droitural, and is also made comprehensive enough to try the mere right to real property, as well as the right of possession, and to determine it finally, being substantially a writ of right as much as an action of ejectment. See Report of Revisors of Code, 1849, p. 691, note. Such statutory remedy prevails now pretty much everywhere throughout common-law countries, and, except where a second trial is given, is a conclusive and final determination as to the title or right of possession established in such action upon the party against whom it is rendered, and against all persons claiming from, through, or under such party by title accruing after the commencement of such action, except as therein after mentioned (see § 35, ch. 90, Code); and such conclusiveness and finality applies as much to a judgment by default as to one rendered on verdict found on issue joined, for § 12, ch. 90, says: "And if the defendant fail so to appear and plead, his default shall be entered and judgment given against him." *Clark v. Perdue*, 40 W. Va. 300, 21 S. E. 735.

Persons Concluded.—A judgment by default can not conclude persons not parties or privies to the suit, although they have a common interest in the subject matter. *Brewis v. Lawson*, 76 Va. 36; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

In *Brewis v. Lawson*, 76 Va. 36, 40, *Burks, J.*, delivering the opinion of the

court, said: "A judgment (at least by default) against a personal representative in a suit to which the heirs or devisees of the decedent are not parties, is not evidence against such heirs or devisees in a suit or proceeding by the creditor to subject the real estate, descended or devised, to the payment of the debt; and the reason assigned is, that there is no privity between the representative and such heirs or devisees. It was so held, by this court at an early day (1810) in *Mason v. Peter*, 1 Munf. 437, and the decision has been since repeatedly recognized as authority. See *Foster v. Crenshaw*, 3 Munf. 514, 520; *Chamberlayne v. Temple*, 2 Rand. 384, 396; *Shields v. Anderson*, 3 Leigh 729, 736; *Street v. Street*, 11 Leigh 498, 508; *Robertson v. Wright*, 17 Gratt. 534, 540. And Chief Justice Marshall, in delivering the opinion of the supreme court in *Deneale v. Stump*, 8 Peters 531, said: 'It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them. It could not be given in evidence against them.' The same principle has been affirmed by the courts of other states. See *Harwood v. Rawling*, 4 Har. & Johns; *Davis v. Green*, Id. 270; *Birely v. Staley*, 5 Gill & J. 432, 453; *Sargent v. Davis*, 3 La. Ann. 353, 354; *McCoy v. Nichols*, 4 How. (Miss.) 31, 38; *Osgood v. Manhattan Co.*, 3 Cowen 612, 622; *Boykin v. Cook*, 61 Ala. 472." To the point that a judgment against the personal representative is no evidence against the heirs or devisees of the real estate, *Mason v. Peter*, 1 Munf. 437 is also cited in *Foster v. Crenshaw*, 3 Munf. 514, 520; *Shields v. Anderson*, 3 Leigh 729, 736; *Street v. Street*, 11 Leigh 498, 508; *Robertson v. Wright*, 17 Gratt. 534, 540; *Laidley v. Kline*, 8 W. Va. 218, 230; *Merchants' Nat. Bank v. Good*, 21 W. Va. 455, 462. But see Va. Code 1904, § 2668.

Matters Concluded.—If a physician sue for his services and judgment goes

by default, for the nonappearance of the patient, defendant in that suit, recovery by the former does not estop the latter from bringing a cross action for malpractice; but if he appear, unless the record shows that it was not to defend, but solely to disclaim the waiver of his own right, he is estopped by the recovery. *Holt, J.*, dissenting. *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564.

Judgment by Consent.—In a controversy in a county court about the confirmation of a report of commissioners appointed to assess damages for land taken for the use of a railroad company, no witnesses were examined, and a judgment was entered by consent against the company, confirming the report, and for the amount of damages assessed by the commissioners, for the purpose of removing the cause to the circuit superior court of the county by appeal, the counsel for both parties being of opinion, that an appeal lay of right to the circuit court. No such right of appeal existed, and the circuit court dismissed the appeal. Upon an appeal from an order of the circuit court dissolving an injunction to the judgment of the county court, held, that, although the damages were obviously excessive, and neither party intended that the judgment of the county court should be final and conclusive, that a court of equity could afford no relief against the judgment. *Richmond, etc., R. Co. v. Shippen*, 2 Pat. & H. 327.

A consent decree dismissing a bill with costs, with no saving therein of the right to bring another suit, is an adjudication of the merits of the cause. *Lockwood v. Holliday*, 16 W. Va. 651.

A judgment by consent, must have the same force and effect as any other judgment, so far as the doctrine of res judicata is concerned. *Richmond, etc., R. Co. v. Shippen*, 2 Pat. & H. 327.

Judgments by Confession.—See the title CONFESSION OF JUDGMENTS, vol. 3, p. 75.

A confessed or agreed judgment operates as fully as an estoppel as a judgment on the verdict of a jury. 21 Am. & Eng. Ency. Law 267. *Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407.

A judgment by default, agreement, confession or trial is an estoppel against the relitigation of all such direct questions as were or might have been in issue and determined thereby in a collateral proceeding in equity between the same parties. *Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407.

On a motion for award of execution against three obligors in a forthcoming bond, one of whom is principal and the other two are sureties, the entry upon the record states that as well the plaintiffs came by their attorney, "as the defendant, M." (the principal), "in his proper person, and the other defendants by their attorney, and the said defendants acknowledge judgment." In the same entry (after the judgment) is the following: "And the plaintiffs by their attorney here in court release to the defendants 183 dollars, 60 cents, and agree to stay execution of this judgment until the first day of the next term." On a bill in equity by the sureties, claiming a discharge on the ground that the agreement to stay was without their consent or knowledge, it is alleged that the sureties did not appear by an attorney at law, but by an attorney in fact; that the power under which the attorney acted did not authorize him to confess judgment with stay of execution; and that in fact he never consented to such stay, but the agreement for the stay was with the principal alone. The power of attorney is in these words: "We authorize J. M. to confess judgment for us and in our name, on a delivery bond in favor of S. & S. executed by us on the 18th of November, 1840;" and is signed and sealed by the three obligors. Held, that the entry must be taken altogether, and regarded as the record of a judgment between the parties upon

the confession of the defendants therein, with the condition of a stay of execution. That the power of attorney under which the attorney acted did authorize the confession of judgment with stay of execution. *Caldwells v. Shields*, 2 Rob. 305.

B. JUDGMENTS ON DEMURRER.

See the title DEMURRERS, vol. 4, p. 496.

In General.—A decision upon a demurrer which has clearly gone to the merits of the case is an effectual bar to further litigation. If it appears by the record that the point in controversy was necessarily decided in the first suit, whether upon a demurrer or the facts in issue, it can not be again considered in any subsequent suit. *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Coville v. Gilman*, 13 W. Va. 314; *Beckwith v. Thompson*, 18 W. Va. 103; *Corrothers v. Sargent*, 20 W. Va. 351, 356; *Poole v. Dilworth*, 26 W. Va. 583, 593; *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433.

A judgment or decree upon a demurrer, where it goes to the merits of the cause, is final and res judicata. *Corrothers v. Sargent*, 20 W. Va. 351, cited in *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 998.

A decision upon a general demurrer to a bill, which has clearly gone to the merits of the case, is an effectual bar to further litigation; and where no formal defects appear upon the face of the bill the court will presume that the demurrer has gone to the merits. *Corrothers v. Sargent*, 20 W. Va. 351.

In *Poole v. Dilworth*, 26 W. Va. 583, this court held: "A decision upon a demurrer, though it be but a decree dismissing a bill, will be conclusive of every matter whether specially stated in the bill or not, provided it is clear that such matter was necessarily in controversy in the suit and was decided in it, otherwise such decree will not be conclusive of such matter." *Biern v. Rav.* 42 W. Va. 129, 38 S. E. 530.

A decision upon a demurrer, though it be but a decree dismissing the plaintiff's bill, will be conclusive of every matter whether specially stated in the bill or not, provided it is clear that such matter was necessarily in controversy in the suit and was decided in it, otherwise such decree will not be conclusive of such matter. *Corrothers v. Sargent*, 20 W. Va. 351. According to this general rule, a decision upon a demurrer or issue of law, possesses the same conclusiveness as an issue upon a plea or issue of fact. In either case the matter so decided is *res judicata* and absolutely conclusive between the parties in any court whether of law or equity. *Bias v. Vickers*, 27 W. Va. 456, 463.

"Though a decision upon a demurrer be as in this case but a simple dismissal of the bill, it will be conclusive of every matter whether specifically stated in the bill or not, provided it is clear, that such matter was necessarily in controversy in the suit and was decided by it. Yet, if as in this case it be not clear, that such matter was not necessarily in controversy in the suit, and if it be not clear, that it was decided in such suit, such decision will not be conclusive of such matter." *Poole v. Dilworth*, 26 W. Va. 583.

Often has it been held, that a judgment on the first declaration on demurrer or verdict does not bar the second suit. "If the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration, which is supplied in the second suit, the judgment in the first suit is not a bar to the second." *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

Illustrative Cases.—In a widow's suit in the county court, in 1862, for the sole purpose of having her dower assigned, the court, after assigning dower, of its own accord decreed sale of the residue of the land for division of the proceeds among the infant heirs,

they being parties to the suit. Where, after the suit was removed to circuit court, the heirs filed in 1876 petition to rehear and avoid the decree of county court for want of jurisdiction, decree of circuit court dismissing petition makes not the matters alleged therein *res judicata*. *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36.

A surety on an injunction bond for the second endorser of a negotiable note, who has been compelled to pay said note, is entitled to recourse against the first endorser to recover the amount so paid. Nor is such surety barred of such recourse by the fact, that in another suit in equity, brought by the second endorser to establish the liability to him of the first endorser, the bill was dismissed upon answer and demurrer, there being set out several causes of demurrer, of which some went to the merits of the controversy, and others did not, and it not appearing for what cause the bill was dismissed. *Chrisman v. Harman*, 29 Gratt. 494, 26 Am. Rep. 387.

Demurrer to Cross Bill.—Where a county files a cross bill admitting the validity of certain of its bonds, yet on the ground that the plaintiff has not complied with its contract with the county, the county asked the court to decree that it was not bound, except to bona fide holders of the bonds for value and without notice, the effect of a dismissal of the cross bill on demurrer, when it appears that the demurrer was sustained upon the grounds going to the merits of the question raised by the pleadings, is to adjudge that the county is bound; and such a decree is, as between the same parties, a final determination of the question. *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433.

C. DISMISSAL, DISCONTINUANCE AND NONSUIT.

See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 704.

Dismissal Not on Merits.—The dismissal of a suit for any cause that does not determine the question raised by the pleading, is not an estoppel. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

In order that a judgment may constitute a bar to another suit, the point in controversy must be the same in both cases, and in the first must have been determined on the merits. An order simply dismissing the suit is not a determination on its merits, and so is not a bar to the maintenance of a second suit for the same cause of action. *Wilcher v. Robertson*, 78 Va. 602. See also, *Saunders v. Marshall*, 4 Hen. & M. 455.

Order of dismissal is not a determination on its merits, and is no bar to second suit for same cause of action. *Wilcher v. Robertson*, 78 Va. 602.

"In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of form of proceedings, or want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. *Hughes v. U. S.*, 4 Wall. 237." *Tate v. Bank*, 96 Va. 765, 32 S. E. 476. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879; *Chrisman v. Harman*, 29 Gratt. 494.

The dismissal of a suit, not conclusive on the merits, by one court of equity, will not prevent another co-ordinate court of equity from taking jurisdiction. *Carter v. Campbell*, Gilmer 159.

It must be an adjudication on the merits. The dismissal of a suit without prejudice, or for want of jurisdiction, or any other cause that does not

determine the questions raised by the pleadings, is not an estoppel. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

"Accordingly, it is the general practice in this country, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification, in a proper case, will be corrected on appeal." *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

The same rule applies to a defendant who sets up affirmative matter in defense of a suit against him. If the court dismisses him as to such matter without prejudice, it is not an adjudication on the merits, so far as such defense is concerned, and he has the right to institute any necessary suit to obtain such adjudication. And if the court decides such cause without considering the affirmative matter, and without preserving his rights as to the same, he may appeal, and have the decree reversed for this cause alone. And if the court does consider the case on the merits, and finally determines it, and yet reserves a right to either party to continue the litigation in a different form, this would be appealable matter, which would be corrected on appeal by the party prejudiced thereby. And if the party in the latter case fails to appeal, he is bound by the reservation in the decree, even though it should be erroneous, as it is an adjudication by the court that for some reason it has not jurisdiction of the matter reserved to the defendant, and therefore sends him to another and different tribunal. When a court decides a jurisdictional question, either for or against the right, its decision is reviewable; but, if the party prejudiced thereby fails to have such decision reversed, it becomes res adjudicata as to him, and he can never afterwards be heard to say that it is erroneous. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

On Pleadings.—A judgment for the defendant upon pleadings not going to

the foundation of the action, is no bar to the plaintiff's bringing another action for the same cause. *Lane v. Harrison*, 6 Munf. 573.

Where a petition to rehear is rejected on the ground that it is not accompanied by an affidavit, and because it does not state why the matters set up were not brought to the attention of the court before the decree was rendered, the matter does not become res judicata, and it is error to refuse leave to file a new petition, accompanied by an affidavit that the matter therein set up was unknown to petitioners, and could not have been known by reasonable diligence. "The rejection of that petition was not an adjudication rendering the matter res judicata, in the sense contended for by the appellees. Even a final decree dismissing a bill in equity, when made because of some defect in the pleadings, or upon some other ground not going to the merits of the case, is not a final determination which bars a renewal of the litigation in proper form. 1 *Hern. Estop.*, § 403; *Durant v. Essex Co.*, 7 Wall. 107; *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433." *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431.

Dismissal under Four Years' Rule.—

In order that a suit between parties, which has been pending for a time, and been dismissed under the four years' rule, should bar a subsequent suit between the same parties for the same subject matter, the first suit must have been heard upon its merits. *Cornell v. Hartley*, 41 W. Va. 493, 23 S. E. 789.

The dismissal of a suit for want of jurisdiction is not an estoppel. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

Dismissal for Want of Amendment.

—"A reference to the bill and answers, as hereinbefore stated, will clearly show that the matter in controversy in the suit pleaded in said answers, so far at least, as it relates to the attempt to enforce the vendor's lien set up in the bills, is identically the same and be-

tween the same parties litigant, as that set up in the suit at bar. This is virtually conceded by appellants' counsel, but he insists, and that is the only matter of difficulty, that the matters averred in the bill in said former suit were not litigated therein, because the court simply sent the bill to rules for amendment and the plaintiffs failing to amend, the bill was dismissed for the want of such amendment, and not upon the merits. To determine whether said dismissal was an adjudication of the subject matter of the bill or not, requires an examination of the nature of the order of dismissal and the necessary effect of the same. From the record it appears that at a circuit court held for the county of Taylor, on the 7th day of March, 1863, the cause came on to be regularly heard and certain of the defendants demurred generally to the plaintiffs' bill and the plaintiffs joined in said demurrer, and the cause was set for hearing on said demurrer, and was signed by counsel. "On consideration whereof the court is of opinion and doth consider that the said demurrer be sustained, and doth adjudge, order and decree that the plaintiffs' bill be dismissed and that the defendants last named (the demurrants) recover against the plaintiffs their cost by them about their defense in this behalf expended. And on motion of the plaintiffs, and for reasons appearing to the court, they withdraw their joinder in defendants' demurrer, and on their further motion they have leave to amend their bill, and for that purpose this suit is remanded to rules." At the May rules, 1863, on the motion of the defendants a rule was awarded against the plaintiffs for an amended bill. And the plaintiffs having failed to file an amended bill, at the June rules, 1863, on motion of defendants the cause was dismissed. And at a term of said court held on the 27th day of August, 1863, a final decree was entered in the cause as follows: "This day came the plaintiffs and the defendants (the demur-

rants), and the office dismissal had herein not having been set aside, and this being the last day of the term, the said dismissal is now final. Therefore, the suit is dismissed, and it is considered that the said defendants recover against the plaintiffs their costs by them about their defense in this behalf expended, etc." Thus it appears by the said decree of March 7, 1863, that the court sustained the demurrer of the defendants and dismissed the plaintiffs' bill with costs. The demurrer was general, and as no formal defects appear, the conclusion is irresistible that the court was of opinion that the facts averred in the bill did not entitle the plaintiffs to relief, and therefore it must have dismissed the suit for the want of merit. This was necessarily an adjudication of the facts set out in the bill, and a positive decision against the plaintiffs on the merits." *Corrothers v. Sargent*, 20 W. Va. 351, 357, 358.

Caveat.—It has been held by this court that an order dismissing a caveat, when not on the merits, is not conclusive of the controversy. *Hunter v. Hall*, 1 Call 206; *Wilcher v. Robertson*, 78 Va. 602, 618.

A dismissal of a suit, by the plaintiff's order, is no bar to his bringing another suit, for the same cause of action. *Coffman v. Russell*, 4 Munf. 207.

A withdrawal by one interested of his exceptions to the settlement of an ex parte report to settlements of an executor's account after he had filed them, does not estop him from afterwards filing his bill in equity to surcharge and falsify the account after it is confirmed. *Seabright v. Seabright*, 28 W. Va. 412. See also, *National Bank v. Jarvis*, 28 W. Va. 805.

Pauper Suit for Freedom.—Relief given in equity, in a pauper's suit for freedom, (1) by awarding a new trial at law, and, a (verdict being certified) decreeing for the plaintiff; upon a bill stating, that, in the previous proceed-

ings, he had not been permitted to obtain his testimony; and on proof now produced in support of his right; notwithstanding the defendant pleaded in bar to such relief, a former verdict and judgment, by which the plaintiff was declared to be a slave, and a decree of another court of chancery dismissing a similar bill, exhibited on his behalf; from which judgment and decree he had not appealed. *Isaac v. Johnson*, 5 Munf. 95.

Dismissal upon Demurrer.—Defendant files an answer to a bill of discovery, in which, without responding to the allegations and interrogatories of the bill, he states that the same plaintiffs had heretofore filed a bill against him for the same subject matter, and that upon a demurrer thereto the same had been dismissed by a decree of the court, which decree remained in full force and unreversed; and he sets up that decree in bar to the last suit. *Quære*, if bill dismissed upon demurrer is a bar to another suit upon the same subject matter. *Northwestern Bank v. Nelson*, 1 Gratt. 108.

A surety on an injunction bond for the second endorser of a negotiable note, who has been compelled to pay said note, is not barred from recourse against the first endorser to recover the amount so paid by the fact that, in a suit in equity brought by the holder of such note against the maker and endorsers, a decree was rendered in favor of the first endorser. Nor is the surety barred of such recourse by the fact that, in another suit in equity brought by the second endorser to establish the liability to him of the first endorser, the bill was dismissed upon answer and demurrer, there being set out several causes of demurrer, of which some went to the merits of the controversy, and others did not, and it not appearing for what cause the bill was dismissed. *Chrisman v. Harman*, 29 Gratt. 494.

"A dismissal of a suit 'without prejudice' is no decision of a controversy on

its merits, and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought." This statement of the law is found in *Mathews v. Glenn*, 100 Va. 352, 41 S. E. 735, and is sustained, if it needs authority in support of it, by *Ragsdale v. R. R. Co.*, 62 Miss., at page 487, and *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238." *Newberry v. Ruffin*, 102 Va. 73, 45 S. E. 733.

The dismissal of a suit without prejudice does not determine the question raised by the pleading, and therefore is not an estoppel. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

If a judgment of reversal states that it "is not to bar or prejudice any future claim of the appellee, made on fuller proof of the auditor," and the new case does not differ from the former, the first judgment concludes the cause. *Innis v. Roane*, 4 Call 379.

When a decree is entered reserving the right to any party to further litigate any matter in controversy in the suit, such reservation may be reviewed on appeal by any party prejudiced thereby, and, if no appeal is taken, such reservation becomes *res adjudicata*, and can not be called in question by any party in any other suit or proceeding. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

Where an action for damages for breach of the conditions of a written contract is brought before a justice, and upon a general denial by the defendant of the complaint, the justice hears the case upon the evidence, and arguments of counsel and enters a judgment dismissing the plaintiff's suit for failure to prove the execution of the contract sued on, with costs, he can not, by adding the words "without prejudice to a new suit," authorize a new suit for the same cause of action. If a new suit is brought by the plaintiffs against the same defendant for the same cause of action, and the plea of *res adjudicata* is interposed by the

defendant, it will bar the action. "The case under consideration was not dismissed for defect of pleadings, or want of proper parties, or a misconception of the form of proceeding, or for want of jurisdiction, or upon any other ground which did not go to the merits of the action, but after a full hearing of the case upon the proofs and allegations of both parties. The action of the justice in this case in dismissing it without prejudice to a new suit can be regarded in no other light than allowing the plaintiffs to suffer a nonsuit, after the parties had presented their proofs, and they had been fully considered by the court in lieu of a jury." *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. 806.

Discontinuance.—Where a plaintiff discontinues his action, the judgment is no more than an agreement not to proceed farther in that suit against that particular defendant. Such judgment is not a bar to any future action against the same party. *Muse v. Farmers' Bank*, 27 Gratt. 252, 257, citing *Coffman v. Russell*, 4 Munf. 207, as a direct authority upon the point.

Nonsuit.—"One was a plea of *res adjudicata*, based on a judgment of a justice for some cause in favor of defendants. It is faulty because it does not in any way show that the dismissal of the suit before the justice was on the merits, so as to be a bar to a second suit; for, if it was a nonsuit, or any other of many causes not precluding another suit, it would not bar." *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

There is a demurrer to a declaration and to each of the six counts thereof, the court sustains the demurrer as to four counts and overrules it as to two which set out a different cause of action. A subsequent order, which recites that the demurrer had been sustained as to four of the counts in the declaration leaving and sustaining only the third and fourth counts, says as to them: "On which the plaintiff is un-

willing to risk his case alone, he suffers a nonsuit as to them without fine, which the defendant waives," and then proceeds: "It is, therefore, considered by the court, that the plaintiff be nonsuited as to said counts, and that defendant recover against the plaintiff his costs herein expended." Held, it was not a nonsuit as to the two counts. If a nonsuit at all, it went to the whole case, as there is no such thing as a partial nonsuit. It was not a nonsuit but was a retraxit as to the said third and fourth counts, and a final judgment on the demurrer to the other four counts. It was also a judgment against the plaintiff on the said third and fourth counts, and no suit could ever be prosecuted for the same cause of action, as is set out therein or in either of them. *South Branch R. Co. v. Long*, 26 W. Va. 692.

Dismissal upon Merits.

In General.—In *Durant v. Essex Company*, 7 Wall. 107, it was held, that a decree, absolute in its terms, dismissing a bill in equity, is an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant had an adequate remedy at law, or upon some other ground which does not go to the merits. And, so the court, where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. Quoted in *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36; *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433.

Dismission of a suit on its merits at the hearing, whether on plea in bar or demurrer for want of equity or cause of action, is a bar to another suit for the same subject matter between the same parties, unless the dismissal be

"without prejudice," etc.; whereas if the bill is dismissed for defect of form or structure, not going to the merits, it is no bar to a future suit for the same subject matter. *Payne v. Grant*, 81 Va. 164; *Hughes v. U. S.*, 4 Wall. (U. S.) 237; *Durant v. Essex Company*, 7 Wall. (U. S.) 107. *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36; *Cornell v. Hartley*, 41 W. Va. 493, 23 S. E. 789. *Barton's Ch. Pr.* (2d Ed.) 358; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861; *Wandling v. Straw*, 25 W. Va. 692; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

Injunction to Enforcement of Deed of Trust.—Where a bill for an injunction is filed to prevent the enforcement of a deed of trust on the ground that the consideration of the bond secured by the deed of trust is usurious, and the cause is heard on the bill and answer and dismissed at the plaintiffs' costs, this is final and conclusive in a subsequent controversy involving the charge of usury in the transaction. *Tracey v. Shumate*, 22 W. Va. 474.

Fraudulent Deeds.—A decree, by a court of competent jurisdiction, dismissing a bill, upon the ground that the deed under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill. *Holliday v. Coleman*, 2 Munf. 162.

Dismissed without Reservation.—A bill in equity having been dismissed generally without a reservation of any right of the plaintiff to sue thereafter, is conclusive between the parties and those claiming under them upon all the issues made up in the cause. *Taylor v. Yarbrough*, 13 Gratt. 183, cited and followed in the following cases: *Carberry v. West Virginia, etc., R. Co.*, 44 W. Va. 260, 265, 28 S. E. 694, 695; *Watson v. Watson*, 45 W. Va. 290, 295, 31 S. E. 939, 940. See, in accord, *Van*

Dorn v. Lewis County Court, 38 W. Va. 267, 18 S. E. 579. See *Clifton v. Town of Weston*, 54 W. Va. 250, 253, 46 S. E. 360.

"See *Watson v. Watson*, 45 W. Va. 290, 31 S. E. 939, where it is held that 'a bill in equity dismissed generally without any reservation to the plaintiff to sue thereafter, is conclusive between the parties, and those claiming under them, of all the issues made up in the cause, even though there was no jurisdiction in equity because of adequate remedy at law.' See also, *Carberry v. West Virginia, etc., R. Co.*, 44 W. Va. 260, 28 S. E. 694 (syl., point 5)." *Buskirk v. Chafin*, 48 W. Va. 630, 37 S. E. 552.

An order dismissing a case agreed is a bar to another suit on the same cause of action. *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199.

The judgment of a court of competent jurisdiction, dismissing a suit agreed, on the ground that it has been agreed by the parties, is a final determination of the matters which were actually, or might have been, litigated in that suit as against said parties and all claiming under them. *Hoover v. Mitchell*, 25 Gratt. 387; *Wilcher v. Robertson*, 78 Va. 602; *Wohlford v. Compton*, 79 Va. 333.

Hoover v. Mitchell, 25 Gratt. 387, is approved in *Siron v. Ruleman*, 32 Gratt. 215; *Wohlford v. Compton*, 79 Va. 333; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

Where a party dies pendente lite, the suit may be compromised by his administrator, and a judgment entered dismissing the suit agreed, without there having been any revival thereof, is, unless reversed on appeal, final and a bar to further prosecution of that or any other suit for the same purpose. *Wohlford v. Compton*, 79 Va. 333.

An action of ejectment was brought in 1848, on the demise of S. v. C., to recover the possession of 2,300 acres of land. In 1870, S. died, and the cause

was revived in the name of his heirs. In August, 1872, C. having died, his death was suggested on the record, and a scire facias was awarded to revive the cause against his "heirs," none of whom were named, but no scire facias ever issued, and the cause was never revived, nor were any of the heirs of C. ever made parties to the suit, nor did they ever appear therein. On the 19th of November, 1872, the court entered the following judgment, which was never reversed or set aside: "For reasons appearing to the court, and by consent of parties, this cause is dismissed agreed." In 1879, the heirs of S., to recover the same land, brought an action of ejectment against the heirs of C., who relied upon said judgment as a bar to the plaintiff's recovery in their new action; and, the circuit court having so instructed the jury, there was judgment for the defendants. Upon a writ of error, held, that the said judgment operated as a simple dismissal of said action, and can not operate as a bar to a recovery in said new action for the recovery of the same land. *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143.

Discontinuance.—Where a plaintiff discontinues his action, the judgment is no more than an agreement not to proceed farther in that suit against that particular defendant. Such judgment is not a bar to any future action against the same party. *Muse v. Farmers' Bank*, 27 Gratt. 252, 257, citing *Coffman v. Russell*, 4 Munf. 207, as a direct authority upon the point.

A judgment of non prosequitur will not bar a second suit for the same cause, it having the effect of a nonsuit. *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863.

Retraxit.—See the title DISMISSAL, DISCONTINUANCE AND NON-SUIT, vol. 4, p. 723.

Nolle Prosequi.—See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 724.

D. JUDGMENTS OF FEDERAL COURTS.

See the title UNITED STATES.

A judgment upon the merits of the case is a bar or estoppel against a prosecution of a second action upon the same demand, and is a finality to the claim or demand in controversy and concludes parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim, but also any other admissible matter which might have been used for that purpose; such demand or claim having passed into judgment can not again be brought into litigation between the parties in proceedings at law upon any ground whatever. These principles apply with equal force as well to judgments of the inferior courts of record of the United States rendered in this state between parties subject to their jurisdiction, as to judgments of the circuit courts of this state. *Wandling v. Straw*, 25 W. Va. 692.

The supreme court of the United States having decided that the act of congress requiring the collection of twenty-five cents on each package of manufactured tobacco for exportation from the exporter, is not a tax on the exportation of the article, the question whether that act is a violation of art. 1, § 9, cl. 5, of the constitution of the United States, is *res adjudicata*; and this court is bound by it. *Burwell v. Burgess*, 32 Gratt. 472.

E. FOREIGN JUDGMENTS.

See the title FOREIGN JUDGMENTS, ante, p. 208.

See the title FOREIGN JUDG— not only to judgments and decrees of the same state, but to the judgments and decrees of the courts of any state in the Union, whenever questioned in any sister state, provided there was personal service or an appearance of the parties to the suit in the sister state. *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Black v. Smith*, 13 W. Va. 780.

F. SENTENCE OR JUDGMENT OF PROBATE COURT.

See the title WILLS.

When a paper is propounded for probate to the proper court by a devisee, and there is a sentence of the court fairly obtained and pronounced on the merits, excluding the paper from the probate, such sentence of exclusion from probate is conclusively binding upon all claiming under the paper. *Schultz v. Schultz*, 10 Gratt. 358; *Connolly v. Connolly*, 32 Gratt. 657; *Ballow v. Hudson*, 13 Gratt. 672.

The sentence of a court of probate fairly obtained and pronounced upon the merits, by which a paper propounded as a will by the nominated executor is rejected, in a proceeding in which some of the next kin interested to defeat it, are parties defendants, is conclusively binding upon a legatee in the paper, though he was an infant at the time, and no party to the proceeding. And the paper can not again be propounded by the legatee. It would be intolerable evil, if the controversy could be renewed, from time to time, at the pleasure of the same, or even of other parties. Obvious considerations of justice and sound policy require that in a proceeding of so much publicity and notoriety, intended to sanction or condemn perpetually an important muniment of title; affecting various interests, original and derivative, which time only can fully develop and determining prospectively, channels of succession, powers of representation, and classes of ownership; there should be, as far as practicable, uniformity, consistency and finality. Such a proceeding becomes to a great extent, a matter of public as well as private interest; and both the general good and individual security prohibit that it should be, so far as can be avoided, in any wise uncertain, vacillating or precarious. *Wills v. Spraggins*, 3 Gratt. 555.

Analogous to Judgments in Rem.—
"When a will has been propounded by

the party interested, and fairly rejected on the merits, it would defeat the policy of the law, and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested, and the contest thus renewed from time to time. The sentence therefore against the will must be regarded as a sentence against all claiming under it. It stands upon a footing analogous to the cases known as judgments in rem, which being adjudications upon the subject matter are regarded as final and conclusive not only in the courts in which they are pronounced, but in all others in which the same question arises." *Schultz v. Schultz*, 10 Gratt. 358; *Connolly v. Connolly*, 32 Gratt. 657.

Will Rejected in County Court Can Not Be Offered for Probate in Circuit Court.—Where a paper was propounded for probate to the county court of C., as the will of B., and was rejected on the ground that B. was incompetent to make a will, and, afterwards, the paper was propounded for probate to the circuit court of C., and that court, with knowledge that it had been rejected in the county court, admitted it to probate, the sentence of the county court is conclusive against the will, and the sentence of the circuit court is a nullity. *Ballow v. Hudson*, 13 Gratt. 672.

A testator in 1868 made a will devising and bequeathing all his property to two adopted daughters. In 1876, he executed a few days before his death another paper purporting to be his will, whereby he devised and bequeathed all his property to one of the adopted daughters saying nothing about the other, who was still living. This last paper was probated in the county court; but subsequently the probate was annulled by a decree in chancery in a suit brought by the other adopted daughter, and this last paper was declared not to be the will of the deceased. This last paper can not be relied upon by the heirs of the deceased

as a revocation of the will of 1868, though they were not parties to the chancery suit, in which this last paper was declared to be null and void and inoperative as a will. *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646.

G. DETINUE AND REPLEVIN.

See the title DETINUE AND REPLEVIN, vol. 4, p. 647.

A judgment against one person in an action of detinue for a slave, is, while unsatisfied, a bar to another action for the same slave, and by the same plaintiff, against another person. *Murrell v. Johnson*, 1 Hen. & M. 450.

In detinue, the plea of non detinet puts in issue the title of the plaintiff, as well as the act of detention. But in such case the verdict does not operate as an estoppel, unless the ground upon which it was rendered appear from the record or by extrinsic evidence. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

After a judgment in detinue, a new action of detinue against the same defendant for the same thing, in which the former judgment is not declared upon, but is only relied on as evidence of title, can not be maintained. *Withers v. Withers*, 6 Munf. 10.

After a judgment in detinue for slaves, the plaintiff can not come into equity for profits accruing afterwards, pending an appeal; nor to recover their increase not included in such judgment; nor to compel the delivery of them by purchasers from the defendant. *Alderson v. Biggars*, 4 Hen. & M. 470.

H. DIVORCE DECREES.

See the title DIVORCE, vol. 4, p. 734.

Grounds of Divorce.—A decree of divorce in a former suit between the same parties, in which the suit is dismissed on the merits, is a bar to a subsequent suit upon all the grounds set forth in the first bill, but not as to different and distinct grounds. *Miller v. Miller*, 92 Va. 196, 23 S. E. 232.

Where a bill is filed praying a divorce a mensa et thoro, on the ground of cruelty, intemperance and abandonment, and a decree is granted, and another suit is filed for a divorce a vinculo matrimonii, upon the same ground as in the former suit, with one exception (adultery), a plea of res adjudicata set up in the defendant's answer, and supported by the record of the former suit between the same parties, is good as to all the grounds except the one above mentioned. *Miller v. Miller*, 92 Va. 196, 23 S. E. 232.

Alimony.—A decree of divorce a mensa et thoro allowing alimony to the wife is res judicata as to the alimony; but the husband may be discharged therefrom by the subsequent adultery of the wife. *Cariens v. Cariens*, 50 W. Va. 113, 40 S. E. 335.

Property Rights.—A debt secured by trust deed on land, became, under the creditor's will, the separate property of a married woman, with whose knowledge and consent it was settled with her husband in the purchase of land that was conveyed to her and yet remains hers. Subsequently the bond of matrimony between them was annulled, but the rights of property were left by the decree as they stood at its date. Afterwards she claimed the debt as her property and as unpaid, alleging her ignorance of her rights under act of April 4, 1877, at the time of the settlement. By her direction the trustee advertised the land for sale under the trust deed. The debtor obtained an injunction to the sale. Held, the rights of property between them became res judicata by the decree of divorce. "In the divorce suit of *Throckmorton v. Throckmorton*, supra, the question as to property rights of the wife was raised, and by the decree in that cause they were disposed of by the decree of absolute divorce, without settling the property rights, and the rights of property were left where they were at the date of the decree. *Porter v. Porter*, 27 Gratt. 599. These rights certainly

might have been disposed of in the divorce suit, and so the matter is res judicata. *Campbell v. Campbell*, 22 Gratt. 649, 666; *Findlay v. Trigg*, 83 Va. 539, 543, 3 S. E. 142. *Osburn v. Throckmorton*, 90 Va. 311, 18 S. E. 285.

I. PROCEEDINGS RELATING TO TITLE AND LAND.

1. Decree as Link in Chain of Title.

The record in a chancery cause is legal evidence for the defendant as a link in his chain of title, though the plaintiff was not a party to the cause. *Baylor v. Dejarnette*, 19 Gratt. 162; *Waggoner v. Wolf*, 28 W. Va. 820, 825.

A decree constituting a link in a chain of title is competent evidence thereof against all the world. *Building, Light, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

But a record to which neither the demandant nor tenant was a party, is not even prima facie evidence against the tenant that the grantor in the deed to the demandant was heir at law of the grantee in the patent in which the demandant claimed title. *Duncan v. Helms*, 8 Gratt. 68.

Where a deed made under a decree by a commissioner or other authority is offered in evidence as a connecting link of the party's chain of title to land, it is necessary to introduce with it so much of the record of the suit, in which such decree was made, as will satisfactorily show, that the persons having the legal title to the land conveyed were parties to the suit, and as will identify the land. *Waggoner v. Wolf*, 28 W. Va. 820.

In tracing a title to land in controversy, a decree in a suit between other parties, is not evidence, against a person claiming under neither of them, that one of those parties was, in fact, as therein described, eldest son and heir of a former proprietor; it being incumbent upon the party, wishing to avail himself of such fact, to prove it by evidence aliunde, but such decree

may be received (as a link in the chain of evidence) to prove the fact that it was rendered. *Lovell v. Arnold*, 2 Munf. 167.

An order of court, appointing commissioners to assign the widow her dower, although made ex parte, and on motion, without regular proceedings in chancery, and the reports of the commissioners are proper evidence, to show that the slave was allotted to the widow for life only; especially, where the widow and her second husband were present and consented to the allotment. *Hunter v. Jones*, 6 Rand. 541.

Where a deed is made by a commissioner or other authority, the decree conferring or attempting to confer such authority is always legitimate and proper evidence, because where title is claimed or derived under a decree, it is necessary to establish the existence of the decree in order to show the validity of the deed. But the legal effect of such decree must generally depend upon other facts. The most important of which is, when it is introduced as a link in the chain of the party's title, that it was made in a suit in which the land is described and to which the persons whose title it transfers or devests were parties. *Baylor v. Dejarnette*, 13 Gratt. 162, 163; *Smith v. Chapman*, 10 Gratt. 445; *Cales v. Miller*, 8 Gratt. 6; *Waggoner v. Wolf*, 28 W. Va. 820.

2. Ejectment.

Prior to the statutes, the rule was, that no verdict and judgment in ejectment, could be relied on as a bar to a subsequent ejectment, though for the same land, and between the same defendants and lessors of the plaintiffs, if the fictitious plaintiffs were not the same. *Pollard v. Baylors* (1819), 6 Munf. 433; *Chapman v. Armistead* (1815), 4 Munf. 382. See *Bargamin v. Clarke*, 20 Gratt. 544, 549.

But in Virginia since the revival of 1850, judgments in actions of ejectment have been conclusive. Va. Code, 1849,

p. 562, § 35; Va. Code, 1887, § 2756; Va. Code, 1904, § 2756.

And in West Virginia, the court said: "Our statute on the action of ejectment (ch. 90, Codes, 1868, 1891) abolishes the writ of right, and molds into the one action called 'ejectment,' simple, and comprehending all the substantial provisions of former law, with such improvements as were found to be proper to disentangle justice from nets of form, preserve all the benefits of the writ of right and of the action of ejectment, as well as of all other actions, possessory and droitural, and is also made comprehensive enough to try the mere right to real property, as well as the right of possession, and to determine it finally, being substantially a writ of right as much as an action of ejectment. See Report of Revisors of Code, 1849, p. 691, note. Such statutory remedy prevails now pretty much everywhere throughout common-law countries, and, except where a second trial is given, is a conclusive and final determination as to the title or right of possession established in such action upon the party against whom it is rendered, and against all persons claiming from, through, or under such party by title accruing after the commencement of such action, except as thereafter mentioned (see § 35, ch. 90, Code); and such conclusiveness and finality applies as much to a judgment by default as to one rendered on verdict found on issue joined, for § 12, ch. 90, says: 'And if the defendant fail so to appear and plead, his default shall be entered and judgment given against him.'" *Clark v. Perdue*, 40 W. Va. 300, 21 S. E. 733.

Persons Concluded—Parties and Privies.—In an action of ejectment, the record of another action of ejectment between other parties, not in privity with the parties to the present suit, is not competent evidence upon a question of boundaries, or the location of the land in controversy. *Reusens v. Lawson*, 100 Va. 143, 40 S. E. 616, citing *Stinchcomb v. Marsh*, 15 Gratt. 202.

In an action of ejectment, the record of another action of ejectment between other parties, is not competent evidence upon a question of boundaries or the location of the land in controversy. *Stinchcomb v. Marsh*, 15 Gratt. 202.

Landlord and Tenant.—Where an action of ejectment is brought by an adverse claimant against a tenant to recover possession of the premises, and judgment is rendered for such plaintiff against the tenant by default, and a writ of possession is executed by which the plaintiff is placed in actual possession, the possession is thereby changed, and the landlord is thereby actually turned out; in a second action of ejectment by plaintiffs, who derive title from the plaintiff in the first suit, against such landlord, sued as defendant, the record of the recovery in the former suit is competent evidence on behalf of plaintiff in the latter suit as showing or tending to show that the defendant's possession at that time was ended and changed by the execution of such writ of possession. "George W. Perdue, being the landlord, was the real party in interest, who could not, as the law then was, have been made a defendant, who would, however, have been the real party benefited had there been a defense and judgment in favor of his tenant, or had he made himself a defendant, and obtained such judgment. Such an one, having an opportunity to make defense, and standing by and letting judgment against his tenant go by default, would, under our then statute, seem to be as much bound and concluded as his tenant in possession (there being no fraud or collusion which vitiates such judgments), for the plaintiff could not make him a defendant, but he could enter himself as such, and make defense, if he saw fit. But the law has been changed, and now permits the plaintiff to make the landlord a codefendant. See § 5, ch. 90, Code (Ed. 1891), p. 699." *Clark v. Perdue*, 40 W. Va. 300, 21 S. E. 735.

Persons under Disability—Infants.—H., the owner of a ground rent in fee secured upon a lot of ground owned in fee by L., brought ejectment against V., the tenant in possession, to recover the lot for the failure of L. to pay the rent; and there was a judgment by default in favor of H., who proved by his own testimony that the rent was due; and there was no sufficient distress upon the premises; and H. was put into possession of the premises. At this time L. was an infant under twenty-one years of age. After one year from the time H. was put into possession, but within five years after L. came of age, he brought ejectment against H. to recover the lot. Held, though L. was not a party to the action of H., yet V., the tenant in possession, was, and that, under § 16 of ch. 138, is sufficient. And the proof by H. was sufficient. *Leonard v. Henderson*, 23 Gratt. 331. See Va. Code, 1904, § 2757.

3. Judgments in Condemnation Proceedings.

See ante, "Persons Concluded," III; "Matters Concluded," IV.

The court in condemnation cases has under the statute jurisdiction of the subject matter and parties; and its judgments, unless reversed in some appellate proceeding, would therefore be conclusive upon the parties. Independent of statutory proceedings a judgment of a court of competent jurisdiction in condemnation proceedings is as conclusive upon the parties thereto, as any other judgment. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

Failure to Plead Defenses.—Where judgment is rendered for a city in street condemnation proceedings, the landowner can not, in a prosecution for obstructing the street, defend on the ground that the proceeding was illegal. *Foster v. Manchester*, 89 Va. 92, 15 S. E. 497.

The finding of a jury, in a mill case, that "probably the health of certain

families who live near the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner. *Mayo v. Turner*, 1 Munf. 405.

In *Leighton v. Maury*, 76 Va. 875, *Mayo v. Turner*, 1 Munf. 405, was cited as holding, that if in the opinion of the jury of inquest, the health of the neighbors will not be annoyed by the erection of a milldam, a person supposing himself to be aggrieved thereby may appear as a contestant, and contest the finding of the jury by their evidence. If, on the contrary, the jury reports that the health of any part of the neighbors will in its opinion be affected, or will probably be affected, this is conclusive; no evidence can be adduced to controvert it; for the law says that in such case, the court shall not give leave to build the mill and erect a dam. *Miller v. Truehart*, 4 Leigh 569, 574, citing *Mayo v. Turner*, 1 Munf. 405.

J. EX PARTE PROCEEDINGS.

Proceedings for the assignment of dower being ex parte, whether with or without notice to the widow, is not an adjudication of the question, who are the heirs of the deceased? This question in any controversy between the parties subsequently, will in no manner be affected by the action or judgment of the court in such proceeding. *Jones v. Fox*, 20 W. Va. 370.

K. AWARD.

See the title **ARBITRATION AND AWARD**, vol. 1, p. 707.

Mere agreement to submit to arbitration is revocable until actual award; but after an actual award, such award may be pleaded in bar of another action. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366, citing *Martin v. Rexroad*, 15 W. Va. 512; *Corbin v. Adams*, 76 Va. 58.

Where an order is made by consent in a justice's court, submitting the matter in controversy to arbitration, the submission is not revocable, except by order of the justice under the statute, and that submission is a bar to a second

suit for the same cause. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

A plea of such submission to arbitration, filed in a subsequent action in a circuit court on the same cause of action, must be in abatement, not in bar, and comes too late after pleas in bar have been filed. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

The parties are bound to present every claim or matter embraced in their submission to arbitrators, unless it is expressly withdrawn before the hearing; and as to any claim or matter thus embraced and not so withdrawn, an award general in its form is conclusive against the party having such claim or matter in any future controversy. *Tennant v. Divine*, 24 W. Va. 387.

L. CRIMINAL PROSECUTIONS.

See the title **AUTREFOIS, ACQUIT AND CONVICT**, vol. 2, p. 181.

In the hustings court of the city of Petersburg it was held, that where the result of a previous trial is an adjudication of a certain fact in favor of the defendant which shows his innocence of the charge in the case at bar, and such fact was directly and necessarily in issue on the former trial, and was decided on its merits in favor of the accused, it is res judicata on the subsequent trial, and the proper manner of raising the objection is by plea of res judicata. 12 Va. Law Reg. 36, criticizing *Justice v. Com.*, 81 Va. 209.

In *Justice v. Com.*, 81 Va. 209, it was said that the doctrine of estoppel is not applicable to the commonwealth in a criminal prosecution. The maxim "no one shall be put twice in jeopardy for the same offense" rests upon the technical notions of jeopardy, and not upon the principle of res judicata. *Chrisman v. Harman*, 29 Gratt. 494.

Although leave has been given by the county court to erect a mill according to the provisions of the statute, yet that is no bar to a public prosecution or private action for injuries, than those actually foreseen, and estimated

by the inquest. *Com. v. Faris*, 5 Rand. 691.

M. JUDGMENTS OF APPELLATE COURTS.

See the title APPEAL AND ERROR, vol. 1, p. 645.

VI. Pleading and Proof.

A. PLEADING.

1. Necessity of Pleading.

To obtain the benefit of *res judicata* it must be pleaded. *Beall v. Walker*, 26 W. Va. 741; *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250. See *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530.

In order that a matter may thenceforth be considered as *res judicata*, the claims of the respective parties concerning the matter must be formally presented to the court, and duly passed upon. *Tarter v. Wilson*, 95 Va. 19, 27 S. E. 818.

If it appears by the bill of the complainants, that there has been an adjudication of the question by a court of competent jurisdiction in a proceeding, in which that question could properly arise, and between the same parties or their privies to this controversy, it is *res judicata*, although it is not so claimed or relied upon either in the bill or in the answer. *Houser v. Ruffner*, 18 W. Va. 244.

2. Manner of Pleading.

In General.—In *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 33, 37 S. E. 321, 325, 6 Va. Law Reg. 665, it is said: "A distinction has been taken in England, and in some of the United States, and several times recognized in this state, between the effect of a judgment as an estoppel where it is pleaded, and where it is only relied on in evidence. In the first instance, it is held to be conclusive; in the last instance, it is held, that the jury are not estopped, but must find their verdict upon the whole evidence in the case, and may find against the former judgment. *Cleaton v. Chambliss*, 6 Rand. 86;

Craddock v. Turner, 6 Leigh 129; *Carroll County v. Collier*, 22 Gratt. 302, 309; *Hayes v. Virginia Mutual Protective Ass'n*, 76 Va. 225, 231."

A judgment between the same parties, upon the same point, which, if pleaded, would have been a perfect bar is, when used as evidence under the general issue, not conclusive on the jury, but only evidence to be weighed by them. *Cleaton v. Chambliss*, 6 Rand. 86; *Bogle v. Conway*, 3 Call 1. Compare *Shelton v. Barbour*, 2 Wash. 64.

A former judgment set up by plea is conclusive, but if only relied on in evidence, the jury are not estopped by it, but must find their verdict upon the whole evidence in the case, and may find against the former judgment. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

But in *Shelton v. Barbour*, 2 Wash. 64, the court held a former verdict between the same parties and privies as conclusive, though such verdict was only relied on in evidence and not pleaded. The court in *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, in deciding the practice in Virginia to be otherwise, cited this case, but apparently failed to note this discrepancy.

General Issue.—Even a judgment between the same parties, upon the same point, and which, if pleaded, would have been a perfect bar, is, when used as evidence under the general issue, not conclusive upon the jury, but only evidence to be weighed by them; the doctrine being, that though the party is estopped if the matter be pleaded, yet that the jury, upon the general issue, are not estopped, but must find their verdict upon the whole evidence in the case, and may find against the former judgment. *Cleaton v. Chambliss*, 6 Rand. 86.

In Assumpsit.—The mode in which a party must avail himself of a former judgment for the same cause of action,

is by plea in bar, or in an action of assumpsit, by evidence on the general issue. *Cleaton v. Chambliss*, 6 Rand. 86.

Special Plea.—It is not error to permit a defendant to plead specially estoppel by a former verdict, though it might be given in evidence under the general issue, if it does not amount to the general issue. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

If in assumpsit, the defendant plead the act of limitations, and the plaintiff would avoid the plea by a former suit having been brought in time, he must reply the former specially; he can not give it in evidence under a general replication to the plea. *Bogle v. Conway*, 3 Call 1.

In assumpsit by the contractor against the county for the price contracted to be paid for building a jail, the defendant pleads specially, that the building was not completed in time, and that the material used and the work was defective, so that it is unfit for use as a jail; and the plaintiff takes issue on this plea. Upon the trial the defendant offers a witness to sustain the defense, when the plaintiff objects to the evidence, and offers in evidence an order of the court, showing that the court had appointed commissioners to examine the building, and upon their report, that it had been done according to contract, had received it. Held, the plaintiff having taken issue upon the plea, the order could not operate as an estoppel when offered in evidence, even if it would have been such if set up by replication to the plea, or if the trial had been upon the general issue. "Had the defendant pleaded the general issue only, and under that issue offered the evidence in question, it would have been competent for the plaintiff to rely upon the estoppel in evidence also. And this upon the well-settled principle that where there is no opportunity of pleading an estoppel, it is to be held conclusive when offered in

evidence. But here the defendant pleaded the matter of defense specially, and thus afforded the plaintiff the opportunity of replying the estoppel. Instead of pursuing this course, he takes issue upon the plea, and thus opens the door to a full investigation of the matters contained therein." *Carroll County v. Collier*, 22 Gratt. 302.

3. Definiteness and Certainty.

"The first contention of appellant upon this appeal is that the plea of res judicata should not have been sustained, because uncertain, indefinite, and insufficient in law. The plea, we think, is sufficient. It related directly to the allegations of the bill in the first suit, disposed of by final decree therein, and is supported by the answer of the defendant and the exhibit of the record in the former suit. 1 Barton's Ch. Pr., § 114." *Miller v. Miller*, 92 Va. 196, 198, 23 S. E. 232.

Answer.

Sufficiency.—The defense of res judicata, made by answer, is sufficient when supported by the production of the record of the former suit between the same parties, touching the same matter, showing a final decree therein on the merits. 1 Barton's Ch. Pr. (2d Ed.), § 114; *Miller v. Miller*, 92 Va. 196, 23 S. E. 232.

4. The Allegations.

a. Judgment on the Merits.

A plea of res adjudicata should aver that the former judgment was on the merits, or it should at least appear by the record vouched. If the plea does neither, it will be rejected. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

A plea of res adjudicata should aver that the decision was on the merits, or it should at least appear by the record vouched. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

The contention that a plea of res judicata "could not be sustained because it does not show that the cause did not go off on the demurrer, can not be

maintained, because of the rule universally recognized, that, if no mention is made of the demurrer in the decree disposing of the main issue, it will be taken as overruled." *Miller v. Miller*, 92 Va. 196, 198, 23 S. E. 232.

b. Identity of Cause of Action or Issue.

In General.—A plea of res adjudicata must contain an averment, that the matter or question at issue in the case at bar was determined in the former suit or proceeding. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

Necessity of Declaration.—If there be judgment upon a general count in assumpsit; or by confession without a declaration; the plaintiff, in a second action for the same cause, must show two subsisting debts, or he can not sustain his action, if the former recovery is pleaded. "It was objected, however, that a declaration was necessary, in order to bar a future suit for the same thing, as the identity of the claim could not be made to appear without one. But that objection would apply, as was observed by the counsel, with equal force to all general counts in assumpsit; which are scarcely more explicit. Besides, if to such new suit, the recovery, in this, were to be pleaded, the plaintiff would be bound to show two subsisting debts at the time of the former judgment, or he would not be able to sustain his action." *Pickett v. Claiborne*, 4 Call 99.

Setting Out the Record.—A plea of former judgment should set forth the portion of the record relied on, so that issue may properly be joined thereon, and the court may examine and compare the record with the recital in the plea; otherwise it will be rejected. *Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

Where a decision of a former suit is pleaded as an estoppel, so much of the former record must be set out, or made

part of the pleading, as will show that the precise question has been adjudicated in the former suit. *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250.

Bill and Answer.—"It is insisted for the plaintiffs that so much of the former bill and answer must be set forth as is necessary to show that the same points were then in issue. Story Eq. Pl., § 791. This is true, and if it does not appear, from the pleadings in the cause, that the same points were in issue, in the present cause, as were in the former, the former decree can not be relied upon as an estoppel to the claim in the present suit." *Western Mining, etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250, 284.

Exhibit of Record.—In assumpsit the testimony of witnesses, offered to prove the items in the plaintiff's account, ought not to be excluded from the jury upon the ground that, in an action of debt between the same parties (the record of which action is not exhibited), determined during the pendency of the action of assumpsit, one of those witnesses was examined touching the same items claimed by the plaintiff, to repel or set off the credits then claimed by the defendant. *Robertson v. Depriest*, 6 Munf. 469.

Objections in Appellate Court.—Where the record in one suit is set up as a bar in another, the circumstance that the "writings and evidences" in the former suit were read at the hearing of the latter, without any exception taken at that time appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the appellate court; the defendant in his answer having objected to the admission of the verdict and other proceedings in the former suit, but offered to agree that the depositions only might be read; to which offer no assent appeared on the part of the plaintiff. *Chapman v. Chapman*, 1 Munf. 398.

c. Parties.

In *Randolph v. Longdale Iron Co.*, 84 Va. 457, 465, 5 S. E. 30, *Chrisman v. Harman*, 29 Gratt. 494, was cited for the proposition that no man can be estopped by any record, unless it is shown that he is a party to it, and this should be shown by the record itself.

5. Replication or Reply.

In an action against a mill company by a millowner to recover damages for diverting water from plaintiff's mill, and for failure to maintain a dam which it is alleged it was the duty of the canal company to maintain, there is a plea that a verdict had been obtained and judgment rendered on the merits which found that the company had unlawfully erected the dam in question, whereby the mill and appurtenant property had been damaged, it was held, that a replication that the wrongs and injuries in the declaration mentioned are not the same, or any part which were in issue, and on which the judgment and plea mentioned was rendered, is not sufficient. "The replication is not a denial of the plea. It neither makes nor tenders an issue. It simply says that the injuries complained of in this suit are not the same injuries for which the judgment was rendered in the *Stillman and Ashlin* suit. That was apparent on the face of the plea, and if the plaintiff considered it a reason why the plea was bad, he should have demurred. A replication must either traverse the plea, or set up matter in confession and avoidance." *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

If the plaintiff admits the existence of the record set forth in the defendant's plea of former judgment, that ends the matter, for the plea bars this suit. If he wishes to deny it, he does so by replying that there is no such record, which he prays may be inquired of by the record. *Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

6. Trial of Issue.

It is elementary law that a plea of former judgment must be tried by the court by inspection of the record; it is error to submit it to the jury. *Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

A plea of former judgment on the same cause of action in bar of the plaintiff's suit, replied to by "No such judgment," should be tried by the court by an examination and inspection of the record, and it is improper to submit the same to a jury. *Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

B. PROOF.

In General.—It devolves upon us to ascertain what points were settled. In *Herm. Estop.*, § 279, we find it laid down that, "in order that a decree in one suit shall be conclusive in another, it must appear with reasonable certainty that the question in the record was litigated and decided in the first." And in *Freem. Judgm.*, § 257: "Every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree, is concluded." "If a judgment necessarily determines a particular fact, that determination is conclusive, and in all subsequent actions between the same parties requires the same fact to be determined the same way." To ascertain what points or facts are determined by the judgment or decree, as the rule applies to both alike, and which are concluded thereby, we must resort to the record, the opinion of the court, and sometimes to parol testimony. *Freem. Judgm.*, §§ 272-275. *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

The Record.—The record must show that issue was taken on the same allegation. And where the record shows on just what facts the first decree went, the record is the only test. *State v. McEldowney*, 54 W. Va. 695, 47 S. E.

650, citing *Cleaton v. Chambliss*, 6 Rand. 86.

A judgment or decree upon what was brought directly in issue, as to those who are no parties, though it is always evidence to prove that such judgment or decree was rendered, yet it is not so as a medium of proof of ulterior facts upon which it was founded or which may be recited in the record. 1 Stark. Ey. 191 and n; 1 Greenl. Ev., § 527, 538. *Early v. Garland*, 13 Gratt. 1.

The record of a judgment is evidence in a subsequent suit between the same parties, to the effect that claims asserted in both suits which were disallowed or set off in the former suit are not done. *Johnson v. Jennings*, 10 Gratt. 1.

The law is, that by matter of record all parties are estopped, so that a man shall not be allowed to make an averment contrary to a record; and, if a deed be enrolled of record, the party is estopped to say that it is not his deed, or that it was not acknowledged by him; but when the truth is apparent on the record, the adverse party shall not be estopped to take advantage thereof, for he can not be estopped to allege the truth when it appears of record. So that where the record is general, and does not disclose the ground of decision, the bar created thereby is as general; but where the record leads to the grounds of decision, it is no farther a bar, than as to that ground; for that is all that has been decided, and so far, and no farther, it is a bar; as, for example; if the law was, as decided by the county court, that in no case could the assignor be sued, without a suit first against the maker, and a return upon a fieri facias of nulla bona, this decision would be a bar to another action against the assignor, before a suit against the makers; but it would be no bar to a suit against them, nor afterwards to a suit against the assignor; and, therefore, if the plaintiff's remedy was not at law, his bill might be entertained

in equity, notwithstanding the judgment. *Saunders v. Marshall*, 4 Hen. & M. 455.

Contradicting Record.—In *Allebaugh v. Coakley*, 75 Va. 628, 637, the court states the law as follows: "Whenever a former judgment is relied on as a bar, whether by pleading or in evidence, it is competent for the plaintiff to show that it did not relate to the same property or transaction in controversy, and the question of identity thus raised is a matter of fact to be decided upon the evidence if the record itself is silent, and so, if the cause of action is divisible or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury." Citing *Chrisman v. Harman*, 29 Gratt. 494; *Green. Ev.*, § 532.

Partition.—The plaintiff who claimed under one of the heirs of K., offered in evidence a record of a suit for partition of K.'s land amongst his heirs. This record showed that there had been a decree appointing commissioners to lay off and assign to the heirs respectively, their shares of said lands, and that these commissioners had performed the duty, and made their report to the court, accompanied by a plat of the division, which report and plat were ordered to be recorded. Held, the record is admissible evidence that partition had been made by the final decree of the court amongst said heirs. *Shanks v. Lancaster*, 5 Gratt. 110.

Fact of Rendition of Decree.—In *Wynn v. Harman*, 5 Gratt. 157, it was held, that a decree and deed made in pursuance thereof might be offered in evidence, without the production of the whole record, the decree sufficiently describing the land which the commissioner was directed to convey. It is true, as a general rule, that a party desiring to avail himself of record evidence, must produce all of the record relating to the subject matter, but this is not true in all cases. As when the question is simply whether a particular

decree has been rendered. In such case, the exhibition of the decree alone is all the law requires. *White v. Clay*, 7 Leigh 68; *Waggoner v. Wolf*, 28 W. Va. 820.

Opinions.—Mere opinions, and no matter how honestly they may be held, can not prevail as against the actual record of what was done, impressed upon the face of the pleadings and proceedings. *Freemant on Judgments*, § 258. *Withers v. Sims*, 80 Va. 651.

Declaration and Admissions.—"Of necessity in a subsequent and separate suit against one who was no party to the previous cause, but whom it is sought to hold bound by the judgment as a purchaser pendente lite, resort must be had to proof extrinsic to the judgment that he stood in circumstances which made the judgment so binding upon him. And although in the record there may be an admission or declaration in regard to the fact, it is admitted in evidence against him not as a judgment conclusively establishing the fact but as a deliberate declaration or admission that the fact was so, as indeed it might be admitted for such purpose even in favor of a stranger; and it is to be treated according to the principles governing admissions to which class it properly belongs. 1 Greenl. Ev., 527, a." *Early v. Garland*, 18 Gratt. 1.

Parol Evidence.

In General.—"Upon the question, whether parol proof is admissible to show what matters were litigated and decided in the former suit, the decisions have not been so uniform. But the great preponderance of American authority, as is said by the writer of the notes to Phil. Ev., *supra*, is in favor of the admission of parol evidence. Whenever a question is raised as to the identity of the matters litigated in the first suit, parol evidence is admissible, to explain what transpired on the former trial. *Parker v. Thompson*, 3 Pick. R. 490; *Cist v. Zeizler*, 16 Serg. & Rawle R. 282, 285;

Stevens v. Payne, 2 Roots R. 83; *Wood v. Jackson*, 8 Wend. R. 9; *Burt v. Sternburgh*, 4 Cowens R. 559; *Gardner v. Buckbee*, 3 Id. 120. These cases are cited in support of this doctrine in Cowens & Hill's notes to Phillips on Evidence, 4th volume, pp. 838, 839, note 590. And it does seem to me, as the writer says it appears to him, that it is indispensable to the efficient administration of justice." *Kelly v. Board of Public Works*, 25 Gratt. 755.

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. * * *

According to Coke, an estoppel must be 'certain to every intent;' and if upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." *Chrisman v. Harman*, 29 Gratt. 494; *Withers v. Sims*, 80 Va. 651. See also, *Corprew v. Corprew*, 84 Va. 599, 5 S. E. 798; *McComb v. Lobdell*, 32 Gratt. 185; *Tilson v. Davis*, 32 Gratt. 92.

Parol evidence is admissible to prove that the claim for which the case at bar is brought was not embraced in a

former judgment. *Kelly v. Board of Public Works*, 25 Gratt. 755.

Where a judgment or decree is relied upon as an estoppel, and the pleadings and proceedings in the former suit leave it doubtful what was the precise issue or state of facts upon which the judgment or decree was rendered, parol or extrinsic evidence may be received in a subsequent suit to show what was actually in issue and determined on the trial of a former suit. *Withers v. Sims*, 80 Va. 651; *Chrisman v. Harman*, 29 Gratt. 494, 26 Am. Rep. 387; *Legrand v. Rixey*, 83 Va. 862, 3 S. E. 864; *Kelly v. Board of Public Works*, 25 Gratt. 755; *Allebaugh v. Coakley*, 75 Va. 628, 637.

Parol or extrinsic evidence may be received in a subsequent suit to show what was actually in issue and determined on the trial of a former suit, where the judgment or decree is relied upon as an estoppel, and the pleadings and proceedings in the former suit leaves us in doubt as to the precise issue or state of facts upon which the judgment or decree was rendered. *Campbell v. Rankin*, 9 Otto, 263; *Davis v. Brown*, 94 U. S. R. 428; *Chrisman v. Harman*, 29 Gratt. 494; *Withers v. Sims*, 80 Va. 651.

"When the record discloses the exact point in controversy, the rule above laid down is universally admitted; but when by reason of the generality of the issue it embraces many issues, and it is not possible to determine on what issue the verdict was rendered, the question, whether the real issue tried by the jury, and on which their verdict was rendered, can be proven by parol evidence, has given rise to decisions which are not harmonious. The weight of authority, however, as well as reason is, that in such case the issue actually tried by the jury may be proven by parol; and when so proven it is as conclusive as if shown by the record alone." *Beckwith v. Thompson*, 18 W. Va. 103.

Divisible Cause of Action.—When-

ever a former judgment is relied on as a bar, whether by pleading or in evidence, it is competent for the plaintiff to show by parol evidence that it did not relate to the same property or transaction in controversy, and the question of identity thus raised is a matter of fact to be decided upon the evidence if the record is itself silent. And so if the cause of action is divisible or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury. 1 Green. Ev., § 532; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Kelly v. Board of Public Works*, 25 Gratt. 755, 760; *Packet Co v. Sickles*, 5 Wall. 480; *Chrisman v. Harman*, 29 Gratt. 494; *Allebaugh v. Coakley*, 75 Va. 628.

Illustrative Cases.—A contractor has two claims against the state, arising out of the same contract, one for commission, and the other a percentage on his actual expenditures. He brings his suit, and recovers judgment for a certain amount which he alleges was the amount of the commissions. He brings another suit for the amount of the percentage on his actual expenditures; and the judgment in the first case is relied upon by the defense as having decided upon his whole claim. Parol evidence is admissible to prove that only the claim for commission was involved in that case. *Kelly v. Board of Public Works*, 25 Gratt. 755.

Limitation on Admissibility.—Except for the purpose of identifying the subject matter to which a verdict and judgment apply, parol evidence is inadmissible. The record must speak for itself when it is pleaded as an estoppel. The record alone can be looked to for the purpose of showing what the issues were. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320, 6 Va. Law Reg. 665.

Parol proof may be given to show the grounds upon which the verdict was rendered in the first action, where the record does not disclose them. But

it will not be sufficient to show that the testimony established a particular fact; it must clearly appear that the verdict was based upon that fact. *Daniel v. Southside R. Co.*, 20 Gratt. 344.

In an action by a millowner against a canal company to recover damages for diverting water from plaintiff's mill, and for failure to maintain a dam which it is alleged it is the duty of the defendant to do, a plea alleges that a former suit had been brought against the same defendant, averring in the declaration that the defendant had unlawfully erected the dam in question, whereby the mill and appurtenant property had been damaged; that a verdict and judgment was obtained, and judgment rendered on the merits in favor of the plaintiffs in the present suit, and that the plaintiff is thereby estopped from asserting his present claim. The court in passing on this plea said: "The last assignment of error which we consider it necessary to notice is the admission of parol evidence, tending to prove that, in the suit of Stillman and Ashlin *v.* James River and Kanawha Co., the issue of the dam being unlawfully erected, was not tried. This evidence was improper. The record must show what the issues were. The declaration alleged that the dam was unlawfully erected. Without that allegation, no cause of action was alleged. The plea, 'not guilty,' put that allegation in issue. To say that this was not in issue, is to contradict the record. 'Parol evidence to show a recovery for a different cause of action from one specially stated in the pleadings did not tend to explain, but to contradict the record of a former recovery.' 7 Rob. Prac. 265. Except for the purpose of identifying the subject matter to which the verdict and judgment apply, parol evidence is inadmissible, and the record must speak for itself when it is pleaded as an estoppel. 7 Rob. Prac., pp. 269, 270. If Stillman and Ashlin had owned two mills, and the canal company had owned two

dams, parol evidence would have been admissible to explain which mill and dam were the subjects of the issue made by the pleadings, but not to prove what the issues were." *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 35, 37 S. E. 320, 6 Va. Law Reg. 665.

Judgments by Confession.—On a motion for award of execution against three obligors in a forthcoming bond, one of whom is principal and the other two are sureties, the entry upon the record states that as well the plaintiffs came by their attorney, "as the defendant, M." (the principal), "in his proper person, and the other defendants by their attorney, and the said defendants acknowledge judgment." In the same entry (after the judgment) is the following: "And the plaintiffs by their attorney here in court release to the defendants 183 dollars, 60 cents, and agree to stay execution of this judgment until the first day of the next term." On a bill in equity by the sureties, claiming a discharge on the ground that the agreement to stay was without their consent or knowledge, it is alleged that the sureties did not appear by an attorney at law, but by an attorney in fact; that the power under which the attorney acted did not authorize him to confess judgment with stay of execution; and that in fact he never consented to such stay, but the agreement for the stay was with the principal alone. The power of attorney is in these words: "We authorize J. M. to confess judgment for us and in our name, on a delivery bond in favor of S. & S. executed by us on the 18th November, 1840;" and is signed and sealed by the three obligors. Held, that it not appearing from that record whether the sureties appeared by an attorney at law or an attorney in fact, evidence aliunde is admissible for the purpose of proving that they appeared by an attorney in fact, and to show the authority under which he acted. That parol testimony is not admissible to prove that so much of the entry

as relates to the stay of execution was without the consent of the said attorney. *Dissentiente*, Standard, J. *Calwells v. Shields*, 2 Rob. 305.

Burden of Proof and Sufficiency of Evidence.—As is said by Parker, C. J., in *Parker v. Thompson*, 3 Pick. 490, every fact which exists on record must be proved by the record; but when the question is as to the real subject matter of a suit, or to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be proven by other than record evidence. But if the record shows that the first suit was apparently for the same cause of action litigated in the second suit, it will be the *prima facie* evidence that such cause of action has once passed in *rem judicata*; and hence the onus will devolve upon the party against whom the record is used, to show the contrary. *Kelly v. Board of Public Works*, 25 Gratt. 755.

And this should be done by clear and decisive testimony. *Kelly v. Board of Public Works*, 25 Gratt. 755.

Opinion of Trial Judge.—When a decree in a former suit is pleaded as *res judicata*, and the decree does not show upon which of the several points in litigation it is based, but refers to the opinion of the trial judge, filed in the case to explain what was determined, such opinion becomes a part of the record, and must be looked to, to determine what was in issue and what was adjudicated by the decree. *Le-grand v. Rixey*, 83 Va. 862, 3 S. E. 864.

"Having concluded that the court could have decided that Holt and Mathews had no title to the land, it remains now to ascertain whether it did so decide. * * * Where the decree of a court is not ambiguous, it speaks for itself. When it is ambiguous, the accompanying opinion may be examined in order to determine what has been adjudged. *Herman on Est. & Res.*

Jud., p. 470, § 402. As has been shown, it is always proper to consider the pleadings. The final decree in question here is not wholly free from ambiguity." *St. Lawrence Co. v. Holt*, 51 W. Va. 352, 41 S. E. 351.

In bill for injunction, a former decree was pleaded as *res judicata*. That decree did not show which of the points in controversy it was based on. It referred to the opinion of the trial judge. That opinion by this reference became part of the record, and must be examined to determine what points were in issue, and what were adjudicated by the decree. "If, in case the record leaves a doubt as to which of several matters may have been passed upon, parol evidence may be admitted to solve the doubt, what possible objection can there be to the consultation by the appellate court, for that purpose, of the written opinion of the judge who heard and decided the case below. In the case at bar, the trial judge filed with the papers in the cause his reasons for his decision, which the decree itself shows was done for the express purpose of explaining his decision. This being the case, the opinion of the trial judge thus referred to in the decree becomes a part of the record, and may be looked to, and is even more reliable to explain, in doubtful cases, what was in issue and what was determined, than mere extrinsic evidence to the same end. We do not mean that the mere opinion of the trial judge, which may happen to be in writing and copied into the record, constitutes a part thereof; but we do say that where the decree—as in this case—refers to the opinion of the trial judge in terms that make it clear that the object was to refer to it to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to to explain what was in issue and what was determined by the judgment or decree in question. See *Burton v. Mills*, 78 Va. 470." *Le-*

grand *v. Rixey*, 83 Va. 862, 3 S. E. 864.

Order Book of Court.—"The defendant had given parol testimony, tending to show a former recovery. To contradict which, the plaintiff read in evidence the judgment from the order book of the court, proved the loss or destruction of all the papers and other records of the case, and offered parol testimony to prove that the matter in controversy in this suit was not embraced in the former judgment; which testimony was excluded by the court. The order read in evidence shows upon its face the grounds of the judgment of the court, and what was the matter in issue between the parties in that suit upon the case agreed. It shows that the only question submitted to the court was the question as to what was due the plaintiff on account of the commission he was to receive as a compensation for his services in lieu of all other profits, and that that is the only matter covered by the judgment. The order shows also that it was a case agreed by the parties, in order to get the judgment of the court upon this question of commissions; that no proceedings were had at rules, but that the plaintiff by his attorney filed his declaration by consent of the attorney general, and that on his motion, and by like consent, it was ordered that the proceedings at rules be dispensed with, and the cause placed on the docket of the court. These statements of record justify the inference, that only the question of commissions was submitted to the court, and also that the only claim set out in the declaration was for the commissions, the facts agreed showing that that was the only matter submitted to the court for its decision, and the declaration being prepared at the time, and filed in court by consent, and not at rules, and the case being at once placed on the court docket, the presumption is, that the declaration, prepared with reference to the question agreed to be submitted, would

only claim what was agreed to be submitted to the court. And I am inclined to think that it sufficiently appears upon the face of the order itself that the matter litigated in this suit was not in issue in that, and is not embraced in the former judgment; at least it is so *prima facie*, and the onus devolved on the defendant to show the contrary." *Kelly v. Board of Public Works*, 25 Gratt. 755.

Copy of Judgment.—A copy of a judgment of the general court, upon a case adjourned to it by a superior court, attested by the clerk of the general court, his attestation or handwriting being proved, is competent and sufficient evidence before the same superior court, to prove what it purports to be. *Gibson v. Com.*, 2 Va. Cas. 111.

Under a declaration alleging that a certain judgment in a prior suit was rendered on May 30th, a copy of such judgment purporting to have been rendered on May 31st, was admissible in evidence; the record showing that the verdict on which the judgment was based was rendered on May 30th. *Sayre v. Edwards*, 19 W. Va. 352.

VII. Waiver of Estoppel.

Inconsistent Admissions.—If a party who would be entitled to the benefit of a decree as *res judicata* to the prejudice of another, afterwards makes an admission of record in the case, inconsistent therewith, detracting from his right under said decree, and such admission is the truth, he can not rely on such decree as *res judicata*. *Crumlish v. Shenandoah, etc., R. Co.*, 45 W. Va. 567, 32 S. E. 234. See the title **ESTOPPEL**, vol. 5, p. 282.

Identity of Issues.—Where condemnation proceedings against a canal company adjudged that the company must pay damages for injuries sustained from erecting a dam for supplying the canal with water, and subsequently the landowners brought suit to recover damages for diverting water

from the mill, and for failure to maintain a dam, which it is alleged it was the duty of the canal company to maintain, the court said that if the adjudication were on the same point in both the condemnation proceeding and in the suit for damages, it would be necessary to consider how far the effect

of the judgment in the condemnation proceedings was waived by the parties, by submitting the question to a trial in a suit for damages. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 33, 35, 37 S. E. 320, 6 Va. Law Reg. 665, citing *Mersereau v. Pearsall*, 19 N. Y. 111; *Tibbetts v. Sharpleigh*, 60 N. H. 487.

Former Jeopardy.

See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181.

Former Recovery.

See the title FORMER ADJUDICATION OR RES ADJUDICATA, ante, p. 261.

Former Suit Pending.

See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 15.

FORMS.—In *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450, 451, it is said: "Under the common law, forms are as sacred as the principles they embody. They are precedents. The precise form being a precedent, the certainty of the principle is thereby fixed. Steph. Pl. (Tyler's Ed.) 14."

Fornication.

See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 187.

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CROSS REFERENCES.

See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 70; BONDS, vol. 2, p. 507; CONTINUANCES, vol. 3, p. 306; COSTS, vol. 3, p. 612; DEBT, THE ACTION OF, vol. 4, p. 293; INDEMNITY; SHERIFFS AND CONSTABLES; SHERIFFS' SALES; SURETYSHIP.

As to manner of taking appeal from judgment on forthcoming bond, see the title APPEAL AND ERROR, vol. 1, p. 541. As to the recovery of damages beyond those laid in the declaration, see the title BONDS, vol. 2, p. 573. As to recovery of money paid under an execution when the bond has been satisfied, see the title ATTORNEY AND CLIENT, vol. 2, p. 155.

I. General Consideration.

A. DEFINITION.

"A delivery or forthcoming bond is an obligation given to the creditor at whose suit a writ of fieri facias or a distress warrant is issued, which has been levied upon chattels that the debtor wishes to retain in his possession, and at his risk, until the day of sale thereof. It is conditioned to have the property forthcoming or delivered at the day and place of sale." 4 Min. Inst. 28.

B. NATURE.

Statutory.—A forthcoming bond is a statutory bond and its operation must be determined by references to the law under which it is taken. *Garland v. Lynch*, 1 Rob. 545.

As a Substitute for Replevin Bond.—In some measure the forthcoming bond as a remedy for illegal distress stands in the place of the replevin bond under the old remedy of replevin. *Carter v. Grant*, 32 Gratt. 769; *Robinson v. Woodford*, 37 W. Va. 377, 16 S. E. 602.

Before Forfeiture.—Prior to the forfeiture of a forthcoming bond, it is a mere collateral and inchoate bond, liable to be ripened by the efflux of time and the nonperformance of the condition therein, into an instrument having the force of a judgment. *Lusk v. Ramsay*, 3 Munf. 417. See post, "Effect as Judgment," III, A, 6.

Nature of Bonds Taken under Stay Law.—The ordinance of the Virginia convention adopted April 30, 1861, provided as follows: "Where executions of fieri facias have issued and are now in the hands of officers, whether levied or not, if the debtor offer bond and security for the payment of the debt, interest and costs, when the operation of his ordinance ceases, the property shall be restored, and the bond so taken shall be returned, as in the case of a forthcoming bond, and shall constitute a lien on the realty of the obligors, to the same extent and in the same manner, as forfeited forthcoming bonds returned to the clerk's office now do; and judgment may be had on said bonds in the same manner and by the same proceedings, as judgments may be obtained on forthcoming bonds under existing laws." *Porter v. Daniels*, 11 W. Va. 250.

Bonds Taken at Sales under Act of May 1870.—The bonds taken at sales under the act of May 28, 1870, to prevent the sacrifice of personal property at forced sales, were in the nature of forthcoming bonds, and the creditor was not bound to receive them as so much paid on his debt. *Garland v. Brown*, 23 Gratt. 173.

C. PURPOSE.

The object of a forthcoming bond is to secure the forthcoming of the property on a day of sale and its preservation without cost in the meantime. *Adler v. Green*, 18 W. Va. 201.

D. WHEN PROPER.

Section 3617, Virginia Code, provides: "The sheriff or other officer levying a writ of fieri facias or distress

warrant may take from the debtor a bond, with sufficient surety payable to the creditor, reciting the service of such writ or warrant, and the amount due thereon (including his fees for taking the bond, commissions, and other lawful charges, if any), with condition that the property shall be forthcoming at the day and place of sale; whereupon such property may be permitted to remain in the possession and at the risk of the debtor." *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467.

Where Goods Distrained for Rent.—In a note of the revisors is found the following: "We propose that a tenant be permitted to give a forthcoming bond when his goods are distrained for rent in like manner as a debtor may give such bond when his goods are taken under execution." *Allen v. Hart*, 18 Gratt. 722.

E. FOR WHOSE BENEFIT.

Delivery bonds were introduced for the benefit of defendants in execution. *Lusk v. Ramsay*, 3 Munf. 417.

The law relating to forthcoming bonds was passed for the benefit of the owner of the goods taken, to enable him at his risk, to retain the possession and use of the goods, and to avoid the expense of their safekeeping until the day of sale. *Garland v. Lynch*, 1 Rob. 545.

"Forthcoming bonds should be favorably treated, as they are for the ease of the debtor, who should not be allowed to impeach them upon slight grounds." *Buchanan v. Maynadier*, 6 Call 1.

F. HISTORY.

In *Lusk v. Ramsay*, 3 Munf. 417, the court said: "The act of 4 Anne 1705 (3 Hen. Stat. at large, 385), gives us the first notice of a delivery bond; but it was a bond to produce the property at the end of three days, for appraisement. The act of 1726, (Virginia Laws, Ed. 1733, p. 356), repeals the former laws, allowing executions to be paid

in kind, and directs the sheriff to sell the property, on giving three days' notice, allowing the debtor, however, to give a delivery bond, to have the goods forthcoming on the day of sale, whereupon the sheriff is to suffer the goods to remain in his possession, and at his risk; and provides, also, that if the debtor, on the day of sale, shall tender the debt, damages, and costs, the sheriff shall accept the same, and restore the property to the debtor. The act of 1748 (Ed. of 1769, p. 190), so far as relates to this subject, is substantially a copy of the act of 1726; and so stood the law until the year 1769."

"A forthcoming bond was for the first time authorized by law to be taken under a distress warrant at the revision of 1849." *Allen v. Hart*, 18 Gratt. 722.

II. Form and Sufficiency.

See post, "Relief against Bond," IV.

A. TIME FOR EXECUTION OF BOND.

Bond Taken after Death of Creditor.

—In *Turnbull v. Claibornes*, 3 Leigh 392, a forthcoming bond was held to be good though taken after the death of the creditor in the execution, to whom it was made payable. *Booth v. Kinsey*, 8 Gratt. 560.

Bond Executed after Return Day of

Fl. Fa.—An appellate court will not reverse the judgment of an inferior court, overruling a motion to quash an undertaking or forthcoming bond made to the sheriff, simply because it appears that the undertaking was executed after the return day of the writ of fieri facias. *Harwood v. Creel*, 8 W. Va. 579.

B. PARTIES.

It is not the duty of the sheriff to require every defendant in the original execution to join in the delivery bond. *Garland v. Lynch*, 1 Rob. 545.

A bond taken upon replevying property distrained for rent is good if executed by the original lessee, though

he be not the tenant in actual possession, nor the owner of the property distrained, if he has assigned his lease to a third person, without the privity of assent of the lessor. *Ferguson v. Moore*, 2 Wash. 54.

C. TO WHOM PAYABLE.

To the Creditor.—A forthcoming bond should be made payable to the creditor and not to the sheriff. *Downman v. Chinn*, 3 Wash. 189; *Wilkinson v. M'Lochlin*, 1 Call 49; *Lewis v. Thompson*, 2 Hen. & M. 100; *Lusk v. Ramsay*, 3 Munf. 417; *Turnbull v. Claibornes*, 3 Leigh 392; *Booth v. Kinsey*, 8 Gratt. 560; *Meze v. Howver*, 1 Leigh 442; *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4.

The creditor to whom a forthcoming bond should be made payable is the person entitled to sue out the execution, the plaintiff on the record. No other person can be known to the officer or to the court as the creditor. To no other person, then, can the bond be taken. *Meze v. Howver*, 1 Leigh 442.

Bond Made Payable to Wrong Person.

—Where a forthcoming bond is made payable to a person other than that provided for in the statute, such fact renders the bond inoperative as a statutory bond. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467.

Where a fi. fa. is sued out by M. & M. on judgment recovered by them, they indorse on the writ, that it is for benefit of H.; the sheriff levies it, and takes forthcoming bond payable to H.; the bond is invalid. *Meze v. Howver*, 1 Leigh 442.

In *Winston v. Com.*, 2 Call 290, a forthcoming bond was held to have properly been made to the sheriff but in this case it was under direction of the assembly that it should be taken to the sheriff for the use of the commonwealth. See also, *Winslow v. Com.*, 2 Hen. & M. 459.

Where Oblige Is Dead.—*Robertson, executor of Cole*, recovered judgment

against Claiborns, and sued out execution thereon; before the execution was delivered to the sheriff, Robertson died. The execution being then delivered to the sheriff, he levied it on property of defendant, and took a forthcoming bond payable to Robertson, executor of Cole. It was held, the execution was properly levied, though Robertson was dead before it was delivered, and the forthcoming bond was rightly taken to Robertson as executor. *Turnbull v. Claibornes*, 3 Leigh 392.

D. ONE BOND ON TWO EXECUTIONS.

One forthcoming bond may be taken on two executions. *Winston v. Com.*, 2 Call 290.

E. TWO BONDS IN ONE INSTRUMENT.

Two separate bonds may be included in one instrument. *Winston v. Com.*, 2 Call 290.

F. RECITAL OF EXECUTION.

1. As against Whom Execution Issued.

A forthcoming bond must recite against whom the execution issued. *Hubbard v. Taylor*, 1 Wash. 259; *Downman v. Chinn*, 2 Wash. 189; *Lewis v. Thompson*, 2 Hen. & M. 100, 104; *Glascok v. Dawson*, 1 Munf. 605, 606; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

2. As to Property upon Which Execution Issued.

A forthcoming bond must recite upon whose property the execution was levied. *Hubbard v. Taylor*, 1 Wash. 259; *Downman v. Chinn*, 2 Wash. 189; *Lewis v. Thompson*, 2 Hen. & M. 100, 104; *Glascok v. Dawson*, 1 Munf. 605, 606; *Harpers v. Patton*, 1 Leigh 306, 320; *Central Land Co. v. Calhoun*, 16 W. Va. 361; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

Statement of Ownership.—A forthcoming bond, mentioning the person against whom the execution issued,

and that "they were desirous of keeping in their possession, until the day of sale, the property taken by the sheriff," sufficiently describes it as their property. *Bronaugh v. Freeman*, 2 Munf. 266.

Bond Failing to State against Whose Property Execution Issued.—A forthcoming bond should not be deemed informal or defective, although the condition does not recite on whose property the execution was levied, provided enough appear to show that it was the property of the defendants. *Lewis v. Thompson*, 2 Hen. & M. 100.

Incomplete Recital.—On a *fi. fa.* against three, A., T. & H. a forthcoming bond is taken, the condition whereof does not distinctly state to which of the three defendants the property taken in execution belonged. Held, the bond is good. *Harpers v. Patton*, 1 Leigh 306.

Vagueness in Description of Property.—A forthcoming bond should not be quashed for the vagueness with which the property named in it is described, the description being: "All of F. J. Calhoun's household and kitchen furniture now in said tenement," referring to that described in the warrant; there being in such case no necessity that an inventory of the property should be made. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

3. As to Amount of Execution.

A forthcoming bond should recite the amount of the execution. *Downman v. Chinn*, 2 Wash. 189; *Lewis v. Thompson*, 2 Hen. & M. 100; *Garland v. Lynch*, 1 Rob. 545.

Effect of Failure to Recite Amount of Execution.—A forthcoming bond is not invalid for the reason that it fails to recite the amount for which the execution issued. *Morgan v. Hale*, 12 W. Va. 713, 729.

G. RECITAL AS TO CUSTODY OF GOODS.

A forthcoming bond should recite the fact that the goods were permitted

to remain in the possession of the owner or debtor. *Lewis v. Thompson*, 2 Hen. & M. 100; *Harpers v. Patton*, 1 Leigh 306.

H. DIRECTION AS TO DELIVERY OF PROPERTY.

1. As to Time of Delivery.

The condition in a forthcoming bond should provide that the goods be delivered at the time set for sale and not when demanded. *Downman v. Chinn*, 2 Wash. 189; *Scott v. Hornsby*, 1 Call 41; *Lewis v. Thompson*, 2 Hen. & M. 100; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

Incorrect Direction as to Time for Delivery.—A forthcoming bond which provides for the delivery of property on a day different from the day of sale fixed in the bond, is defective. *Adler v. Green*, 18 W. Va. 201; *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4.

Conditioned for Delivery after Return Day.—A forthcoming bond, with condition to deliver property taken in execution, on a day of sale occurring after the return day, is valid. *Ballard v. Whitlock*, 18 Gratt. 235. The court, in its opinion on this point, said: "In regard to the first error assigned, it will not be necessary to say much. The sheriff could legally receive the property on the day of sale named in the forthcoming bond, though that day was after the return day of the execution, and the bond was not, therefore, void. The execution of a writ of fieri facias is an entire thing, and having been commenced but not completed by the sheriff to whom it is directed before the return day, it is his duty to complete the execution afterwards."

Where Date for Delivery Passed before Execution of Bond.—Where an undertaking taken by an officer under the provisions of the first section of chapter one hundred and forty-two of the Code of West Virginia, of 1868, shows upon its face that the fieri facias was levied upon various articles of personal property which were valued

by the officer, in the aggregate, and that the day fixed in the undertaking for the delivery of a large part of said property had passed at the execution of the undertaking; the undertaking is not good, under the provisions of said chapter of said Code, but is materially defective and irregular. *Wallace v. McCarty*, 8 W. Va. 193.

2. As to Place of Delivery.

The condition in a forthcoming bond should contain a direction that the delivery be made at the place designated for the sale. *Downman v. Chinn*, 2 Wash. 189; *Scott v. Hornsby*, 1 Call 41; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

Effect of Failure to Appoint Place for Delivery.—A forthcoming bond is good, although it appoints no place at which the delivery is to be made. *Burwell v. Court*, 1 Wash. 254.

I. RECITAL AS TO DATE AND PLACE OF SALE.

As to the Date of Sale.—The condition of a forthcoming bond ought to set forth, with certainty, the time but it need not state that the day mentioned is that appointed for the sale. *Irvin v. Eldridge*, 1 Wash. 161; *Wood v. Davis*, 1 Wash. 69; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

As to Place of Sale.—The condition of a forthcoming bond ought to set forth with certainty the place of sale. *Irvin v. Eldridge*, 1 Wash. 161; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

J. AMOUNT OF PENALTY.

1. Usual Practice.

In *Scott v. Hornsby*, 1 Call 41, it was said, that the universal practice was to take forthcoming bonds in double the sum contained in the execution.

2. Amount of Interest.

A forthcoming bond given on a judgment which bore only five per cent. interest, should carry only five per

cent, although the bond was taken after the act allowing six per cent. *Brooke v. Roane*, 1 Call 205.

3. Penalty Taken for Incorrect Sum.

Penalty Taken in Other than Customary Sum.—In *Scott v. Hornsby*, 1 Call 41, it was held, that since the law was silent as to the amount of the penalty for forthcoming bonds, a bond voluntarily given would be valid, notwithstanding the fact that, through mistake or misapprehension, a greater or less sum than that customary taken was given.

A forthcoming bond will not be held void upon the ground that it is taken for too much, but judgment will be rendered for what is really due, if the party will release. *Wilkinson v. McLochlin*, 1 Call 49; *Scott v. Hornsby*, 1 Call 41.

Sheriff's Fee Included.—The sheriff's fee for taking a forthcoming bond may be included in it. *Bronaugh v. Freeman*, 2 Munf. 266.

Effect of Including Sheriff's Commission.—If before the act of 1794, the sheriff in taking a forthcoming bond included his commissions on the debt, it was erroneous, but in such case the bond is not void; and the judgment shall be entered for the sum due without the commissions. *Worsham v. Egleston*, 1 Call 48. See also, *Scott v. Hornsby*, 1 Call 41.

K. SECURITY.

1. Necessity For.

Prior to the act of 1769, there was no provision to the effect that security need not be taken on an execution issued on a forthcoming bond. *Lusk v. Ramsay*, 3 Munf. 417.

After 1788.—The clerk was not authorized after the act of the 4th of January, 1788, to indorse upon a writ of fi. fa. issued on a judgment obtained on a forthcoming bond, before that day, that no security was to be taken. *Hare v. Gay*, 4 Call 151; *Richardson v. Fontaine*, 4 Call 152.

2. Bond Given without Proper Security.

The fact that a forthcoming bond was given by the defendant only, without any security, will not invalidate it. *Washington v. Smith*, 3 Call 13.

Where Security Insufficient When Taken.—If the security on a forthcoming bond was insufficient when taken, the plaintiff may, on motion, have the bond quashed. *Rhea v. Preston*, 75 Va. 757; *Taylor v. Dundass*, 2 Wash. 92.

As to the quashing of a bond where the obligors in a forfeited bond prove insolvent, though solvent when the bond was taken, see post, "Enumeration of Grounds for Quashing," IV, A, 3.

If a sheriff fraudulently receive as security on a forthcoming bond a person notoriously insolvent, the court, upon this fact being shown, would quash the bond, and this notwithstanding the sheriff has made himself liable, for he might be insolvent and unable to indemnify the plaintiff. *Garland v. Lynch*, 1 Rob. 545.

Where Obligee Also a Surety.—A forthcoming bond will not be held invalid on the ground that the obligee in the bond is also a surety. *Booth v. Kinsey*, 8 Gratt. 560.

L. BOND FOUNDED ON EXECUTION IMPROPERLY ISSUED.

A forthcoming bond is not void because founded on an execution issued at a time when it should not have been. Such bond is defective and should be quashed if an objection is made to it before judgment was rendered, but the objection can not be made in the appellate court. *Conaway v. Odbert*, 2 W. Va. 25.

In What Court Objections Raised.—An objection that a forthcoming bond is void because founded on an execution issued at a time when it should not have been, can not avail in the appellate court. Such objection should be made before judgment was rendered on the bond. *Conaway v. Odbert*, 2 W. Va. 25.

M. BOND NOT AUTHORIZED BY LAW.

The mere fact that a forthcoming bond not authorized by law has been taken by an officer, does not render such bond invalid at common law. *Porter v. Daniels*, 11 W. Va. 250.

By Officer without Authority.—The mere fact that a forthcoming bond was taken by an officer who was unauthorized by law to take such bond has never been held sufficient to render a bond invalid as a common-law bond. *Porter v. Daniels*, 11 W. Va. 250.

N. EFFECT OF ERROR IN SOLVENDUM.

If, in a forthcoming bond, the teneri be right, though the solvendum be wrong, it will not vitiate; but the bond is good. *Wilkinson v. McLochlin*, 1 Call 49.

O. OBLIGEE'S NAME INACCURATELY WRITTEN.

It is error to quash a forthcoming bond on motion, simply because the name of the obligee therein has been misspelled, or so written as to make it doubtful as to the person intended. Parol evidence of the surrounding circumstances should be admitted in such case that the court may be placed as nearly as possible in the situation of the person who wrote the deed or note, and thus ascertain the person intended by the name employed. *Ambach v. Armstrong*, 29 W. Va. 744, 3 S. E. 44.

P. EFFECT OF LEAVING BLANKS IN BOND.

1. In Obligatory Part.

Blank Left for Name of Obligors.—A forthcoming bond, appearing in other respects to be in proper form, ought not to be quashed on the ground that, in the obligatory or penal part thereof, a blank is left for the names of the obligors. *Beale v. Wilson*, 4 Munf. 380.

Omission of Penal Sum.—A motion for judgment on a forthcoming bond, in the obligatory part whereof no penal

sum is mentioned, can not be sustained; but such bond, with the execution on which it was founded, may be quashed, on a motion for that purpose. *Bragg v. Murray*, 6 Munf. 32.

2. In Condition.

A blank being left in the condition of a forthcoming bond for the name of the high sheriff, to whom the property was to be delivered at the time and place of sale, was held not to vitiate it, the name of the high sheriff having been mentioned in a former part of the condition. *Bartley v. Yates*, 2 Hen. & M. 398.

Q. EFFECT OF ALTERATION OR AMENDMENT.

Alteration by Clerk.—If the clerk of the court alter a forthcoming bond, it will not prejudice the plaintiff; but the bond will be restored to what it originally was. *Buchanan v. Maynadier*, 6 Call 1.

Effect of Amendment.—"With respect to the amendment of the bond, whatever may be the case of an erasure made by a party, or others, before the rendition of the judgment, the bond, after it comes into the custody of the court and its officers; and whether considered as a record, or quasi a record; stands, in this respect, on a common foundation with other records." *Buchanan v. Maynadier*, 6 Call 1.

R. VARIANCE.

1. Effect of Variance.

Where there is a material variance between a forthcoming bond and the execution upon which it is taken, the bond should be quashed. *Holt v. Lynch*, 18 W. Va. 567; *Scott v. Hornsby*, 1 Call 41; *Couch v. Miller*, 2 Leigh 545; *Glascock v. Dawson*, 1 Munf. 605.

2. Illustrations of Variance.

As to Amount Due.—Where a forthcoming bond in its condition recites that the amount due on the execution with the fee for taking the bond and the sheriff's commissions is larger than

is in fact due, this is not a variance for which the bond will be quashed. *Holt v. Lynch*, 18 W. Va. 567; *Scott v. Hornsby*, 1 Call 41.

Variance between Bond and Sheriff's Return.—If the forthcoming bond recites an execution, and that property has been taken to satisfy it, a variance, between the sheriff's return and the bond, provided the bond agrees with the execution, is unimportant. *Buchanan v. Maynadier*, 6 Call 1.

As to Service of Writ.—A *fi. fa.* is directed to the sheriff of Campbell, but is delivered to and levied by the sergeant of Lynchburg, who takes a forthcoming bond upon it, reciting that the writ had been directed to the sergeant. Held, the writ gave no authority to the sergeant, and no warrant to him to take the forthcoming bond, and that the bond is variant from the execution and therefore ought to be quashed. *Couch v. Miller*, 2 Leigh 545.

As to Goods against Which *Fi. Fa.* Issued.—A writ of *fieri facias* against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and as to other damages and costs of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a forthcoming bond taken," etc. The bond being given by the administratrix, *eo nomine*, but expressing that the *fi. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *fi. fa.* and therefore quashed. *Glascoek v. Dawson*, 1 Munf. 605.

By a *fieri facias*, the sheriff is commanded to cause principal, interest and costs to be levied of the goods and chattels of J. W., deceased, in the hands of S. H., his administrator, if so much thereof he hath, but if not, then out of the goods and chattels of S. H. There being no goods and chattels of J. W. in the hands of S. H., the sheriff levies the execution on the individual property

of S. H. and takes a forthcoming bond, which recites the execution as being against the goods and chattels of S. H., administrator of J. W., deceased. Held, there is no substantial variance between the execution and the recital thereof in the forthcoming bond. The court, in rendering this decision, distinguished this case as follows: "The case is not like *Glascoek v. Dawson* (1 Munf. 605). There the administrator was to be liable, in the event of there being no assets, for the damages and costs only; yet her own proper goods were seized for the whole debt. The bond was therefore properly quashed. Here, as there were no goods of the decedent, the defendant was liable for the whole. It was, therefore, unnecessary to preserve the distinction in the recital of the bond; nor was there anything illegal in levying on his own proper goods for the whole, since the court would intend, even if it did not appear by the return, that the officer could find no goods of the intestate on which to levy." *Hairston v. Woods*, 9 Leigh 308.

As to Parties against Whom Execution Issued.—Where an execution is against four persons and the forthcoming bond recites an execution against three only, this is material variance for which the bond must be quashed. *Holt v. Lynch*, 18 W. Va. 567.

An execution describes defendants as F. and H. and S., his sureties as administrator for J., deceased; they are described in the forthcoming bond simply as F., H. and S. This is not a variance for which the bond should be quashed. *Creigh v. Boggs*, 19 W. Va. 240.

S. ESTOPPEL TO QUESTION VALIDITY OF BOND.

Where a forthcoming bond has been voluntarily entered into, and the party executing the same has enjoyed the benefit of said bond by retaining in his possession the property levied upon under a distress warrant, which bond

was made payable to S. B. H., agent for J. H., instead of to J. H., the party to whom the rent was due, in an action of debt upon the said forthcoming bond the doctrine of estoppel applies, and it is then too late to raise the question as to the validity of said bond. *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4.

Estoppel to Deny Validity of Levy.

—The obligors having voluntarily executed the bond, they are precluded and estopped from all inquiry as to the regularity and validity of the levy of the execution upon which it was taken. *Downman v. Downman*, 2 Call 507; *Casper v. McDowell*, 5 Gratt. 212; *Cox v. Thomas*, 9 Gratt. 312; *Cecil v. Early*, 10 Gratt. 198; *Shaw v. McCullough*, 3 W. Va. 260, 261; *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4; *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338; *Harwood v. Creel*, 8 W. Va. 579.

Where property of the execution defendant has been levied upon at the instance of the defendant by the officer having the execution, and a bond given for the forthcoming and delivery of said property on day of sale and such bond is forfeited, such defendant will be estopped from the defense that such property was not subject to levy. *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

Obligors Estopped to Dispute Title to Property.—The obligors in a forthcoming bond can not dispute the title of the execution debtor to the property levied on. *Syme v. Montague*, 4 Hen. & M. 180; *Adler v. Green*, 18 W. Va. 201.

T. DEFECTIVE AS TO STATUTORY BOND—GOOD AT COMMON LAW.

If a forthcoming bond be not good as a statutory bond, it may be good as a bond at common law. *Johnston v. Meriwether*, 3 Call 523; *Beale v. Downman*, 1 Call 249; *Meze v. Howver*, 1 Leigh 442; *Downman v. Chinn*, 2

Wash. 189; *Hubbard v. Taylor*, 1 Wash. 259; *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467; *Morgan v. Hale*, 12 W. Va. 713; *Adler v. Green*, 18 W. Va. 201; *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4; *Wallace v. McCarty*, 8 W. Va. 193; *Booker v. McRoberts*, 1 Call 243.

Illustrative Cases.—A forthcoming bond which provides for the delivery of the property on a day different from the day of sale fixed in the bond, though not good as a statutory bond, is good as a common-law bond, if there is no other objection to it. *Adler v. Green*, 18 W. Va. 201.

Where a forthcoming bond is not taken in accordance with the statutes, it may be a good common-law bond, and the sheriff may bring an action of debt upon it. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467; *Beale v. Downman*, 1 Call 249; *Johnston v. Meriwether*, 3 Call 523.

Bond Taken under "Stay Law."—A bond taken by a sheriff, in whose hands there was an execution payable to the plaintiff in the execution, and taken pursuant to the ordinance of the Virginia convention, adopted April 30, 1861, entitled: "An ordinance to provide against the sacrifice of property, and to suspend proceedings in certain cases," which bond was conditioned that the obligors should well and truly pay the debt, interest and costs for which the execution issued, when the operation of said ordinance ceases, is valid as a common-law bond, even if this ordinance is null and void. *Porter v. Daniels*, 11 W. Va. 250.

III. Operation and Effect.

A. BEFORE FORFEITURE.

1. On Rights of Plaintiff.

A delivery bond before its forfeiture is a part of the execution, and although it was introduced for the benefit of the defendants, yet it is in no way injurious to the plaintiffs, as it affords them ample amends for the lien on the prop-

erty which the execution before had, but which lien is removed and substituted by the delivery bond. *Lusk v. Ramsay*, 3 Munf. 417.

2. On Property Rights.

In *Lusk v. Ramsay*, 3 Munf. 417, it is said: "I have ever been of opinion that goods taken by virtue of fieri facias, for the delivery of which, at the day of sale, a forthcoming bond had been given, were not released until the day of delivery had past; but were only suffered to remain in possession of the debtor, for his own convenience, and the ease of the sheriff; nor were they subject to another execution until after that time, for, in my conception, the law can not (nor was it ever intended by the legislature that it should) step in by its own officer to arrest and render impossible to frustrate or obstruct what the law itself requires or permits to be done; especially, when it may tend to the distress and irreparable injury of an innocent third person."

On Possession of Property.—When a forthcoming bond is executed, it operates to release the property distrained and restore it to the possession of the tenant. *Carter v. Grant*, 32 Gratt. 769.

By giving a forthcoming bond under a distress warrant, the tenant acquires the right to retain possession of the property distrained. *Allen v. Hart*, 18 Gratt. 722.

Upon Right to Dispose of Property.—Since the principal in a forthcoming bond has the right to hold back property on the day of sale; by means whereof the bond becomes forfeited, it follows that he should not be prevented from making any disposition of such property which he may desire before the day of sale; the court in its opinion on this point saying: "This power of previous disposition of the property, forms, in my opinion, one important ingredient in the policy of our laws on this subject, and has been often

exercised to the great benefit of defendants, whilst it can never injure the plaintiffs in the execution." *Lusk v. Ramsay*, 3 Munf. 417.

3. On Judgment.

a. On Force of Judgment.

A forthcoming bond adds nothing to the force of the former judgment. *Turnbull v. Claiborne*, 3 Leigh 392.

b. As Bar to Proceedings on.

A forthcoming bond, even is defective until quashed, is a bar to any further proceedings on the original judgment. *Downman v. Chinn*, 2 Wash. 189; *Randolph v. Randolph*, 3 Rand. 490; *Langford v. Perrin*, 5 Leigh 552; *Rhea v. Preston*, 75 Va. 757.

c. As Satisfaction.

A forthcoming bond, so long as it is in force, is a satisfaction of the judgment. *Ward v. Vass*, 7 Leigh 135, 143.

Not Satisfaction of Judgment.—In *Lusk v. Ramsay*, 3 Munf. 417, 457, Judge Roane said he entirely concurred in the opinion of Judge Cabell in *Cooke v. Piles*, 2 Munf. 157, that a forthcoming bond is no satisfaction of a judgment, until forfeiture of the bond. See also, *Rhea v. Preston*, 75 Va. 757.

The taking of a forthcoming bond, on a judgment and execution against the obligor of an assigned bond, is not such a satisfaction of the judgment, as will preclude the assignees from having recourse against the assignors. *Smith v. Triplett*, 4 Leigh 590.

Where One of Joint Debtors Gives the Bond.—If judgment be rendered against two, and one gives a forthcoming bond with security, which bond is forfeited, the other is not discharged from the original judgment if the obligor in the forthcoming bond proves insolvent. *Garland v. Lynch*, 1 Rob. 545; *Randolph v. Randolph*, 3 Rand. 490.

4. On Execution.

An execution is not discharged by the giving of a delivery bond, but from the moment of giving such bond, and until the day of sale, it does not operate as at common law upon the prop

erty; it exists, during that period, in the delivery bond only. *Lusk v. Ramsay*, 3 Munf. 417.

On Execution Lien.—An execution lien upon the property of a debtor is not released by his giving a forthcoming bond, but continues until such bond is forfeited. *Lusk v. Ramsay*, 3 Munf. 417; *Adler v. Green*, 18 W. Va. 201.

Bond as Part of Execution.—A forthcoming bond until forfeited is part of the execution collateral to the payment of the debt. *Garland v. Lynch*, 1 Rob. 545.

As Conflicting with Execution Lien.—In *Lusk v. Ramsay*, 3 Munf. 417, it was held, that there is nothing inconsistent with the execution lien, in the permission given to the debtor by the statutes allowing him to retain possession of his property upon which an execution has been issued by entering into a forthcoming bond. The court, in passing upon this point, said: "There is nothing inconsistent with this lien, in the permission given to the debtor by this act, to hold his goods for a few days, and until the day of sale. The latter right is merely an exception out of the former, for the convenience of the debtor, and whose custody is, for the time, the custody of the sheriff. It merely amounts to this, that the custody of the defendant, allowed by the act, is not such an eioining of the goods as would authorize the sheriff to sue therefor. It would excuse him in case of nondelivery. There is no such incompatibility between the right of the sheriff, and that of the defendant, under the delivery bond, as must repeal the former by implication, and deprive the debtor's custody, authorized by this act, of its accumulative character. The two may well stand together; the one respects the right, and the other the possession, of the property, until the day of sale. There is not only no such incompatibility between the two, as, in default of an express provision of the act to that effect, would deprive the debtor's right

of custody of its accumulative character, and make the bond, before its forfeiture, a substitute for the execution, but that construction would exhibit a case entirely anomalous in our laws."

As Admitting Regularity and Validity of Levy of Fl. Fa.—The regularity and validity of the levy are admitted by the execution of the bond, if the property levied on was in fact subject to seizure. *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

As Admitting Liability of Property to Levy.—The execution of a forthcoming bond does not admit the liability to seizure of the property levied on under the execution. *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

5. As Estoppel to Claim Exemption Benefits.

The giving of a forthcoming bond does not estop the debtor to claim the benefits of statutory exemptions, unless by acts or omissions he waives his right. *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

6. Effect as Judgment.

Prior to forfeiture, a forthcoming bond does not have the force of a judgment. *Lusk v. Ramsay*, 3 Munf. 417.

In *Lipscomb v. Davis*, 4 Leigh 303, 307, the court said: "Admitting, however, that the bond has, to some intents the force of a judgment as soon as it is filed, I think it obvious that it has not all the effect of a judgment, until there has been an award of execution." Quoted in *Allen v. Hart*, 18 Gratt. 722.

B. AFTER FORFEITURE.

1. On Original Judgment.

a. As Satisfaction.

Where judgment is obtained against a principal and surety to a bond, and the latter gives a forthcoming bond, which is forfeited, the original judgment is not thereby satisfied. *Randolph v. Randolph*, 3 Rand. 490.

A forfeited forthcoming bond stands as a security for the debt, and though, while in force, no execution can be

taken out or other proceedings be had at law to enforce the original judgment, yet the bond is not an absolute satisfaction. For if it be faulty on its face, or the security when taken be insufficient, or the obligors, though solvent when the bond is taken, become insolvent afterwards, the plaintiff may, for these or other good reasons, on his motion, have the bond quashed and be restored to his original judgment. And though the bond be not quashed, if it appear that it may properly be, a court of equity, which looks to substance rather than form, and, when occasion requires, treats that as done which ought to be done, will regard the bond as a nullity, and the original judgment in full force. *Rhea v. Preston*, 75 Va. 757, 779; *Garland v. Lynch*, 1 Rob. 545; *Jones v. Myrick*, 8 Gratt. 179, 219.

If a forthcoming bond be taken and forfeited, the forfeited bond is only an apparent satisfaction of the debt. *Garland v. Lynch*, 1 Rob. 545; *Taylor v. Dundass*, 1 Wash. 92; *Downman v. Chinn*, 2 Wash. 189; *Randolph v. Randolph*, 3 Rand. 490.

A judgment is obtained against three persons, and execution is issued thereon, which is levied on the property of one of them, who, thereupon, gives a bond with surety for the forthcoming and delivery of the property on the day of sale; and this bond is forfeited. Held, the execution and forfeiture of the bond did not discharge and extinguish the original debt, as against the other joint debtors. *Robinson v. Sherman*, 2 Gratt. 178; *Garland v. Lynch*, 1 Rob. 545.

b. As a Bar to Further Proceedings.

A forfeited forthcoming bond will prevent an execution or other proceeding in the original judgment until such bond be quashed. *Garland v. Lynch*, 1 Rob. 545; *Taylor v. Dundass*, 2 Wash. 50, 53; *Downman v. Chinn*, 2 Wash. 189; *Randolph v. Randolph*, 3 Rand. 490.

When a forthcoming bond is forfeited it is a bar to any other proceedings on the original judgment until quashed, even though defective; so that if it is never quashed, the right to levy a new execution upon the original judgment ceases—is gone forever. The creditor must rely upon the security afforded by the bond and the judgment thereon. *Trevillian v. Guerrant*, 31 Gratt. 525.

c. As Extinguishment of Judgment Lien.

On a joint judgment against several, the service of a ca. sa. on one, and the execution and forfeiture of a forthcoming bond by him, does not extinguish the lien of the judgment upon the land of the others. *Leake v. Ferguson*, 2 Gratt. 419.

2. On Execution.

If a forthcoming bond is forfeited, the forfeiture of such bond operates upon the execution so as to terminate it completely. *Lusk v. Ramsay*, 3 Munf. 417.

As Extinguishment of Execution Lien.—An execution lien ceases when a forthcoming bond is given and forfeited. *Adler v. Green*, 18 W. Va. 201.

3. Effect as Judgment.

a. General Rule.

After a forthcoming bond is forfeited, it assumes a new character, attains the dignity of a judgment and becomes the foundation of a new procedure. *Lusk v. Ramsay*, 3 Munf. 417.

The statutes provide that when a forthcoming bond is forfeited and returned as therein mentioned, it shall have the force of a judgment. *Allen v. Hart*, 18 Gratt. 722; *Cole v. Fenwick*, Gilmer 134; *Lusk v. Ramsay*, 3 Munf. 417; *Garland v. Lynch*, 1 Rob. 545; *Turnbull v. Claibornes*, 3 Leigh 392; *Booth v. Kinsey*, 8 Gratt. 560.

Limited Meaning of Words "Force of a Judgment."—In *Allen v. Hart*, 18 Gratt. 722, the court said: "And the present law continues to say in regard to all forthcoming bonds, whether

taken under an execution or under a distress warrant, that when forfeited and returned as therein mentioned, 'they shall have the force of a judgment.' We have seen in what a limited sense these words were used, even in regard to a bond taken on an execution under the former law; and they must have been used in a still more limited sense in the present law, especially in regard to a bond taken under a distress warrant."

In *Allen v. Hart*, 18 Gratt. 722, the court, in commenting on the effect of a forfeited forthcoming bond under a distress warrant, said: "But I think too much effect is given in the argument to the words 'shall have the force of a judgment.' Even in regard to a forthcoming bond taken under an execution, it had the force and effect of a judgment only sub modo, even under the old law which existed before the Code took effect."

b. When Bond First Acquired Force of Judgments.

In *Redd v. Ramey*, 31 Gratt. 205, the court said: "Before the act of 1842 (Sess. Acts, 1842, ch. 71, § 2) a forthcoming bond forfeited had the force of a judgment, and the clerk, on motion, awarded execution thereon."

But in *Lusk v. Ramsay*, 3 Munf. 417, it is said that, it was not until the year 1869 that forthcoming bonds were declared to have the force of judgments, and placed on their present footing.

Under the Act of 1842.—In *Redd v. Ramey*, 31 Gratt. 205, it is said that, by the act of 1842, a forthcoming bond, forfeited and returned, no longer had the force of a judgment, but that the court was directed after notice to grant judgment and award execution."

c. From What Time Operative.

After Return to Clerk's Office.—A forthcoming bond forfeited has the force of a judgment so as to create a lien upon the lands of the obligors, only from the time the bond is returned to the clerk's office. *Jones v.*

Myrick, 8 Gratt. 179; *Booth v. Kinsey*, 8 Gratt. 560; *Cabell v. Given*, 30 W. Va. 760, 5 S. E. 442.

Where the only evidence of the time when a forfeited forthcoming bond is returned to the clerk's office is an indorsement as follows: "Notice proved and docketed in court 10th October, 1868, and mo. to quash,"—such bond would have the force of a judgment from the date in such indorsement. *Cabell v. Givens*, 30 W. Va. 760, 5 S. E. 442.

It seems that a forthcoming bond has not the force of a judgment, till it is returned forfeited and filed in the clerk's office; and even after it is filed, it is only in a partial sense, that it has the force of a judgment before execution upon it is awarded. *Lipscomb v. Davis*, 4 Leigh 303.

Filing of Bond as a Prerequisite.—*"In Lipscomb v. Davis*, 4 Leigh 303, 305, *Tucker, P.*, said: 'The filing previous to the motion is not indeed essential to it (*Eppes v. Colley*, 2 Munf. 523;) but the bond must be filed when the judgment is given, and until filed it will not, I presume, have the force of a judgment. Were it otherwise, these newly-created judgments, instead of being deposited in a fixed and known office for examination and as notice to all concerned, would be ambulatory in the pockets of the plaintiffs or the sheriffs, to the great prejudice of executors and administrators who must look to them as debts of superior dignity, and to the entrapping of purchasers of lands of the debtor, or his sureties, which would be overreached by these judgments in ambuscade.' In *Central Land Co. v. Calhoun*, 16 W. Va. 361, it was held, that 'though the forthcoming bond be left at the clerk's office before it is forfeited, yet, if the property is not produced on the day of sale, the officer may have the clerk indorse it as filed in the office after the day of sale, and it will operate as a judgment as if actually returned to the office after the

day of sale.' The purpose of the statute is that such forfeited bonds, before they can have the force of judgments so as to create liens on the real estate of the obligors, must be returned to the clerk's office where they are filed for the purpose, as clearly appears by the statute, of giving notice to all persons interested therein. In *Jones v. Myrick*, [8 Gratt. 179], supra, it was held, that a forthcoming bond forfeited has the force of a judgment, so as to create a lien on the lands of the obligors, only from the time the bond is returned to the clerk's office; and where there is no evidence that it was returned to the clerk's office before the day on which there was an award of execution thereon by the court, it will be regarded as having been returned to the office on that day. At the time that decision was rendered the statute did not require that the clerk should indorse the date of the return on the bond. By the Code of 1860, which governs this case, § 2, ch. 189 provides: 'The clerk shall indorse on the bond the date of its return; and against such of the obligors therein as may be alive when it is forfeited, and so returned it shall have the force of a judgment.'" *Cabell v. Given*, 30 W. Va. 760, 5 S. E. 442.

Not Until Award of Execution.—In *Lipscomb v. Davis*, 4 Leigh 303, the court said: "Admitting, however, that the bond has, to some intents, the force of a judgment as soon as it is filed, I think it obvious, that it has not all the effect of a judgment until there has been an award of execution. No execution can be sued on it, at the mere will of the party; the authority of the court must first be obtained by motion. And even the lapse of a year, that authority may be obtained by motion. Moreover, it can not be obtained by scire facias, but the motion and the action of debt are the only remedies. Then again, though the statute gives to the bond the force of a judgment, still it looks upon it, until execution has been

awarded, in a far different light. A judgment is certain, fixed and conclusive. It can only be controverted by a proceeding in error; and execution is accordingly awarded upon the demand of the party, without the authority or leave of the court. And, as he has this uncontrolled power to pursue his debtor by execution, a presumption of payment arises from his failure to do so. The forthcoming bond, on the other hand, is not final and conclusive. It was foreseen that these instruments, taken by ministerial officers, would be exceedingly liable to errors, and hence the intervention of the court was required to ascertain the validity of this new species of judgment. No execution can issue upon it but on motion; for the regularity of the bond may be questioned, a performance of its conditions averred, even the execution of it denied. It has not, therefore, until the award of execution, the most important characteristics of a judgment."

d. Against Whom Operative.

Where a forfeited forthcoming bond is returned to the clerk's office and properly indorsed, it should have the force of a judgment against such of the obligors as may be alive when it is forfeited and so returned. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

e. Where Bond Improperly Taken.

When a forthcoming bond made payable to a person other than that provided for in the statute, is forfeited and returned to the clerk's office, it does not have the force of a judgment, as it would have done if it had been taken and returned in the manner provided by the Virginia Code. *Lynchburg, etc., Co. v. Elliott*, 94 Va. 700, 27 S. E. 467.

4. Effect as a Lien.

A forfeited forthcoming bond is a lien upon land from the date of its return to the clerk's office. *Terry v. Wooding*, 2 Pat. & H. 178.

Nature of Lien.—The lien which results from the execution and return of a forfeited forthcoming bond is the

creature of the statute, and in order to be valid the proceedings which lead up to it must be substantially in accordance with the provisions of the statute which creates it. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467.

Exception Where Bond Not Properly Taken.—When a forthcoming bond made payable to a person other than that provided for in the statute is forfeited and returned to the clerk's office, such bond does not constitute a lien upon the lands of the obligor in the bond, as it would have done if it had been taken and returned in the manner provided by the Code. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 720, 27 S. E. 467.

In Whose Favor Lien Operates.—A forthcoming bond payable to one person can not operate as a lien in favor of another, in the absence of a statute to that effect. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467.

IV. Relief against Bond.

M. MOTION TO QUASH.

1. Power of Court to Quash.

Every court has power to watch over the execution of its process and where the same has been irregularly or fraudulently executed, to quash it. *Taylor v. Dundass*, 2 Wash. 50; *Windrum v. Parker*, 2 Leigh 361; *Taylor v. Dundass*, 1 Wash. 92; *Downman v. Chinn*, 2 Wash. 189, 303; *Snaveley v. Harkrader*, 30 Gratt. 487; *Steele v. Boyd*, 6 Leigh 547, 553, 29 Am. Dec. 218.

2. Time for Quashing.

A forthcoming bond may be quashed whenever a motion is made for the award of execution, no matter how many terms have intervened since the forfeitures. *Garland v. Lynch*, 1 Rob. 545.

3. Enumeration of Grounds for Quashing.

General Rule.—If a forthcoming bond is defective, the same will be quashed on motion. *Downman v.*

Chinn, 2 Wash. 189; *Meze v. Howver*, 1 Leigh 442.

As to the various defects and errors for which a forthcoming bond may be quashed, see ante, "Form and Sufficiency," II.

Defects Apparent on Face of Bond.—A forthcoming bond may be quashed as well for defects apparent on its face as for objections shown aliunde. *Garland v. Lynch*, 1 Rob. 545; *Rhea v. Preston*, 75 Va. 757.

Bond Not Taken in Accordance with Statute.—The execution creditor can have a forthcoming bond quashed if it has not been taken in accordance with the statute. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467.

Where Former Execution Issued and Bond Taken for Same Debt.—Where a motion is made to quash a forthcoming bond, on the ground that a previous execution had issued, and a forthcoming bond taken for the same debt, which execution and bond, it was alleged, had been improperly quashed, the court will not inquire into the validity of the first execution and bond, upon the motion to quash the second. The judgment of a competent court will be considered right, until regularly reversed. *Jett v. Walker*, 1 Rand. 211.

Failure to Advertise Sale.—A forthcoming bond having been taken and forfeited; on motion by the plaintiff for an award of execution thereon, the defendants move to quash on the grounds that the sale had not been advertised. It was held, that the failure to advertise was no ground for quashing the bond. *Gregg v. Jones*, 1 Va. Dec. 325.

Where Obligors in Forfeited Bond Prove Insolvent.—If the obligors on a forthcoming bond, though solvent when the bond is taken, became insolvent after it, the plaintiff may on his motion have the bond quashed. *Rhea v. Preston*, 75 Va. 757.

As to the quashing of a forthcoming bond where the security was insuffi-

cient when taken, see ante, "Bond Given without Proper Security," II, K, 2.

Though a forthcoming bond is forfeited, and not quashed, yet in equity the lien of the original judgment still exists; and if the obligors in the bond prove insolvent, so that the debt is not paid, a court of law will quash the bond so as to revive the lien of the original judgment. And a court of equity, having jurisdiction of the subject, will treat the bond as a nullity, and proceed to give such relief as the creditor is entitled to under this original judgment. *Jones v. Myrick*, 8 Gratt. 179.

In the action between the assignees and assignors the sheriff's return of nulla bona on the execution against the obligors in the forthcoming bond, though amended after the assignee's action and five years after the return, so as to show the insolvency of both, is conclusive evidence of such insolvency. *Smith v. Triplett*, 4 Leigh 590. *Taylor v. Dundass*, 1 Wash. 92.

It seems, the deputy sheriff in whose hands the execution on the forthcoming bond is placed, is a competent witness to prove the insolvency of the obligors. *Smith v. Triplett*, 4 Leigh 590.

Where Execution on Bond Proves Unavailing.—Even after execution has been awarded on a forthcoming bond, the bond may be quashed on the motion of the creditor, to enable him to have execution on the original judgment, if the case be one in which the execution on the forthcoming bond has proved unavailing, without any default of the creditor. *Garland v. Lynch*, 1 Rob. 545.

Where Motion for Award of Execution Made after Injunction against Enforcement.—Where a forthcoming bond is given for the delivery of property levied upon by virtue of an execution, and injunction is obtained before the day of sale against the enforcement of the execution; if either before or after the dissolution of the injunction a motion is made for award of execution on

the forthcoming bond, the court on motion of the defendants should quash such bond and dismiss the motion. *Hull v. Bloss*, 27 W. Va. 654.

4. Execution Regarded as Part of Record.

Upon a motion to quash a forthcoming bond, for defects apparent on the face of the execution on which it was taken, an appellate court will regard the execution as part of the record, though not made so by any express order to that effect. *Couch v. Miller*, 2 Leigh 545.

B. EQUITABLE RELIEF WHERE BOND MAY BE QUASHED.

Even though a forthcoming bond be not quashed, if it appears that it may properly be, a court of equity, which looks to substance rather than form, as when an occasion requires that as done which ought to be done, will regard the bond as a nullity, and the original judgment as in full force. *Rhea v. Preston*, 75 Va. 757.

Equity will treat as a nullity a forfeited forthcoming bond, on the execution issued on the judgment whereon there has been a return of "nulla bona," and regard the lien of the original judgment as still subsisting for the benefit of the creditor. *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. 387; *Jones v. Myrick*, 8 Gratt. 179.

C. CORRECTION OF ERRORS.

Upon an appeal from the judgment of an inferior court, errors in the execution or replevy bond, issued or taken, after the judgment, will not be noticed. They are merely ministerial acts, and must be corrected in the same court upon motion; and if, on such motion, that court give an erroneous opinion, the party injured may then appeal, and have it corrected in the appellate court. *Leftwitch v. Stovall*, 1 Wash. 303.

A forthcoming bond having been taken and forfeited, on motion by the plaintiff for an award of execution thereon, the defendant moved to quash

the bond because there was an alleged mistake in the execution thereof, it being claimed that it was not intended to be a common forthcoming bond, but a forthcoming bond under the interpleader statute. It was held, that the alleged mistake in the execution of the bond could be taken advantage of by a special plea, alleging the mistakes, or by a special plea of non est factum; and not on a motion to quash the bond. *Gregg v. Jones*, 1 Va. Dec. 325.

D. APPEAL FROM JUDGMENT QUASHING BOND.

In *Couch v. Miller*, 2 Leigh 545, a motion was made to quash a forthcoming bond for defects apparent on the face of the execution upon which it was taken. On appeal, it was objected in the court of appeals that the execution not having been made a part of the record, by any express order of the lower court, or by a bill of exceptions filed for that purpose, it was not competent for the appellate court to look into it, and compare it with the bond. In support of the objection, *Jones v. Hull*, 1 Hen. & M. 212; *Bronaugh v. Freeman*, 2 Munf. 266, and *Burke v. Levy*, 1 Rand. 1, were cited. Judge Cabell, who delivered the opinion of the court, in regard to these cases, said: "It is true, that in those cases, the court did refuse to look into the executions. But, in all of them, the defendants, though they appeared in the court below, had made no objection to the bonds, on the ground of their being unauthorized by or variant from the executions. This court said, their failure to make such objections in the court below, furnished ground to presume that the bonds had been rightly taken, so far as related to the executions, and therefore it would not look into the executions, to see whether that was in fact the case or not. The principle on which those cases were decided, does not apply to that which is now before us; for here, it is expressly stated, that the bond was ob-

jected to by the defendant, and quashed by the court, on account of defects apparent on the face of the execution. This necessarily made the execution a part of the record, and imposes on the appellate court the duty to look into it, as the only means of testing the correctness of the judgment appealed from."

Reversal of Judgment Quashing Bond.—If a judgment quashing a forthcoming bond be reversed, the appellate court will not proceed to give judgment for the plaintiff, unless it regularly appear that the defendants had legal notice of the motion, or appeared to oppose it. If, therefore, there be no bill of exceptions, making the notice, stated in the record, a part thereof, and it do not appear by the judgment itself, that the defendants had legal notice, or appeared in the court below, the cause should be sent back, to give the plaintiff an opportunity to prove his notice, and the defendants to make any defense thereto, which their case may admit of, according to law. *Beale v. Wilson*, 4 Munf. 380.

V. Taking New Bond.

Right to Take.—A sheriff or other officer levying a writ of fieri facias takes a forthcoming bond, and the property therein named is delivered up on the day of sale, but for want of bidders is not sold. He can take another forthcoming bond under the statute. *Adler v. Green*, 18 W. Va. 201.

Estoppel to Deny Performance of First.—A sheriff or other officer, who takes a second forthcoming bond for the property included in the first bond, is estopped from denying, that the property was delivered in performance of the condition of the first bond. *Adler v. Green*, 18 W. Va. 201.

VI. Performance of Condition. **A. BY DELIVERY OF PROPERTY.**

Prior to the day mentioned in the condition of a forthcoming bond, the

bond is defeasible by the delivery of the property. *Lusk v. Ramsay*, 3 Munf. 417; *Scott v. Hornsby*, 1 Call 41; *Garland v. Lynch*, 1 Rob. 545.

If the property mentioned in the condition of a delivery bond, is produced on the day of sale, the bond has accomplished its object, and is as much without effect as if it never had existed; the execution resumes its operation as at common law, and the sheriff proceeds to sell accordingly. *Lusk v. Ramsay*, 3 Munf. 417.

What Constitutes Delivery.—On the day of sale the property is at the place of sale and consists principally of household furniture and ornaments in different rooms of the house, and the officer goes through those rooms, has the property in his presence and power, and the execution debtor does not interfere or prevent a sale of the property; this is such a delivery of the property, as discharges the obligors in the bond from responsibility, notwithstanding the fact that the execution debtor may claim that a portion of the property is exempt from forced sale under the exemption laws, and third parties may claim a portion of it as their property. *Adler v. Green*, 18 W. Va. 201.

Effect of Partial Delivery.—A partial delivery of the goods mentioned in the condition of a forthcoming bond is not a performance thereunder. *Pleasants v. Lewis*, 1 Wash. 273; *Wallace v. McCarty*, 8 W. Va. 193.

Where Day of Sale Different from Day Fixed for Delivery.—If a forthcoming bond fixes a day of sale different from the day of delivery named in the bond, and on the day fixed for the delivery the execution debtor goes to the sheriff or other officer and informs him that the property is at the place of sale, and he does not go there to receive it, and the property is there in fact and ready to be delivered to the officer, this is a satisfaction of the condition of the bond, and there can be no

recovery on it. *Adler v. Green*, 18 W. Va. 201.

B. BY SATISFYING EXECUTION.

A forthcoming bond may be discharged by payment of the sum mentioned in the execution, and not that recited in the bond. *Scott v. Hornsby*, 1 Call 41.

Even if the value of the property mentioned in the condition of a forthcoming bond exceeds the amount due on the execution, a breach of the condition is saved by paying that amount. *Garland v. Lynch*, 1 Rob. 545.

C. ESTOPPEL TO DENY PERFORMANCE.

A sheriff or other officer, who takes a second forthcoming bond for the property included in the first bond, is estopped from denying, that the property was delivered in performance of the condition of the first bond. *Adler v. Green*, 18 W. Va. 201.

When the day of sale mentioned in a forthcoming bond arrived, the property was not sold for the want of bidders; and the same parties gave a new bond for the forthcoming of the property. The sergeant is estopped from denying that the property mentioned in the first bond was not delivered up in performance of the condition of the bond. *Adler v. Green*, 18 W. Va. 201.

VII. Forfeiture.

A. PRINCIPAL'S RIGHT TO FORFEIT.

It is well settled that the principal in a delivery bond has the legal right of forfeiting his bond by failing to have the property forthcoming on the day appointed for its delivery and sale, which right no court can obstruct. *Lusk v. Ramsey*, 3 Munf. 417.

B. WHAT CONSTITUTES FORFEITURE.

Partial Delivery Only.—Where there is only a partial delivery of the goods

mentioned in the condition of the bond, the penalty becomes forfeited. *Pleasants v. Lewis*, 1 Wash. 273; *Cole v. Fenwick*, Gilmer 134; *Wallace v. McCarty*, 8 W. Va. 193.

Computation as to Time for Delivery.—A forthcoming bond dated the 1st day of November, 1834, being conditioned for the delivery of the property "on the third Monday of November next," it is contended that there could be no breach of the condition until the third Monday in November 1835. Held, by the court of appeals (construing the instrument according to the subject matter and the evident meaning of the parties), that the day for the delivery of the property was the third Monday of November 1834. *Spencer v. Pilcher*, 10 Leigh 490.

Delay in Delivery.—Where, on the day of sale mentioned in the forthcoming bond, the property is on the spot before 1 o'clock, but not delivered to the sheriff until after 4 o'clock, this will not be a good delivery under the act of 1821, in certain cases, and the bond will be forfeited. *M'Kinster v. Garrett*, 3 Rand. 554.

Failure to Pay Sheriff's Commissions.—Where a forthcoming bond is given, and the debtor, on the day of sale, pays to the creditor the full amount of the debt, interest and costs, except the sheriff's commission, the bond will be forfeited, and a motion will lie upon it. *Bernard v. Scott*, 3 Rand. 522.

C. AS SATISFACTION OF EXECUTION.

Until the forthcoming bond be forfeited there is no satisfaction of the execution. *Cooke v. Piles*, 2 Munf. 151; *Lusk v. Ramsay*, 3 Munf. 417.

D. EXTENT OF PRINCIPAL'S LIABILITY.

On the forfeiture of a forthcoming bond, the principal incurs thereby the penalty annexed by law, which is all that others can require of him. *Lusk v. Ramsay*, 3 Munf. 417.

E. FORFEITURE PRIOR TO INJUNCTION AGAINST ENFORCEMENT OF EXECUTION.

If a forthcoming bond is forfeited before the issuance of an injunction against the enforcement of an execution, the injunction does not discharge it, the obligors remaining liable. *Wilson v. Stevenson*, 2 Call 213; *Hull v. Bloss*, 27 W. Va. 654.

F. FORFEITURE AFTER INJUNCTION AGAINST ENFORCEMENT OF EXECUTION.

If the forthcoming bond be not forfeited at the time when an injunction issues against the enforcement of the execution, the penalty is saved because the compliance with the condition would be useless, as the property must be restored immediately upon its delivery to the sheriff and therefore the law will dispense with it. *Wilson v. Stevenson*, 2 Call 213; *Hull v. Bloss*, 27 W. Va. 654.

G. PREVENTION OF FORFEITURE.

By Delivery of Goods by Surety.—See ante, "Performance of Condition," VI.

The surety of a forthcoming bond has a right to deliver the property on the day of sale, if he can on that day peaceably obtain possession thereof. *Lusk v. Ramsay*, 3 Munf. 417.

By Supersedeas.—If a supersedeas to a judgment (execution being levied, and a forthcoming bond taken), be issued before the day of sale, and thereupon the property be not forthcoming, the penalty of the bond is saved, and no motion lies upon it. *Rucker v. Harrison*, 6 Munf. 181.

VIII. The Return.

A. NECESSITY FOR RETURN.

If a forthcoming bond is forfeited, it should be returned to the clerk's office of the county court of the county wherefrom such warrant emanated to

be there safely kept. *Central Land Co. v. Calhoun*, 16 W. Va. 361; *Lipscomb v. Davis*, 4 Leigh 303; *Booth v. Kinsey*, 8 Gratt. 560.

Statutory Provision.—Section 3619, Virginia Code, provides: "If the condition of such forthcoming bond be not performed, the officer, unless payment be made of the amount due on the execution or warrant (including his fee, commission, and charges aforesaid), shall, within thirty days after the bond is forfeited, return it with the execution or warrant to such court, or to the clerk's office of such court as is prescribed by § 900. The clerk shall indorse on the bond the date of its return. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467.

B. TIME FOR RETURN.

Though the forthcoming bond be left at the clerk's office before it is forfeited, yet, if the property is not produced on the day of sale, the officer may have the clerk endorse it as filed in the office after the day of sale, and it will operate as a judgment, and as if actually returned to the office after the day of sale. *Central Land Company v. Calhoun*, 16 W. Va. 361.

C. TO WHAT PLACE RETURNABLE.

Forfeited forthcoming bonds taken on distress warrants issued for rent by justices of the peace of a county are returnable to the county courts. *Hancock v. Whitehall*, 100 Va. 443, 41 S. E. 860.

Replevy Bond Taken under Distress for Rent.—The court in *Ferguson v. Moore*, 2 Wash. 54, in passing upon the question as to what court a replevy bond taken under a distress for rent should be returned, said: "But then the question is, to what court is the bond to be returned? The answer is an obvious one, and results from the nature of the case. It should be to that court to which the officer belongs, of which he is the representative, and whose orders and process he is bound

to obey and execute, or to the court of that county in which the land lies. This must be a general rule, unless in some special case where the law hath otherwise directed, and which on that account will form an exception. This case comes properly within that rule, though no precept issues from any court. Consider what would be the situation of both parties, were the law otherwise. If the sheriff may return the bond to a court whose officer he is not, he may return it to any court in the commonwealth, which might prove as inconvenient to the landlord, as to the tenant. If the bond be delivered to the party, the same reason requires that the motion should be made in the same court which would have had jurisdiction, in case the sheriff had returned it according to the rule before mentioned. The above observations are intended to show the necessity of confining the return to some particular court, and is a complete answer to the supposed case of a distress made in a different county, from that in which the land lies, in which case, the bond should be returned either to the court of the county in which the land lies, or to that to which the officer belongs."

D. ENDORSEMENT OF DATE OF RETURN.

Upon the return to the clerk's office of a forfeited forthcoming bond, the clerk is required to indorse on the bond the date of its return. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

The requirement by the statute that the clerk of the court shall indorse on a forfeited forthcoming bond "the date of its return," is directory. *Cabell v. Given*, 30 W. Va. 760, 5 S. E. 442.

A court will take official notice of who is its clerk; and an endorsement by him of when a forfeited forthcoming bond was filed in his office will be regarded as evidence thereof, though he failed to add to his signature his official position as clerk of the court. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

E. RELATION BACK WHERE RETURN DELAYED.

A forfeited forthcoming bond not returned to the clerk's office until some day in the term after the first, when there is an award of execution thereon does not relate back to the first day of the term. *Jones v. Myrick*, 8 Gratt. 179.

F. CONCLUSIVENESS OF RETURN.

A sheriff's or other officer's return upon a forthcoming bond is not conclusive, but only prima facie evidence of its truth. *Adler v. Green*, 18 W. Va. 201; *Cole v. Fenwick*, *Gilmer* 134.

Contradiction of Return.—The uniform practice in Virginia has been to allow the contradiction of the sheriff's return of "forfeited" upon forthcoming bonds. *Adler v. Green*, 18 W. Va. 201; *McKinster v. Garrott*, 3 Rand. 554; *Bernard v. Scott*, 3 Rand. 522; *Pleasants v. Lewis*, 1 Wash. 273; *Nicolas v. Fletcher*, 1 Wash. 330; *Burke v. Levy*, 1 Rand. 1; *Jones v. Raine*, 4 Rand. 386; *Cole v. Fenwick*, 1 *Gilmer* 134.

In *Alder v. Green*, 18 W. Va. 201, it was held, that sheriff's or other officer's return of "forfeited" on a forthcoming bond, is not even prima facie evidence of the truth thereof. *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4.

G. PRESUMPTION OF RETURN.

There being no evidence that a forthcoming bond was returned to the clerk's office before the day on which there was an award of execution thereon by the court, it will be regarded as having been returned to the office on that day. *Jones v. Myrick*, 8 Gratt. 179.

IX. Redelivery of Bond to Debtor.

Since a forthcoming bond is held merely as a substitute for the property, and as a sheriff is required to return the property of the debtor upon his obtaining an injunction or after staying an execution before the conversion of

the property into money by a sale thereof, it necessarily follows that if his duty require him to deliver the property, it would be equally his duty to deliver to the debtor the forthcoming bond, the substitute for the property. *Hull v. Bloss*, 27 W. Va. 654.

X. Enforcement.

A. IN GENERAL.

A judgment can be obtained on a forthcoming bond only by action or motion. *Allen v. Hart*, 18 Gratt. 722.

In *Redd v. Ramey*, 31 Gratt. 265, it is said that, "although a forfeited forthcoming bond when returned to the clerk's office has the force of a judgment, yet there may be a judgment rendered by the court, by motion or action, thereon. See Code, 1849, ch. 189, § 2."

B. BY MOTION ON BOND.

1. Notice of Motion.

a. Time for.

Barton in his second volume of Law Practice (page 1053) says: "No special time for a notice being required, it will come under the general rule of ten days." Quoted in *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

Necessity for Three Months' Notice.

—The act of May 28, 1870, entitled an act to prevent the sacrifice of property at forced sales, acts of 1869-70, ch. 120, p. 162, does not require three months' notice of a motion on a forthcoming bond, where the bond was forfeited before the passage of the act. *Goolsby v. Strother*, 21 Gratt. 107.

b. Form and Sufficiency.

If the notice on a forthcoming bond be signed by the plaintiff, it is sufficient, although it omit to state to whom the bond is made payable, as the defendant, in such a case, has no reason to presume that the plaintiff means to move upon a bond not given to himself. *Lemoigne v. Montgomery*, 5 Call 525.

A notice of motion for judgment on an undertaking, in which a blank is left for the day on which the motion

will be made, and a blank for the name of the party who will make the motion; the name of the party to whom the undertaking is given, and to whom the money is to be paid, being signed at the foot of the notice, as the person giving the same, is sufficient. *White v. Sydenstricker*, 6 W. Va. 46.

A notice upon a forthcoming bond, given to a regular term of a court which the judge fails to attend, is sufficient to authorize an award of execution on the bond, at a special term held under § 17 of the circuit court law, Sup. Rev. Va. Code, p. 141. *Wootten v. Bragg*, 1 Gratt. 1.

"As to the form of the notice, 9 Ency. Pl. & Prac. 666, says: 'A material mistake in describing the forfeited bond will render the notice insufficient. But strict, technical accuracy in the notice does not appear to be necessary.'" *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

Barton, in his second volume of Law Practice (page 1040), speaking of the notice says: "If the form of it be such that the defendant can not mistake the object of the motion, it is sufficient." *Graves v. Webb*, 1 Call 443; *Board of Education v. Parsons*, 22 W. Va. 308; *Carr v. Meade*, 77 Va. 142; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

c. Variance.

In a notice of a motion to be made on a forthcoming bond, the bond was described by mistake as having been executed by John M. Cooke, while it was in fact executed by George M. Cooke. It was held, that the variance was material and the notice insufficient as a result of such variance. *Cooke v. Patriotic Bank*, 1 Leigh 433.

d. Amendment.

An amendment of the return made by an officer on a notice, does not permit him in any wise to change or amend the notice itself; and if he does, the changed or amended notice is a nullity. *White v. Sydenstricker*, 6 W. Va. 46.

e. Docketing.

After proving due service of a notice for the award of execution on a forfeited forthcoming bond, notice should be docketed in the county court on the day on which the notice was returnable. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

2. Time for Making.

A motion on a forthcoming bond can only be made on the day to which the notice is given, unless the defendant be called, and the motion entered and continued. *Parker v. Pitts*, 1 Hen. & M. 4.

3. Filing Bond as Prerequisite to Motion.

On a motion on a forthcoming bond, it is not essential that the bond shall have been filed in the clerk's office previous to the motion, but the bond must be so filed when the judgment is given. *Lipscomb v. Davis*, 4 Leigh 303.

4. Who Entitled to.

A, executor of B, recovered judgment against C and sued out execution thereon; before the execution was delivered to the sheriff, A died; the execution being then delivered to the sheriff, he levied it against the property of C, and took a forthcoming bond payable to A, executor of B. A motion for the award of execution on the forthcoming bond was made by D, executor of A. It was held, that the forthcoming bond belonged to B's estate and D was entitled to the motion and to award the execution on the bond as the representative of B, not as the representative of A. *Turnbull v. Claibornes*, 3 Leigh 392.

Where Bond Not Taken in Accordance with Statute.—Where a forthcoming bond was not taken in accordance with the statute, an execution creditor can not proceed upon it by motion in his own name. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467; *Downman v. Chinn*, 2 Wash. 189.

5. Pleading.

No formal issue need be joined on a motion on a forthcoming bond, as the

pleadings may be ore tenus, and the court may pronounce judgment on the evidence. *M'Kinster v. Garrott*, 3 Rand. 554; *Wallace v. McCarty*, 8 W. Va. 193.

6. Effect of Confession of Judgment.

A confession of judgment on a motion on a forthcoming bond, will operate as a release of errors in the original judgment. *Edmonds v. Green*, 1 Rand. 44; *M'Rea v. Turnpike Co.*, 3 Rand. 160; *Stanard v. Timberlake*, 3 Leigh 681.

Where an office judgment is erroneously entered up against the principal and special bail, the latter afterwards gives a forthcoming bond, and confesses judgment on the said bond. He can not avail himself of the error in the original judgment. *Edmonds v. Green*, 1 Rand. 44.

7. Bond Taken under Distress for Rent.

When a forthcoming bond under a distress for rent is forfeited, the landlord may proceed on such bond by motion. *Carter v. Grant*, 32 Gratt. 769.

Burden of Proof.—On proceedings by motion upon a forthcoming bond given on a distress for rent, the plaintiff must prove the contract of rent for which the distress was sued out. *Carter v. Grant*, 32 Gratt. 769.

Where Plaintiff Fails to Produce or Prove Distress Warrant.—If the defendant in a motion on a forthcoming bond appears and makes defense, and the plaintiff proves the execution of the bond and its forfeiture, on a demurrer to the evidence by the defendants, judgment should be given for the plaintiff, though he failed to produce or prove the distress warrant on which the forthcoming bond was based. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

8. Bond without Security.

A forthcoming bond given by the defendant only, without any security, will support a motion, and judgment will be rendered on it in favor of the

plaintiff. *Washington v. Smith*, 3 Call 13.

9. Suspension or Bar on Right to Move.

Effect of Supersedeas on Right to Move.—The right to move on a forfeited forthcoming bond is not suspended by a supersedeas to the original judgment. *Spencer v. Pilcher*, 10 Leigh 490.

Bar to Motion against Surety.—A. gave a forthcoming bond with W. as security. Judgment was rendered on the bond against A. and a fi. fa. issued. Property was taken but the fi. fa. was not returned. It was held, that these proceedings were no bar to a motion upon the bond against W. *Winston v. Whitlocke*, 5 Call 435.

Statute of Limitations as Bar to Motion.—The statute of limitations, 1 Rev. Va. Code, ch. 128, § 5, whereby the remedy on a judgment by debt or scire facias is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years' standing. *Lipscomb v. Davis*, 4 Leigh 303.

10. Estoppel to Deny Liability.

In a motion on a forthcoming bond, the defendant will not be allowed to prove that the execution issued against another person of the same name who is now dead. *Downman v. Downman*, 2 Call 507.

11. Necessity for Jury.

Upon a motion for judgment upon a forthcoming bond if there is an issue of fact made by the pleadings and neither party ask for a jury, the court may try it or direct a jury, either, in the exercise of its discretion. *Wallace v. McCarty*, 8 W. Va. 193; *McKinster v. Garrott*, 3 Rand. 554.

Necessity for Jury Where Non Est Factum Is Pleaded.—Where non est factum is pleaded to a motion on a forthcoming bond, the court may render judgment without the intervention of a jury; or they may impanel a jury by the issue at its discretion. *Burke*

v. Levy, 1 Rand. 1; *Watson v. Alexander*, 1 Wash. 340.

12. Bond Considered as Part of Record.

In a summary motion on a forthcoming bond, the bond is considered a part of the record without being spread upon it by exception, for it is the foundation of the plaintiff's claim, and the bond certified by the clerk is taken to be that on which judgment was given. *Skipwith v. Mut. Assurance Society*, 10 Leigh 502.

13. Proof of Forbearance.

The principal debtor is a competent witness for the surety on the hearing of the motion on a forthcoming bond, to prove an agreement between the creditor and himself for forbearance. *Steele v. Boyd*, 6 Leigh 547, 29 Am. Dec. 218. See also, *Armistead v. Ward*, 2 Pat. & H. 504.

14. Burden of Proof.

Upon a motion for judgment on a forthcoming bond, the plaintiff is not bound to show a breach of the condition; but the defendant is to prove performance. *Nicolas v. Fletcher*, 1 Wash. 330.

15. Notice to Joint Obligors—Judgment against One.

On a joint notice to all the obligors in a forthcoming bond, the plaintiff may take judgment against one of the defendants. *Glassel v. Delima*, 2 Call 368, quæred in *Wilson v. Stevenson*, 2 Call 213.

C. BY ACTION ON BOND.

1. When Right of Action Accrues.

No right of action accrues upon a forthcoming bond until the forfeiture thereon has been incurred. *Lusk v. Ramsay* 3 Munf. 417.

2. Who May Maintain.

Where Bond Not Taken in Accordance with Statute.—Where a forthcoming bond was not taken in accordance with the statute, an execution creditor can not proceed upon it by action in his

own name. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 467; *Downman v. Chinn*, 2 Wash. 189.

Executors and Administrators.—Executors may maintain an action of debt upon a three months' replevy bond payable to their testator. *Booker v. M'Roberts*, 1 Call 243. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

Where Bond Made Payable to Sheriff.—If a forthcoming bond be taken payable to the sheriff, he may maintain an action of debt upon it. *Beale v. Downman*, 1 Call 249.

3. After Unsuccessful Motion.

An action of debt may be brought on a defective forthcoming bond, even after an unsuccessful motion has been made on it. *Hewlett v. Chamberlayne*, 1 Wash. 367.

4. Bond Taken under Distress Warrant.

When a forthcoming bond under a distress for rent is forfeited the land may proceed on the bond by regular action. *Carter v. Grant*, 32 Gratt. 769.

Burden of Proof.—On proceedings by action upon a forthcoming bond given on a distress for rent, the plaintiff must prove the contract of rent for which the distress was sued out. *Carter v. Grant*, 32 Gratt. 769.

5. Validity of Judgment.

R. obtains a decree against his guardian and his sureties for a certain sum of money; and sues out an execution, which is levied, and a forthcoming bond taken, and forfeited. The court on its chancery side, on notice to the obligors in the forthcoming bond, renders a judgment in favor of R. against them; and this judgment is docketed. It was held, that the judgment is a valid judgment, and having been docketed, it is notice which will affect all subsequent purchasers of land from any of the defendants in the judgment. *Redd v. Ramey*, 31 Gratt. 265.

D. DEFENSES.**1. Where Bond Taken on Distress Warrant.**

Defenses as a Substitute for Replevin.—"It appears that the defense which a tenant may make to an action or motion on a forthcoming bond taken under a distress warrant, was intended by the legislature to be a substitute for his common-law remedy by the action of replevin, which was abolished by the Code." *Allen v. Hart*, 18 Gratt. 722.

Defenses to Motion on Bond on Execution and on Distress Warrant Distinguished.—In *Allen v. Hart*, 18 Gratt. 722, the court said: "But whatever may be the defenses which may be made to a motion on a forthcoming bond taken under an execution, the question is very different in regard to defenses which may be made to a motion on forthcoming bond taken under a distress warrant. The legislature found it convenient to adopt the forthcoming bond as the means of affording a substitute for the action of replevin; but they did not intend thereby to adopt, in regard to such a bond, all the consequences which flowed from a forthcoming bond taken under an execution; or rather, they did not intend to place the two bonds on the same footing in all respects. The radical difference between the two cases consist in this; that when a forthcoming bond is taken under an execution, it is a part of the process of the execution of the judgment, and partakes of all the finality which belongs to the judgment. When the bond falls, the execution on which it was taken falls with it, and the judgment stands in full force, subject to the right of the plaintiff to sue out a new execution thereon. The plaintiff having obtained his judgment, the defendant can not obstruct its execution by making defenses which he might have made, but neglected to make, before the judgment which concludes him was obtained. But in the case of a forthcoming bond, taken un-

der a distress warrant, there has been no judgment. The tenant has had no day in court; and when the bond is quashed, the landlord falls back upon no judgment, but upon his mere claim for rent, for which he may sue or distrain, as before."

All Defenses Formerly Made in Replevin.—By giving a forthcoming bond under a distress warrant the tenant acquires the right of making, in the action or motion on the bond, all the defenses which he could formerly have made in the action of replevin, including the defense of set-off. *Allen v. Hart*, 18 Gratt. 722; *Carter v. Grant*, 32 Gratt. 769.

Defenses Not Confined to Statutory Enumeration.—Section 3621 was not intended to embrace all the defenses which may be made to an action or motion on a forthcoming bond taken under a distress warrant; but other defenses, such as "non est factum," "conditions performed," etc., may still be made. *Allen v. Hart*, 18 Gratt. 722; *Hancock v. Whitehall*, 100 Va. 443, 41 S. E. 860.

Illegality of Distress.—In an action or motion on a forthcoming bond, when it is taken under a distress warrant, the defendant may make defense on the ground that the distress was for rent not due in whole or in part, or was otherwise illegal. *Allen v. Hart*, 18 Gratt. 722; *Carter v. Grant*, 32 Gratt. 769; *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4; Va. Code, § 3621.

In an action of debt upon a forthcoming bond taken under a distress warrant, the defendant may plead and show by way of defense that the distress was for the rent not due from him at the time of suing out the distress warrant mentioned in the condition of said bond. *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4.

Judgment against One Defendant Only.—R. brings an action of detinue against two, and gives land under the statute in order to take possession of the property; in order to retain it they

give bond with security to have the property forthcoming to answer the judgment. In an action upon the bond the defendant pleads in bar, that judgment was against one only, and that he was thereby discharged. It was held that a demurrer to the plea was properly sustained. *Reynolds v. Hurst*, 18 W. Va. 648, overruling *Vandiver v. Hyre*, 5 W. Va. 414.

Plea of Set-Off.—In *Baltimore, etc., R. Co. v. Jameson*, 13 W. Va. 840, the court said: "So in *Allen v. Hart*, 18 Gratt. 722, it was held, that under our statutes the defense of set-off is admissible in a motion on a forthcoming bond, taken on a warrant of distress; a decision based on previous Virginia decisions, that set-off was a good defense to an avowry for rent in an action of replevin. See *Turberville v. Self*, 2 Wash. 71; *S. C.*, 4 Call 580; *Nicolson v. Hancock*, 4 Hen. & M. 491, and *Murray v. Pennington*, 3 Gratt. 91." See also, principal case cited and approved as to this point in *Washington v. Castleman*, 31 W. Va. 832, 8 S. E. 603, 605; *Carter v. Grant*, 32 Gratt. 769, 772. But such defense can not be made to a forthcoming bond taken on an execution. (P. 736, of principal case.)

When motion is made in the county court for judgment on a forthcoming bond taken on a distress warrant issued by a justice of the peace, the tenant may make any defense which shows that the rent is not due in whole or in part. The tenant has the right to rely upon set-offs in said courts to the extent to which it is necessary to make complete defense to the landlord's demand, regardless of the amount of such set-off. There is no pecuniary limit to the jurisdiction of said courts in this respect. *Hancock v. Whitehall*, 100 Va. 443, 41 S. E. 860.

2. Where Bond Given on Levy of Taxes.

No set-off of the sheriff's individual

indebtedness can be allowed against a forthcoming bond given on the levy of taxes, under acts, 1893, ch. 23. *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237.

E. TIME FOR JUDGMENT.

A judgment can not properly be given on a forthcoming bond before the day named in the notice. *Ballard v. Whitlock*, 18 Gratt. 235.

F. WHERE ONLY PARTIAL DELIVERY OF PROPERTY.

How Treated.—Where only a part of the property mentioned in a forthcoming bond is delivered, the sheriff is bound to receive the same and to proceed therewith in the same manner as if the whole had been delivered. *Pleasants v. Lewis*, 1 Wash. 273; *Cole v. Fenwick*, *Gilmer* 134.

Amount Must Be Credited.—Where there has been only a partial delivery of the goods mentioned in the condition of a forthcoming bond, if the sheriff secure and sell what is so delivered, the amount must be credited to the obligor. *Pleasants v. Lewis*, 1 Wash. 273; *Cole v. Fenwick*, *Gilmer* 134.

G. JUDGMENT BY DEFAULT.

If there be a judgment by default on a forfeited forthcoming bond, the appellate court will regard the execution as a part of the record, but if there be a variance between it and the execution, the judgment will be reversed. *Central Land Co. v. Calhoun*, 16 W. Va. 361; *Glascocock v. Dawson*, 1 Munf. 605.

In reviewing a judgment by default on a forthcoming bond, the appellate court will compare it with the execution on which it was taken. *Glascocock v. Dawson*, 1 Munf. 605.

Where there is a judgment by default on a forfeited forthcoming bond and there exists a variance between it and the execution, if the defendant appeared in the court below and made no objection to such variance, and did

not make the execution a part of the record by bill of exceptions or otherwise the appellate court will not regard such a variance. *Central Land Co. v. Calhoun*, 16 W. Va. 361; *Bronaugh v. Freeman*, 2 Munf. 266; *Burke v. Levy*, 1 Rand. 1.

Where there is a judgment by default on a forfeited forthcoming bond, if the record shows affirmatively, that it was objected to in the court below, because of defects in the execution, and that it was for that reason quashed, the execution will be inspected, though not more formally made a part of the record. *Central Land Co. v. Calhoun*, 16 W. Va. 361; *Couch v. Miller*, 2 Leigh 545.

H. BY EXECUTION ON BOND.

Authority to Award.—The court, to whose office forfeited forthcoming bond is returned, is authorized upon motion, on ten days' notice, to award execution thereon for principal, interest and costs against the obligor or obligors, or any of them, in behalf of the obligee or obligees. *Booth v. Kinsey*, 8 Gratt. 560.

Where Allowed.—No execution can be sued out on a forfeited forthcoming bond at the will of either party; the authority of the court must first be obtained by motion. *Lipscomb v. Davis*, 4 Leigh 303; *Allen v. Hart*, 18 Gratt. 722.

Filing Bond as Prerequisite.—If a forthcoming bond be delivered, by the sheriff to the plaintiff, before notice thereupon be given to the defendants, execution may be awarded upon it, though it has not been filed in the clerk's office. *Eppes v. Colley*, 2 Munf. 523.

Stay of Execution.—Under the act of January 31st, 1809, "concerning executions, and for other purposes," the debtor was not entitled to a stay of execution, or to sale of the property on credit, on any forthcoming bond executed after the passage thereof. *Richardson v. Perkins*, 4 Munf. 512.

Jurisdiction to Quash.—A judgment and award of execution upon a forfeited forthcoming bond, having been entered by default, upon a day prior to that to which notice was given, the court in which the judgment and award of execution was rendered has jurisdiction on the motion of the plaintiff to quash the execution, upon reasonable notice to the defendants. *Ballard v. Whitlock*, 18 Gratt. 235.

Quashing Prior and Awarding New Execution.—The plaintiff having given a second notice to the obligors in the forthcoming bond, for a judgment and award of execution thereon, and they appearing and objecting to the rendering of the judgment and award of execution asked, the court may at the same time quash the first judgment and execution, and render another judgment and award of execution on the bond. And the obligors being present by their counsel, they had reasonable notice of the motion to quash. *Ballard v. Whitlock*, 18 Gratt. 235.

Appeal from Judgment on Motion for Award of Execution.—Where county court overrules motion for award of execution on forthcoming bond, and circuit court reverses this judgment and awards execution, an appeal lies from such judgment of the circuit court, as of right; aliter, where circuit court affirms judgment of county court awarding execution, or itself gives original judgment awarding execution, on such bond. *Anderson v. Leitch*, 1 Leigh 462.

Effect of Failure to Award Execution on Judgment.—A judgment on a forthcoming bond, instead of awarding execution thereon, is that the plaintiff recover a debt against the defendant. Held, though irregular in form, this is substantially right. *Harpers v. Patton*, 1 Leigh 306.

Effect of Invalidity of Original Judgment.—An award of execution on a forfeited forthcoming bond can not successfully be objected to on account

of the invalidity of the original judgment, unless such judgment is null and void. *Pates v. St. Clair*, 11 Gratt. 22.

Where Judgment Reversed and Cause Remanded.—Where a county court overrules a motion for award of execution on a forthcoming bond, on a particular ground, which renders all other defense unnecessary, and this judgment is reversed by the circuit court for error in the particular point, held, the circuit court ought not to proceed to award of execution immediately, without giving defendant opportunity to make other defense, unless it appear from the record he had no other defense to make. *Anderson v. Leitch*, 1 Leigh 462.

Amount of Execution.—An execution on a forthcoming bond is to be awarded not for the value of the property to be ascertained by the jury, or in any other way, but for the amount of the execution as recited in the bond. *Garland v. Lynch*, 1 Rob. 545.

Amendment of Return on Execution.—Upon a bond assigned for valuable consideration, the assignees bring suit against the obligor, recover judgment, and sue out a fi. fa. which is levied, and a forthcoming bond taken, and that being returned forfeited, execution is awarded thereon against principal and surety, and a fi. fa. is sued out on the forthcoming bond; and on this execution, the sheriff returns nulla bona as to the surety but not as to the principal; then the assignees bring suit against the assignors, and after trial and verdict for defendants, court allows the sheriff to amend his return, and to return nulla bona as to the principal in the forthcoming bond; and gives plaintiff leave to amend his declaration, and to count on the amended return. Held, it was right to permit the sheriff to so amend his return, and to permit the plaintiffs so to amend their declaration. *Smith v. Triplett*, 4 Leigh 590.

I. RIGHTS AND LIABILITIES OF SURETIES.

See the titles CONTRIBUTION AND EXONERATION, vol. 3, p. 469; SUBROGATION.

1. Nature of Surety's Undertaking.

A surety's undertaking on a forthcoming bond bears a double aspect, and the alternative is with him, not the creditor. If he chooses to deliver the property, he is discharged, having elected to do that which constitutes his undertaking a collateral to the payment of the debt. Failing to deliver, he elects the other alternative which his undertaking embraced, the payment of the debt. *Garland v. Lynch*, 1 Rob. 545.

2. Where Bond Is Joint and Several. Plaintiff May Proceed against Each.

—Upon a joint and several forthcoming bond, the plaintiff may proceed to take the judgment against the obligors severally but he can have but one satisfaction. *Winston v. Whitlocke*, 5 Call 435.

Plaintiff's Right to Proceed to Complete Satisfaction.—Until the plaintiff is satisfied for his whole debt he may proceed against the other parties to the bond, to obtain it. *Winston v. Whitlocke*, 5 Call 435.

Judgment against One as Bar to Further Proceedings.—Where two or more are jointly and severally bound on a forthcoming bond, a judgment obtained in a separate suit on motion against one, a fi. fa. issued and seizure of property returned, but the property not sold, nor the money paid, is no bar to a second action or motion against another of the obligors. *Winston v. Whitlocke*, 5 Call 435.

3. Right to Prevent Forfeiture.

The surety in a forthcoming bond has a right to deliver the property on the day of sale, if he can on that day peaceably obtain possession thereof. *Lusk v. Ramsay*, 3 Munf. 417.

4. Right to Relief.

Exoneretur.—The court in which a

forthcoming bond for property levied on is taken may, in a proper case, direct an exoneration of the surety, and need not require him to seek his remedy by audita querela or by bill in equity. *Steele v. Boyd*, 6 Leigh 547, 29 Am. Dec. 218.

Right to Relief Where Sheriff Prevents Delivery of Property.—If the sheriff, after taking a forthcoming bond, accept the same goods from the defendant, in discharge of his body from another execution, and prevent the surety in such bond from delivering them on the day of sale therein appointed; a court of equity, on a bill for discovery and injunction, exhibited by the surety, will require the sheriff, and all parties concerned, to answer a charge of fraud and combination, and (whether fraud be established or not) will perpetually enjoin a judgment rendered against the surety upon the forthcoming bond, as unconscionable against him; leaving a plaintiff, in that judgment, to his remedy against the sheriff and the sheriff to his remedy against the person who indemnified him, or to whom, by mistake, or in his own wrong, he paid the money in satisfaction of the second execution. *Lusk v. Ramsay*, 3 Munf. 417.

Where Surety Procured by Fraud.—A *fi. fa.* being sued out by J. against M. and being in the hands of the sheriff, M. the debtor, applies to G. to join him in a forthcoming bond thereon, and represents to him, in the sheriff's presence, that the amount of the debt is about one-seventh of the real amount, which representation the sheriff does not contradict; whereupon, G. consents to become the surety, and M. and G. sign and seal a forthcoming bond, blank as to the amount of the execution and as to other material particulars, and deliver it to the sheriff, who afterwards fills up the blanks; and execution is awarded upon this forthcoming bond. Held, G. is not entitled to relief in equity against the obligation of the bond, upon the ground

of the deception which induced him to execute it, as the creditor to whom it was taken was no party to the fraud, and the sheriff, who was party to it, was not the creditor's agent in taking the bond. *Gordon v. Jeffery*, 2 Leigh 410.

Where Surety Signs Bond in Blank.—Where a surety on a forthcoming bond was induced to sign the bond in blank by the false representations of the principal and sheriff as to the amount of the judgment, equity will not grant him relief, the judgment creditor not being a party. *Gordon v. Jeffery*, 2 Leigh 410.

Where Surety Pays Amount for Which He Was Bound.—Where judgment on the forthcoming bond was rendered on proof of notice by the sheriff, when in fact no such notice had been given, and the surety was induced by the other party to believe that notice would be given, relief will be granted to the surety on the ground of surprise, if he pays the amount for which he supposed he was bound. *Gordon v. Jeffery*, 2 Leigh 410.

Where Cosureties Become Insolvent While Execution Is Suspended.—A creditor suspends execution on a forthcoming bond for several years, but he does so without consideration, and he nowise binds himself to suspend execution for any definite time; the principal and all the sureties but one become insolvent; and then the creditor sues out execution against the solvent surety. Held, the surety is not entitled to relief in equity. *Alcock v. Hill*, 4 Leigh 622.

Injunction of Judgment against Surety.—Where the sheriff, after taking the forthcoming bond, accepts the same goods from the defendant in discharge of his body from another execution, and prevents the surety in such bonds from delivering them on the day of sale therein appointed, the plaintiff in the second execution, to satisfy which the sheriff improperly sells the goods, need not be made a party to a

suit to enjoin a judgment against the surety upon the forthcoming bond, for the reason that the surety in the bond wants no decree against him. *Lusk v. Ramsay*, 3 Munf. 417.

5. Where Principal Not Served with Notice of Motion.

Under Virginia Code, § 3396, judgment on a forthcoming bond may be had against the sureties, though the principal has never been served with notice of the motion. *Newberry v. Sheffey*, 89 Va. 286, 15 S. E. 548.

6. Where Obligee Also a Surety.

A debtor in execution executes a forthcoming bond to the creditor, and a third person and the obligee execute the bond with the debtor, as his sureties. The bond being forfeited, the obligee gives notice to the principal obligor and the other surety, of a motion for award of execution upon the bond, against them; but the notice does not mention the obligee as a co-obligor. Held, the bond is a valid bond to bind the other surety, but that he is only bound as a cosurety with the obligee. *Booth v. Kinsey*, 8 Gratt. 560.

7. Liability for Original Debt.

The security on a forthcoming bond, upon the forfeiture thereof, becomes bound for the original debt. *Garland v. Lynch*, 1 Rob. 545; *Leake v. Ferguson*, 2 Gratt. 419.

The surety on a forthcoming bond though he may discharge himself by delivering the property before forfeiture, also undertakes for the debt in the event of a failure to deliver the property. *Garland v. Lynch*, 1 Rob. 545.

8. Release from Liability.

By Agreement between Creditor and Principal Debtor.—If the creditor make an agreement with the principal debtor in a forthcoming bond, to take a certain sum, payable in five annual installments, in full satisfaction of the bond, without the consent of the surety, this releases the surety from

his liability on the bond. *Steele v. Boyd*, 6 Leigh 547, 29 Am. Dec. 218.

By Paying Value of Property.—The surety on a forthcoming bond can not discharge himself by paying the value of the property to be delivered, if that is less than the amount of the execution. *Garland v. Lynch*, 1 Rob. 545.

Partial Release in Case of Debtor's Insolvency.—If the debtor proves insolvent, a surety in a forthcoming bond may be released to the extent of one moiety of the debt, either by bill in equity or by motion under the statute for the relief of sureties. *Booth v. Kinsey*, 8 Gratt. 560.

Where Surety Consents to Stay of Execution.—V. having obtained award of execution against T., principal, and W., surety, in a forthcoming bond, with the knowledge, and assent of the surety, who desires him to give the principal as much indulgence as possible; directs execution to be stayed till further orders; all the property of the principal being at the time mortgaged for a debt exceeding its value; afterwards V. sues out a fi. fa. which is levied by the sheriff on a crop of wheat of the principal made on the mortgaged land, and on personal property which is subject to the mortgage; V. being informed of the levy of his execution on the wheat, agrees with the principal debtor that he shall sell the wheat, and pay the proceeds to him, and directs the sheriff to suspend proceedings under the execution. The execution is accordingly returned countermanded; and the wheat is sold, the proceeds paid to the creditor, and credit given for the same. Held, the creditor's agreement with the principal debtor as to the wheat taken in execution, and his order to suspend proceedings on the execution, though these were without the knowledge or assent of the surety, do not discharge the surety. *Ward v. Vass*, 7 Leigh 135.

Where Sureties Execute Conditionally.—P. agrees to join H. W. as his

surety in a forthcoming bond, and executes and delivers the bond, as an escrow, upon condition that K. shall also join in and execute the bond as cosurety; and K. agrees to join as surety in the bond, and executes and delivers the same, as an escrow, upon condition that O. W. also shall join in and execute the bond as cosurety; but O. W. never unites in the bond. Held, that upon this state of facts, neither P. nor K. are liable for any part of the debt in equity, any more than they would be liable for any part of it at law, where the facts would amount to proof of non est factum. *King v. Smith*, 2 Leigh 157.

9. Effect of "Stay Law."

Where a forthcoming bond was given on an execution issued in contravention to the stay law, no advantage can be taken of this fact to defeat the question of substitution between sureties, or change the liability of endorsers, however much it may have been ground for quashing the execution. *Conaway v. Odbert*, 2 W. Va. 25.

J. AMOUNT OF RECOVERY.

In General.—In proceeding for judgment and award of execution on a forfeited forthcoming bond, the judgment should be for the true value of the property for the nondelivery of which the bond was forfeited, with interest on such value from the date of the bond, and costs incurred in the proceeding, or for so much thereof as may be necessary to satisfy the demand against the defendant in the execution or warrant, with costs, by action or motion against the persons signing said bond. *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

"Section 4, ch. 142, of the Code, provides: 'The persons signing said forfeited bond shall be liable for the true value of the property therein mentioned and not delivered as aforesaid, with interest on such value from the date of the bond, and costs incurred in proceedings upon the bond. And

the obligee in such bond * * * may recover said sum and interest, or so much thereof, as may be necessary to satisfy his demand against the defendant in the execution or warrant, with costs by action or motion against the persons signing said bond.'" *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

"In *Holt v. Lynch*, 18 W. Va. 567, it is held, that judgment should be rendered for the actual amount due on the execution, with the fee for taking the bond, and sheriff's commissions. So in *Scott v. Hornsby*, 1 Call 41; *Bell v. Marr*, 1 Call 47; *Worsham v. Egles-ton*, 1 Call 48." *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

Interest.—Judgment ought not to be rendered, on a three months' replevy bond for interest from a day anterior to the date of the bond; but it may for interest from that date, on the rent and costs of the distress added together. And if the bond be taken, including interest from a day anterior to its date, such erroneous interest may be deducted, and judgment entered for the right sum. *Williams v. Howard*, 3 Munf. 277.

Damages for Retarding Execution.—If the defendant appeals from a decree of the high court of chancery, pronounced on a forthcoming bond, the court of appeals may allow ten per cent. damages for his retarding the execution of the decree. *Skipwith v. Clinch*, 3 Call 86.

Execution is awarded on a forthcoming bond against the principal and the surety therein bound; the principal alone obtains an injunction to stay proceedings at law, which injunction is dissolved. Held, the surety is not liable for the damages incurred by the principal for retarding the execution by an injunction; and if an execution issue against the surety as well as principal for such damages, it ought, on the surety's motion, to be quashed. The execution should be so moulded.

as to exempt the surety from the damages, and to make the principal who incurred them alone liable therefor. *Garnett v. Jones*, 4 Leigh 633.

Sterling Debt Reduced to Currency.—In *Scott v. Hornsby*, 1 Call 41, it was held, that a sterling judgment might be reduced into currency at the time of entering judgment on a forthcoming bond.

Where Distress Warrant Called for Excessive Sum.—Upon proceedings upon a forthcoming bond given on a distress for rent, whether by motion or action on the bond, though the warrant of distress was for more rent than was due, the plaintiff may have judgment for the less amount due. *Carter v. Grant*, 32 Gratt. 769.

Where Bond Taken for Too Much.—In a motion on a forthcoming bond, if the defendant can show the court that the sum due by the execution is less than that recited in the bond, the court in rendering judgment will have reference to the execution itself. *Scott v. Hornsby*, 1 Call 41; *Wilkinson v. M'Lochin*, 1 Call 49.

Where Excess Does Not Appear on Face of Bond.—A forthcoming bond is taken for a greater sum than is due upon the fieri facias; but this appears by computation in court upon a motion for award of execution, and does not appear on the face of the bond. Held, the court may award execution, for the true amount due. *Osborne v. Crawley*, 1 Va. Cas. 113.

Where Plaintiff Releases Excess.—If the forthcoming bond include an excess, and the plaintiff after judgment, but during the same term, release the excess, the defect is thereby cured and the judgment rendered valid. *Bell v. Marr*, 1 Call 47. See *Scott v. Hornsby*, 1 Call 41; *Wilkinson v. M'Lochin*, 1 Call 49.

A forthcoming bond will not be held void upon the ground that it is taken for too much, but judgment will be rendered for what is really due, if the

party will release. *Wilkinson v. McLochin*, 1 Call 49; *Worsham v. Egles-ton*, 1 Call 48.

Waiver of Objection.—Although the judgment on a forthcoming bond should be rendered for a larger sum than that due by the execution, yet if the execution is not made part of the record by bill of exceptions, nor any objection made in the court below, such objection can not be sustained in the court of appeals. *Burke v. Levy*, 1 Rand. 1.

K. EQUITABLE RELIEF AGAINST JUDGMENT.

When Equitable Relief Granted.—Where an executor confesses judgments, and gives forthcoming bonds, for debts due by his testator, under the belief that the assets of the estate are amply sufficient to pay all claims against it, but afterwards, by an unexpected depreciation of property, the amount of assets proves inadequate, the executor shall be relieved in equity. *Miller v. Rice*, 1 Rand. 438.

When Equitable Relief Refused.—It is no ground for relieving in equity either the principal or the sureties in a forthcoming bond, that the principal was not the owner of the property specified therein, or had only a qualified interest. *Syme v. Montague*, 4 Hen. & M. 180.

Judgment on a forthcoming bond ought not to be relieved against, in equity, because the bond was forfeited, by a slave having run away, who, by the condition, was to be forthcoming. *Cole v. Fenwick*, Gilmer 134.

L. SETTING ASIDE JUDGMENT.

A judgment upon a forfeited forthcoming bond having been entered by default, upon a day prior to that to which notice was given, the court in which the judgment was rendered has jurisdiction on motion of the plaintiff to set aside the judgment upon reasonable notice to the defendants. *Ballard v. Whitlock*, 18 Gratt. 235.

M. REVERSAL OF JUDGMENT.

See generally, the title **APPEAL AND ERROR**, vol. 1, p. 418.

Reversal of Judgment Overruling Motion on Bond.—In *Anderson v. Leitch*, 1 Leigh 462, it is said: "The cases of *Irvin v. Eldridge*, 1 Wash. 161 and *Lewis v. Thompson*, 2 Hen. & M. 100, 104, show, that a superior court in reversing a judgment of an inferior court which overruled a motion for award of execution on a forthcoming bond, ought not to give final judgment for award of execution, where the motion had been overruled by the inferior court, on a ground, which rendered it unnecessary for the defendant, in the inferior court, to give evidence of payments or make any other objections than those involved in the opinion of the inferior court; unless, indeed, the record shows that the defendants had no such evidence, and no such objections."

Failure of Sheriff to Make Return.—The failure of the sheriff to make a return on an execution is no ground for reversing a judgment obtained on a forthcoming bond taken in pursuance thereof. *Jones v. Hull*, 1 Hen. & M. 212; *Harwood v. Creel*, 8 W. Va. 579.

Failure of Sheriff to Make Full Statement in Return.—The sheriff's failing to mention, in his return of an execution, one of the negroes on whom it was levied, is no ground for reversing a judgment on a forfeited forthcoming bond, in which that negro is mentioned as one of those on whom such execution was levied. *Dix v. Evans*, 3 Munf. 308; *Jones v. Hull*, 1 Hen. & M. 212; *Harwood v. Creel*, 8 W. Va. 579.

Variance.—Where a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating by plea or bill of exceptions, any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance. *Bronaugh v. Freeman*, 2 Munf. 266.

Waiver of Objection.—Where a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating by plea or bill of exceptions, any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance. *Bronaugh v. Freeman*, 2 Munf. 266; *Downman v. Chinn*, 2 Wash. 189.

FORTHWITH.—In *Peninsular Land, etc., Mfg. Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237, 240, it is said: "**Forthwith** means as soon as it can reasonably be done under the circumstances of the particular case (2 May Ins., § 462, and notes 7); 'with due diligence, under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges.' 'But where the facts and circumstances bearing upon the question of due diligence are not in dispute, it may become a question of law for the court, as in this case, by the manner in which the question arises.'" See also, *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

Forwarders.

See the titles **BAILMENTS**, vol. 2, p. 223; **CARRIERS**, vol. 2, p. 684; **EXPRESS COMPANIES**, vol. 5, p. 806; **WAREHOUSES AND WAREHOUSEMEN**.

Fourth of July.

See the title **SUNDAYS AND HOLIDAYS**.

Fowls.

See the title GAME AND GAME LAWS.

FRACTION OF A DAY.—See DAY, vol. 4, p. 224. See also, the titles JUDGMENTS AND DECREES; TIME.

FRANCHISE.—See CHARTER, vol. 2, p. 798. See also, the titles CONSTITUTIONAL LAW, vol. 3, p. 216; CONTRACTS, vol. 3, p. 316; CORPORATIONS, vol. 3, p. 517; FERRIES, ante, p. 26; MONOPOLIES; MUNICIPAL CORPORATIONS; QUO WARRANTO; RAILROADS; STREET RAILROADS; TELEGRAPHS AND TELEPHONES.

In *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 39 S. E. 198, it is said: "‘**Franchises** are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right.’ 8 Am. & Eng. Ency. Law 585. ‘A franchise may be defined as a privilege or authority vested in certain persons, by grant of the sovereign, to exercise powers or to do and perform acts which without such grant they could not do or perform.’ Lewis, Em. Dom. 135. ‘While no rule of law demands it, they are usually conferred upon corporations, for obvious reasons of good business policy.’ 8 Am. & Eng. Ency. Law 586.”

In *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 293, 49 S. E. 39, it is said: "‘A franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest.’”

A franchise is defined to be a royal privilege or branch of the king’s prerogative subsisting in the hands of a subject. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1003.

A franchise is a special right or privilege conferred on individuals by grant, actual or presumed, from the government, and which otherwise they could not exercise. The property acquired is not the franchise, but the franchise consists in the incorporeal right. *Roper v. McWhorter*, 77 Va. 214; *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh 76; *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 787.

Pipes.—The right to dig up streets for the purpose of laying water or gas pipes is a franchise which can only be granted by the legislature, or by the city under legislative authority. *Wheat v. Alexandria*, 88 Va. 742, 14 S. E. 672. See also, the titles GAS; WATER COMPANIES AND WATERWORKS.

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CROSS REFERENCES.

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I. Scope of Title.

The scope of this article is general rather than special, and is not intended to include fraud in transactions between persons in particular personal relations, such as husband and wife, attorney and client, etc., for which see the specific titles; or fraud as committed by particular classes of persons, such as executors and administrators, trustees, guardians, etc.; or the effect of fraud on conveyances and instruments, such as deeds, mortgages, bonds, negotiable instruments, insurance policies, etc.; or fraud in the various sorts of public and fiduciary sales; or the effect of fraud on statutes of limitations; or fraud as a ground for particular remedies in actions, such as arrest, attachment, etc.; or particular classes of offenses involving fraud, such as false pretenses, forgery, embezzlement, etc. For all these, see the specific titles, to which the cross references refer, as, also, the specific internal references below.

II. Definitions, Elements and Distinctions.

See post, "Actions and Remedies," V.

A. DEFINITIONS AND DISTINCTIONS.

Fraud in General.—"Although fraud has been said to be every kind of artifice employed by one person for the purpose of deceiving another, courts have refrained from any attempt to define with exactness what constitutes a fraud, it being so subtle in its nature, and so protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade. Each case must depend upon its own circumstances." *Shoemaker v. Cake*, 83 Va. 1, 5, 1 S. E. 387.

"It has been said that 'fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal duty, trust, or confidence justly

reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.' 1 Story Eq. Jur., § 187." *Dickel v. Smith*, 38 W. Va. 635, 18 S. E. 721, 723. See *Crislip v. Cain*, 19 W. Va. 438, 464.

"When the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud in the truest sense of the terms. There is an evil act with an evil intent; dolum malum ad circumveniendum. And the misrepresentation may be as well by deeds or acts as by words; by artifices to mislead as well as by positive assertions.' 1 Story Eq. Juris., § 192." *Dickinson v. Railroad Co.*, 7 W. Va. 390, 439.

"Fraud is the judgment of law on facts and intents." *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560, 614. And fraud both lurks and deals in generalities. *Benwood v. Railway Co.*, 53 W. Va. 465, 466, 44 S. E. 271.

Lord Hardwicke's Classification.—

"In the celebrated case of *Chesterfield v. Janson*, 2 Ves. 155, Lord Hardwicke classified fraud under five heads, as follows: 1. Actual fraud, arising from circumstances of imposition, which is the plainest case. 2. Fraud which is apparent from the intrinsic nature and subject of the bargain itself, as where the bargain is such as no man in his senses and not under delusion would make on the one hand, and no fair and honest man would accept on the other. 3. Fraud which may be presumed from the circumstances and condition of the parties contracting; and this, he said, goes further than the rule of law which requires it to be proved, not presumed, and is wisely established in a court of chancery to prevent advantage being taken of the weakness or necessity of another, which knowingly to do is against conscience. 4. Fraud which is inferred from the circumstances of the

transaction as being an imposition upon third parties, as in the case of marriage-brochage contracts. And 5. Fraud which infects 'catching bargains.'" *Fishburne v. Ferguson*, 84 Va. 87, 111, 4 S. E. 575.

To act in bad faith is to act fraudulently. *Virginia, etc., Chemical Co. v. Carpenter*, 99 Va. 292, 38 S. E. 143.

"A fraud upon creditors consists in the intention to prevent them from recovering their just debts by an act which withdraws the property of the debtor from their reach." *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 786, 6 Am. St. Rep. 664.

Mere Failure to Comply with Promise.—The mere failure to comply with a promise to pay a balance due upon a settlement does not amount to a fraud. *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875. See *Love v. Teter*, 24 W. Va. 741. See post, "Nonperformance of Promise," II, B, 4.

Fraudulent Representation.—To avoid a contract and recover money back on the ground of fraudulent representation, the representation must be of a material fact, and be false, within the knowledge of defendant, and be made with intent on his part that plaintiff should act upon it, which representation the plaintiff, in ignorance of its falsity, relies upon, and is thereby misled to his injury and damage. *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80; *Wamsley v. Currence*, 25 W. Va. 543; *Crislip v. Cain*, 19 W. Va. 438.

"One of the most usual modes of establishing fraud is by proving a *suggestio falsi* or misrepresentation. This furnishes a ground for relief, when the misrepresentation is a matter of substance, that is, important to the interests of the other party, and in addition thereto it is shown, that it actually did mislead him to his injury." *Crislip v. Cain*, 19 W. Va. 438, 464; *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Misrepresentations as to Land.—A misrepresentation of quantity or quality of land in a sale thereof, in order to

amount to fraud, must not be about a trifling or immaterial thing, and must not be vague and inconclusive in its nature, nor a mere matter of opinion, nor about a fact equally open to the inquiry of either party, in regard to which neither could be presumed to trust the other. *Wamsley v. Currence*, 25 W. Va. 543.

Distinction between Actual and Constructive or Legal Fraud.—See post, "Knowledge and Intent," II, D.

Where a misrepresentation is made knowingly it constitutes actual fraud; where it is made innocently it is constructive. If acted on in either case the result is the same. *Lowe v. Trundle*, 78 Va. 65.

"Actual fraud, fraud involving guilt (scienter, guilty knowledge), may be said to be anything false said or done (not by way of promise *de futuro*) to the injury of the property rights of another." *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, 628.

Actual fraud is a misstatement of a fact made with the intention of deceiving; legal fraud is a misstatement of a matter within the personal knowledge of the person making the statement, or which the other party must have regarded as within his personal knowledge. Such misstatement is a legal fraud, although not made with intent to deceive. *Schwarzbach v. Ohio Val., etc., Union*, 25 W. Va. 622, 657. This was an insurance case.

If a party, for a fraudulent purpose, states a fact which is untrue, and without knowing it to be true, and he does not, at the time, believe it to be true, this is both a legal and a moral fraud. And when the representation, expressly or impliedly, forms part of the contract between parties, it is not essential, in order to invalidate the contract, that there should have been moral fraud in making such representation. *Dickinson v. Railroad Co.*, 7 W. Va. 390, 438; *Zinn v. Mendel*, 9 W. Va. 580, 594.

And where a party intentionally or

by design misrepresents a material fact, or produces a false impression, in order to mislead another, or entrap and cheat him, or obtain undue advantage of him, there is positive fraud. The misrepresentation may be as well by deeds or acts as by words; by artifices to mislead as well as by positive assertions. *State v. Berkeley*, 41 W. Va. 455, 23 S. E. 608; *Dickinson v. Railroad Co.*, 7 W. Va. 390.

"Constructive fraud," depends upon a fiduciary or confidential relation between the parties. There is no actual falsehood or deceit, no concealment of facts which the party ought to have made known, but participation in an act which, if held good, would violate a confidence and trust, which the law implies and imposes in a given state of facts, pronouncing such violation of the trust to be in some cases conclusively, in others *prima facie*, fraudulent. *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, 628.

Fraud is not necessarily willful or actual fraud, but may be constructive, and may be implied from a mistake in estimates so gross as to amount to fraud. *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556; *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

Again: "Fraud may appear from the provisions of the instrument itself, or be proved by evidence aliunde. Whenever it is apparent on the face of the instrument, it is called constructive or legal fraud; and in such case, the fraud is adjudged by the law to be conclusively established by the provisions of the conveyance itself, and can not be disproved by other evidence. *Gordon v. Cannon*, 18 Gratt. 387; *Hughes v. Epling*, 93 Va. 424, 25 S. E. 105." *Didier v. Patterson*, 93 Va. 534, 535, 25 S. E. 661.

"But mere badges of fraud, whether they appear on the face of the instrument or from evidence aliunde, may always be repelled by other evidence. *Gordon v. Cannon*, 18 Gratt. 387; *Hick-*

man v. Trout, 83 Va. 478, 3 S. E. 131." *Didier v. Patterson*, 93 Va. 534, 536, 25 S. E. 661.

"While an instrument which is fraudulent on its face is conclusive of the question of fraud, and the contrary can not be shown by extrinsic evidence, no appearance of fairness on the face of a conveyance, if executed with a fraudulent intent, will exclude evidence of the fraud (1 *Greenleaf on Ev.*, § 284; 2 *Minor's Inst.*, 336 and 690; and *Stark's Ex'ors v. Littlepage*, 4 *Rand.* 368), or give validity to the conveyance, if it proved to be fraudulent." *Didier v. Patterson*, 93 Va. 534, 536, 25 S. E. 661.

Both Included under Term "Fraud."—"Fraud," used generally, ought to be construed in its general sense, and as embracing both actual and constructive fraud. They belong to the same family, and differ only in degree. They both possess one common feature of criminality or culpability. *Jones v. Clark*, 25 Gratt. 642, 680.

B. AS TO EXISTING OR PAST FACT.

1. Statement of Existing Facts, Not Opinions.

a. Principle Stated.

See post, "As to Third Parties," III, A, 2.

A misrepresentation, the falsity of which will afford a ground of action for damages, or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement of some facts, in contradistinction to a mere expression of opinion, which is ordinarily not presumed to deceive or mislead. *Campbell v. Eastern Bldg., etc., Ass'n*, 93 Va. 729, 37 S. E. 350; *Dudley v. Minor*, 100 Va. 728, 42 S. E. 870; *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841; *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950; *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588; *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Max Meadows Land, etc., Co. v. Brady*,

92 Va. 71, 22 S. E. 845; *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243; *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916; *Grim v. Byrd*, 32 Gratt. 293; *Lambert v. Crystal Spring Land Co.*, 2 Va. Dec. 502, 504; *Love v. Teter*, 24 W. Va. 741.

The mere expression of opinion, even in strong and positive language, is no fraud although it be false. Such statements are not fraudulent in law, because they do not ordinarily deceive or mislead, but are considered as "trade talk." *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787; *Garber v. Bresee*, 96 Va. 644, 32 S. E. 39; *Lowe v. Trundle*, 78 Va. 65; *Grim v. Byrd*, 32 Gratt. 293; *White v. McGannon*, 29 Gratt. 511, 530; *Wamsley v. Currence*, 25 W. Va. 543; *Crislip v. Cain*, 19 W. Va. 438.

Grim v. Byrd, 32 Gratt. 293, is sometimes cited as authority for the proposition that a misrepresentation of matter of opinion will warrant the rescission of a contract, but a careful examination of that case will show that the misrepresentations for which the contract was set aside were not only representations of fact, but made by one who had peculiar means of knowledge as to their truth or falsity. *Orr v. Goodloe*, 93 Va. 263, 266, 24 S. E. 1014.

Parties in controversy always persist in their claims, and have a right to do so, stating nothing false, concealing nothing which they ought to disclose; and, were it held that the mere expression of the opinion that a will or deed is void, was a fraud to cancel an agreement, few acts of adjustment would stand. *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. *08.

The statement or representation must either have been of a material existing fact, as distinguished from a mere matter of opinion, expectation, or declaration of intention, or must be alleged and proved to have been made fraudulently, with intent to deceive or mis-

lead. *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918; *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 11, 22 S. E. 554; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845, See 2 Va. Law Reg. 322.

Opinion of Agent as to Surrender Value of Old Insurance.—In an action on a premium note, for additional insurance, defendant testified that he would not have given it but for a representation by the company's agent "that there would be no trouble in getting the cash surrender value" of an old policy held by him, which he had been unable to obtain. It was held, that the agent's statement was merely an expression of opinion, and not such a misstatement of fact as to be a defense to the note. *Garber v. Bresee*, 96 Va. 644, 32 S. E. 39.

Opinion as to Invalidity of Vendor's Lien.—A grantee under an agreement to reconvey property in payment of its price, can not set the agreement aside for fraud, because the grantor told him that he had been advised by able lawyers that the vendor's lien was defective, and could not be enforced, where the question was involved in great doubt and difficulty. *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

b. Dealer's Talk.

Statements by a manufacturer that his "bid for the work is as low as the work can be done for, and that there is no profit in it at that price," are mere expressions of opinion, "dealer's talk," and not such false representations as, if proved and untrue, will invalidate the contract. *Worrell v. Kinnear*, 103 Va. 719, 720, 49 S. E. 988.

Assertions by Vendor as to Value.—Mere general assertions by a vendor of property as to its value or the price he has been offered for it, are assumed to be so commonly made, that the purchaser can not rely upon them, and they are understood as affording him no ground for neglecting to make an examination for himself. One relying

upon such statements does so at his peril and must take the consequences. *Houghton v. Graybill*, 82 Va. 573. See *Hull v. Fields*, 76 Va. 594, 605.

As to Maturity of Stock.—The time within which stock will reach its par value, based on past transactions, is the mere expression of an opinion. *Campbell v. Eastern Bldg., etc., Ass'n*, 98 Va. 729, 37 S. E. 350.

Suitability for Building Purposes.—Where the purchaser of land had an opportunity to make an examination but neglected to do so, a statement by the vendors that it was available for building purposes is the mere expression of opinion, and not such a misrepresentation as will afford a ground for the rescission of the contract. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

Thus where the plaintiff induced the defendant to purchase certain lots by representing them to be level and suitable for building purposes, and neither had ever seen the lots before, it was held that defendant was entitled to no relief although the lots were found to be badly washed into deep gullies, and one of them was thirty feet below the level of the street, and another was situated upon a steep declivity. *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787.

The plaintiff and his agent, not having seen the lots prior to the sale, were not guilty of intentional fraud, and did not use any artifice to induce the defendant to forbear making an investigation of the lots which were accessible. *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787.

Where the vendor of land states that it is suitable for building purposes, and he makes no concealment of facts, nor prevents the vendee from making inquiry, this is merely the expression of an opinion, and is no ground for avoiding the sale, although this vendee and others may be of the opinion that the land is not suitable for building purposes. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

Statements of Opinion—Inducement to Forbear Making Inquiries.—Fraudulent representations by the vendor to the vendee concerning the value of land sold, its condition and adaptability to particular uses, will not entitle the vendee to relief, unless he has been fraudulently induced to forbear making inquiries or an examination of the property which he would otherwise have made. *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787.

c. Facts Leading Party to Suppose Other Facts.

To constitute a fraudulent representation the representation need not be made in terms expressly stating the existence of some fact which does not exist. If a statement be made by a man in such terms as to naturally lead the person to whom it was made to suppose the existence of a certain state of facts, and if such statements be made designedly and fraudulently, it is as much a fraudulent representation as if the statement of an untrue fact were made in express terms. *Brown v. Rice*, 28 Gratt. 467.

Large Sum Secured to Induce Manufacturing Enterprises.—Where the plaintiff was induced to buy a lot by the false representation that one million five hundred thousand dollars had been secured to induce manufacturing enterprises to locate in the town, it was held, that he was entitled to a rescission of the contract and to have the money which he had advanced refunded. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243.

Statement of Offer to Purchase Patent.—A statement, made to induce the purchase of a patent right, that the seller had been offered \$75,000 for it, is not a mere expression of opinion, but an affirmation of a material fact, the falsity of which gives a ground for set-off. *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475. See *Hull v. Fields*, 76 Va. 594.

Recommendation as to Credit.—Where one man recommends another

to a third as being worthy of trust, by which the person recommended obtains a credit, the party recommending shall be answerable for any loss sustained by the fraud in consequence of the credit, if he knew at the time that the man for whom he vouched was not trustworthy. Decided by two judges out of three, representing a court of five, in *Lang v. Lee*, 3 Rand. 410.

Statements by Lessor of Mine—Amount of Royalty.—Where the evidence, in a suit to cancel a lease of mining lands for twenty years, showed that the lessees represented that they had the means and intended to mine and transport daily such a quantity of ore that the royalty thereon, which was the only consideration for the lease, would yield the lessors at least ten dollars per day, and that they also promised to begin operations within sixty days, but that they had wholly failed to fulfill these promises, such representations were not matters of opinion, and the failure to fulfill them was ground for cancelling the lease. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285.

d. Statements Relating to the Future.

See post, "Nonperformance of Promise," II, B, 4.

Representations as to Future Improvements.—A purchaser was not entitled to rescind a contract of sale because of false and fraudulent representations, which related merely to future improvements that would be made on the property, such as grading streets, laying water and gas mains, building houses, running a belt line, etc., as such were not representations as to existing facts. *Slothower v. Oak Ridge Land Co.*, 2 Va. Dec. 506 (1897); *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583; *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Lambert v. Crystal Spring Land Co.*, 2 Va. Dec. 502.

Statement of Purpose to Build Hotel.

—The misrepresentations which will sustain an action of deceit, or plea at law, or bill for the rescission of a contract, must be positive statements of fact, made for the purpose of procuring the contract; they must be untrue and material, and the party to whom they are made must rely upon them, and be induced thereby to enter into the contract. Thus the representations of the purpose to build a hotel, bridge, etc., are not representations of facts. *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Grim v. Byrd*, 32 Gratt. 293; *Dudley v. Minor*, 100 Va. 728, 42 S. E. 870.

As to Future Connection with Waterworks.

—A statement by a vendor of lots to a purchaser that pipes would be laid to the property connecting it with a system of waterworks is not a representation of a fact which will authorize a rescission of the contract because of false representation. *Moore v. Barksdale*, 2 Va. Dec. 416 (1896).

Prospective Buildings and Improvements on Adjacent Property.

—Statements by a seller of lots that there will be built upon adjacent land owned by him a hotel, store, factory, and other manufacturing plants; that they are being erected; and that an electric railway will run near the property, are not such statements as will afford a ground for damages in case the plans are not carried out. *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554.

A purchase of a lot during a boom will not be set aside for the alleged false representation that a railroad was going to build its track along the river bank, surveys for which had been made, and thereby prevent the land from being overflowed by high water, where, though the track had been built, openings for large drains would have had to be left, through which the high water would have backed up and over-

flowed the land, and the grantee purchased the land on the same day that the grantor purchased it at a sale by a land company, at which competition by bidders was extraordinary. *Beckley v. Riverside Land Co.*, 2 Va. Dec. 283 (1895).

But a statement by an agent of a corporation that it had secured the building of a valuable woolen mill and rolling mill, "and had contracted for the same," is the statement of a fact, not mere opinion, and if it induced the contract in suit, and turned out to be false, the defendant is entitled to recover the damages suffered by him in consequence thereof. *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950.

If the plea had stopped with the averment that the plaintiff's agent represented that plaintiff had "actually secured the locating and building" of certain mills, it is not clear that it would not have been obnoxious to the objection that it stated an opinion, and not an existing fact, as it is obvious that it was not the purpose of the pleader to allege the existence of the mills, but that they would be built in the future (*Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554), but the additional averment that the plaintiff has "contracted for the same" is a statement of a fact. *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950.

And a purchaser can not rescind his contract though the vendor represented that it had made arrangements with a railroad to build a station near the lots sold, such arrangements having been made, and the vendor not being responsible for the railroad's default in not building. *Lambert v. Crystal Spring Land Co.*, 2 Va. Dec. 502.

e. Over Valuation of Property for Insurance.

The overvaluation of property, when fire insurance is taken out, will not invalidate the policy, unless the amount be so excessive as to amount to proof

of fraud, as the valuation of property is a matter of opinion. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

2. Materiality.

See post, "Silence and Suppression of Facts," II, C.

The principle is too well settled to need the citation of authority that in order to support a recovery for fraud, it must be shown that the representations are material. *Crislip v. Cain*, 19 W. Va. 438; *Dudley v. Minor*, 100 Va. 728, 42 S. E. 870; *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841; *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787; *Lowe v. Trundle*, 78 Va. 65; *Beckley v. Riverside Land Co.*, 2 Va. Dec. 283; *Grim v. Byrd*, 32 Gratt. 293; *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116; *Wamsley v. Currence*, 25 W. Va. 543. See post, "Silence and Suppression of Facts," II, C.

A representation, which whether true or false, is wholly immaterial, and in no way affects the title to the property in question, does not constitute fraud. *Moore v. Barksdale*, 2 Va. Dec. 416, 418.

Saleableness of Article.—When the exclusive right or privilege to sell an article in a certain district, is the thing sold, the chief element of its value is the saleableness of the article, which depends more upon its appreciation by the public than perhaps upon its intrinsic value. Hence representations calculated to impress the mind of the vendee with the popularity of the article are material, and the vendee may rely upon them without inquiry. *Hull v. Fields*, 76 Va. 594; *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475.

Statement of Sale of Similar Rights.—In an action to rescind a contract for the sale of a certain patented right,

and to annul the deed conveying certain real estate in consideration thereof, it was alleged and proved that as an inducement to purchase the privilege, the grantee represented that he had sold similar rights in certain other places for large sums of money, and that in still other places the article was finding a ready sale at a good price, and also that negotiations were pending with parties for the sale of the territory of Virginia and England, that these devices were relied on by the grantor, which he had a right to do, and that they were false. It was held, that these allegations showed sufficient grounds for rescinding the contract and vacating the conveyance, and that being established by the evidence, the grantor was entitled to an annulment of the contract and deed. *Hull v. Fields*, 76 Va. 594.

3. Certainty and Precision Required.

Misrepresentations, in order to amount to fraud, must not be vague and inconclusive in their nature. *Wamsley v. Currence*, 25 W. Va. 543.

Positive Statement of Facts, Not Opinion.—Fraud is the most frequent ground for rescission of contracts, but for the representations to be fraudulent, they must be false statements of facts, positively made, not mere matters of erroneous opinions. *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916. See ante, "Statement of Existing Facts, Not Opinions," II, B, 1.

4. Nonperformance of Promise.

See ante, "Definitions and Distinctions," II, A; "Statements Relating to the Future," II, B, 1, d.

Fraud can not be predicated on a promise not performed. To make it available there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or his property. *Love v. Teter*, 24 W. Va. 741; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875.

In morals the failure to perform a promise may be without excuse or jus-

tification; but in law false representations, to authorize the rescission of a contract, must be made in regard to existing facts. *Love v. Teter*, 24 W. Va. 741.

A statement or promise to be actionable on the ground of fraudulent misrepresentation, must be of a fact alleged to exist in the present or past, contrary to the truth, as an inducement to a contract, and not a general guaranty or promise as to future events, dependent on future contingencies, thoroughly believed in by the person making the statement, be he ever so badly mistaken in his opinion or judgment. *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583.

"This applies even to the statement regarding the formation of a company of capitalists. This statement being in the alternative, the court must, under a familiar rule of pleading, adopt the view that such company had not been, but was merely expected to be, organized in the future. The representation was not concerning an existing organization." *Love v. Teter*, 24 W. Va. 741, 745.

5. Misrepresentations of Fact and Law Compared.

A misrepresentation as to matters of law, does not constitute fraud, because the law is presumed to be equally within the knowledge of all the parties, but whilst the legal proposition is in general true, it is also true that, "if a man dealing with another misleads him, and takes advantage of his ignorance respecting his legal position and rights, though there be no legal fraud, the case may come within the jurisdiction exercised by courts of equity." *Brown v. Rice*, 26 Gratt. 467.

Where a debt is in fact barred by the statute of limitations, a representation that such debt is "a lawful outstanding debt against the estate," or "an unpaid valid debt in full force in law against the estate," is untrue in fact. And where such representations

induced a personal representative to execute a new obligation for such debt, it furnished ground for relief in equity, as a misrepresentation of fact. *Brown v. Rice*, 26 Gratt. 467; *Brown v. Rice*, 76 Va. 629.

But if this was a misrepresentation of the law, still it is a case in which equity will relieve; and the defense may be made at law by plea under the statute setting out the facts. *Brown v. Rice*, 26 Gratt. 467.

Coupled with Fraud or Confidential Relations.—Mere misstatements of law will not alone constitute fraud to annul a conveyance or other act; but when accompanied by fraud in any form, such as misrepresentation or concealment of fact, imposition, undue influence, or misplaced confidence, or there is a relation of trust and confidence between the parties, it will constitute such fraud as will entitle the other party to relief. *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808.

Advantage Taken of Ignorance.—While it is generally true that misrepresentation as to matters of law does not constitute fraud, because law is presumed to be actually within the knowledge of all the parties, yet it is also true that if a man dealing with another misleads him and takes advantage of his ignorance respecting matters of law, the case may come within the jurisdiction of equity. *Brown v. Rice*, 26 Gratt. 467; *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808.

6. Where Parties Are on Unequal Terms.

Where material and false representations are made on which a party has a right to rely, this is sufficient ground for the rescission of a contract in equity. And matters of opinion may amount to an affirmation, and be an inducement to a contract, especially when the parties are not dealing upon equal terms, but one has or is presumed to have, means of information

not equally open to the other. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588; *Orr v. Goodloe*, 93 Va. 263, 266, 24 S. E. 1014; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243; *Grim v. Byrd*, 32 Gratt. 293, 302. See *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808. If a person being in a situation to know, takes advantage of the confiding ignorance of another, not equally well situated, and falsely represents that a future event will certainly come to pass, and thereby induces the deceived to enter into a disadvantageous contract, such misrepresentation can not be excused as a mere expression of opinion, but will be regarded as the utterance of a known falsehood for fraudulent purposes, and is actionable and renders the contract voidable. *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583.

C. SILENCE AND SUPPRESSION OF FACTS.

See post, "Damage," II, F.

1. Principle Stated and Examples.

Fraud may consist as well in the suppression of what is true as in the representation of what is false. *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939; *Stuart v. Luddington*, 1 Rand. 403; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922; *State v. Berkeley*, 41 W. Va. 455, 23 S. E. 608; *Crislip v. Cain*, 19 W. Va. 438.

Willful Suppression.—A concealment of facts, to afford grounds of rescission for fraud, must be a willful suppression of such facts in regard to the subject matter of the contract, which the party making it is bound to disclose. *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916.

In *Waddill v. Chamberlayne*, Jeff. 10. an action of deceit was held to lie for the sale of a slave with an undisclosed incurable disease.

Must Be Material.—See ante, "Materiality," II, B, 2.

In written proposals for a sale of stock the suppression of any fact within the knowledge of the vendors, materially affecting the value of the thing to be sold, and inconsistent with the statements in the written proposals, vitiates the contract as fully as the false affirmation of any material facts, in case of injury to the purchaser. *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116; *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939; *Bosher v. Land Co.*, 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879.

Concealment of Deficiency of Land.

—Where a contract is made for the purchase of a known body of coal, supposed to contain three hundred acres, but without the knowledge of the purchaser, the grantor diminishes the tract by valid conveyances to his children, so that it contains less than two hundred acres, and withholds this knowledge from the purchaser until after the execution of the deed, this constitutes such a fraud as will relieve the purchaser from completing the contract, and he will be entitled to a rescission of the same. *Carney v. Harbert*, 44 W. Va. 30, 28 S. E. 712.

And where a contract was made for the sale of nine hundred acres of land more or less, and the tract was found to contain only seven hundred and sixty-five acres, the purchaser will be relieved in equity, it appearing that the seller knew of the deficiency at the time of the sale but did not disclose it. *Bedford v. Hickman*, 5 Call 236, 2 Am. Dec. 590.

But where land was sold without being surveyed, the vendor's deeds calling for a certain number of acres, and he conveyed the lands for that quantity, more or less; but, before the execution of the deed, the vendor informed the vendee that he had never had the land surveyed and was disposed to believe that the real quantity was less, the vendee making no objection but saying that he was satis-

fied, when a deficiency was shown by a survey, it was held, that there had been no such misrepresentation in the quantity as would entitle the vendee to a rescission of the contract. *Lovell v. Chilton*, 2 W. Va. 410.

Suppression of Defects in Title by Vendor.—It is the duty of the vendor (of real estate) to ask for the rescission title to the purchaser, and the failure to do so entitles the latter to declare the contract void on discovering the defects. But if he retains the land for speculative purposes he will be deemed to have waived his rights. *Pollard v. Rogers*, 4 Call 239.

"It would appear, then, that the fraud, which will entitle the purchaser of real estate to ask for the rescission of his contracts in equity, is that which consists in misrepresentation of facts or in the concealment of facts from which the defect of title arises, which facts the vendee had no other means of knowing. *Beale v. Seiveley*, 8 Leigh 658." *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845.

One selling personal property, knowing he has no title, and concealing that fact from the purchaser, is liable for fraud. *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575.

Owner's Failure to Disclose Title.—If the owner of a tract of land sees it sold to another person, without disclosing his title, it is a fraud which forfeits his right. *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143; *Floyd v. Jones*, 19 W. Va. 359, 365; *Engle v. Burns*, 5 Call 463.

And "if a man stands by and sees another purchasing land to which he has a prior claim, and does not disclose it, his concealment is a fraud which forfeits his title. 1 Fonbl. Eq. 151. For a full discussion of this principle, see opinion of Judge Tucker, in *Engle v. Burns*, 5 Call 463, 476." *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143.

If the owner of an equitable title stand by, and suffer another to pur-

chase without disclosing his title, he is guilty of a fraud sufficient to defeat his claim. But a legal claim can not be so lost even in favor of a purchaser, and it is doubtful if even an equitable claim can be so lost, in the case of a mere voluntary conveyance. *Applebury v. Anthony*, 1 Wash. 287.

"The rule thus laid down, supposes the party to be present at, or consensual of, the treaty in which the fraud is practiced, and encouraging the purchaser, either in express terms, or by silence and concealment of his own title, to proceed in the purchase." *Engle v. Burns*, 5 Call 463, 471.

Suretyship—Concealment by Creditor.—If a material fact connected with the contract of suretyship, which might influence the surety in entering into the contract, is fraudulently concealed with a view to benefit the creditor, such concealment, though no inquiry has been made by the surety, would vitiate the contract of suretyship and discharge the surety. *Warren v. Branch*, 15 W. Va. 21. See the title SURETYSHIP.

Agents Concealing Fact of Part Ownership.—When agents for the sale of land conceal from the purchasers that they are part owners, and falsely assure them that they intend buying a portion on the same terms as they are offering it, this constitutes such a fraud as will avoid the sale. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

Between Partners.—In dealings between partners the utmost good faith is required, and each is bound to disclose to the other any information in his possession that might be called for, and it is his duty to correct any misapprehension in reference to the affairs of the partnership under which he sees that the other partner is laboring. *Sexton v. Sexton*, 9 Gratt. 204. See also, *Tennant v. Dunlop*, 97 Va. 254, 33 S. E. 620. And see the title PARTNERSHIP.

Concealment of Insolvency.—"Con-

cealment of his insolvency by a purchaser who obtains possession of goods without intending to pay for them is a fraud, and the property does not pass." *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203, 212. See post, "Incurring Debt with No Intention to Pay," III, B.

Sale of Lease of House—Concealment of Covenant.—In the sale of a lease of a house and tenement in a town, if the vendor fail to show the lease to the vendee, and do not inform him of a covenant therein, that, in case of destruction of the house by fire, the lease shall terminate and become void; this is such a concealment as vitiates the contract, and if the house be destroyed by fire in a short time, equity will relieve the vendee by enjoining the vendor from collecting the purchase money, and by directing his notes for the same to be given up and cancelled. *Snelson v. Franklin*, 6 Munf. 210.

2. Where Parties Deal at Arm's Length.

When parties deal at arm's length, and there is no confidential or fiduciary relation between them, mere silence on the part of the purchaser of realty, or failure to disclose knowledge on his part of a peculiar value affecting the property, or the title thereto, would not be sufficient to set aside a sale fairly made, and which is otherwise unimpeachable. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

Thus, where one induces a widow to convey to him her interest in certain land which she and her husband had attempted to convey to other parties before that time, the silence of the grantee as to the fact that there was a defect in her acknowledgment rendering the deed void, "is no ground for setting aside the deed, as there was no confidential relation between the parties." *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

Where the parties are dealing at

arm's length, as vendor and vendee, the purchaser is not bound to disclose his superior knowledge—no matter how acquired—of the property which he proposes to purchase, and a mere nondisclosure of such superior knowledge, without a fraudulent purpose, will not affect the contract so as to cause a court of equity to set it aside upon that ground. *Merchants' Bank v. Campbell*, 75 Va. 455, 459.

"But even in such cases, where there is misrepresentation or fraudulent concealment of superior knowledge acquired, a court of equity will intervene and rescind a contract thus obtained by fraud or misrepresentation." *Merchants' Bank v. Campbell*, 75 Va. 455, 461.

3. Estoppel by Conduct.

See the title **ESTOPPEL**, vol. 5, p. 191.

A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud. *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755. See *State v. Berkeley*, 41 W. Va. 455, 23 S. E. 608.

"Thus, if a person by his promises, or any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded to the extent of the interest intended for him." *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143.

D. KNOWLEDGE AND INTENT.

See ante, "Definitions and Distinctions," II, A; post, "Plea and Answer," V, C, 4.

1. Necessity for Knowledge.

a. In General.

See post, "Pleading and Practice," V, C.

To constitute fraud in a sale, it is not sufficient that there shall be false representations by the vendor, but he must know at the time he makes them that they are false, or at least he must make them as statements of facts within his own knowledge. *Mason v. Chappell*, 15 Gratt. 572; *Proctor v. Spratley*, 78 Va. 254; *Crislip v. Cain*, 19 W. Va. 438, 480.

"After a long controversy in England it may be now regarded as well settled there, that to make a vendor responsible in damages for a representation, which turns out to be untrue, it must be made *mala fide* and not in the *bona fide* belief that it is true. And this is supported by the weight of American authorities. See *Crislip v. Cain*, 19 W. Va. 438, 563, where these English cases are all cited." *Schwarzbach v. Ohio Val., etc., Union*, 25 W. Va. 622.

Thus, it was not fraud where the vendor of goods represented them as sound and marketable, when they were unsound and damaged, unless he knew that the representations were untrue, or used some fraud or art to disguise or conceal their true condition or quality. But if the representations were untrue, and the vendor at the time of making them knew them to be untrue, and knowingly made them with intent to deceive the purchaser, that is a fraud. *Cunningham v. Smith*, 10 Gratt. 255, 60 Am. Dec. 333.

"Whether the imputation of fraud be *suppressio veri*, or *suggestio falsi*, the case of *Mason v. Chappell*, 15 Gratt. 572, settles the law in Virginia, that the *scienter* must be shown." *Proctor*

v. Spratley, 78 Va. 254, 267. See *Crislip v. Cain*, 19 W. Va. 438, 480.

But where one man recommends another to a third, as being worthy of trust, by which the person recommended obtains a credit, the party recommending shall be answerable for any loss the other may sustain in consequence of the credit, if he knew, at the time, that the man for whom he vouched was not trustworthy. So decided by two judges out of three, in *Lang v. Lee*, 3 Rand. 410.

b. Representations Reasonably Inducing Belief.

And if a man represents as true that which he knows to be false, or makes representations in such a way or under such circumstances as to induce a reasonable man to believe that it is true, and is meant to be acted upon, and the person to whom the representation is made believes it to be true, and acts upon the faith of it, thereby sustaining damages, there is fraud to support an action of deceit at law, and ground for the rescission of the transaction in equity. *Lowe v. Trundle*, 78 Va. 65; *Herron v. Dibrell*, 87 Va. 289, 295, 12 S. E. 674.

A false representation of a material fact, constituting an inducement to the contract, on which the purchaser has the right to rely, is ground for rescission of the contract, although the party making the representation was ignorant as to whether it was true or false. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588. And see post, "Reliance by Party Complaining," II, E.

c. Statements as on Knowledge.

If a party to a contract makes a statement of a material fact, when he has no knowledge or information on the subject, or if he makes a statement as on his own knowledge, when he has none, but has information which he believes to be reliable, he is responsible for fraud, if the other party, relying upon his statement, is misled to his injury. *Crislip v. Cain*, 19 W. Va. 438;

Wilson v. Carpenter, 91 Va. 183, 21 S. E. 243; *Mason v. Chappell*, 15 Gratt. 573; *Dickinson v. Railroad Co.*, 7 W. Va. 390, 439. See also, *Blessings v. Beatty*, 1 Rob. 287, and *Nichols v. Cooper*, 2 W. Va. 347, criticized, but the result reached approved, in *Crislip v. Cain*, 19 W. Va. 438, 544, 553.

Hence if a party for a fraudulent purpose states a fact which is untrue, and without knowing it to be true, and he does not at the time believe it to be true, this is both a legal and a moral fraud. Where the representation, expressly or impliedly, forms a part of the contract between the parties, it is not essential in order to invalidate the contract, that there should have been a moral fraud. *Dickinson v. Railroad Co.*, 7 W. Va. 390; *State v. Berkeley*, 41 W. Va. 455, 23 S. E. 608.

Thus if, upon a sale, the vendor makes material representations of matters of fact, as of his own knowledge, and they are in fact untrue, and the vendee is deceived thereby, the sale will be voidable, although the vendor did not know whether they were true or not. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

"Whether the party thus misrepresenting a material fact knew it to be false or made the assertion without knowing whether it was true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and in law, unjustifiable as the affirmation of what is known to be positively false." *Grim v. Byrd*, 32 Gratt. 293, 300; *State v. Berkeley*, 41 W. Va. 455, 23 S. E. 608.

Belief in Truth Has No Effect.—It is fraud for the vendor of land to make false representations as to the existence of railroads and other industries, which would enhance the value of the land, though he may believe such advantages will eventually materialize. *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841.

If one represents as personally known to him what is not true, though he may believe it, he has in contemplation of law acted *mala fide*, and is guilty of a legal fraud though he may in point of fact have acted *bona fide*; and in such a case he is responsible for any injury resulting from his false representation. *Schwarzbach v. Ohio Val., etc., Union*, 25 W. Va. 622, 656; *Crislip v. Cain*, 19 W. Va. 438, 491; *Wilson v. Carpenter*, 91 Va. 183, 190, 21 S. E. 243.

Manner of Statement—Inference of Knowledge.—Where the nature of a statement, and the manner in which it is made, are such as would naturally lead the other party to believe that it was made on personal knowledge, and not on mere information, it will be regarded as a statement on the personal knowledge of the party, although not expressly so given. *Crislip v. Cain*, 19 W. Va. 438; *Herron v. Dibrell*, 87 Va. 289, 295, 12 S. E. 674; *Grim v. Byrd*, 32 Gratt. 293, 300; *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116; *Alexander v. Sanders*, 9 Va. Law J. 97.

So where the representations are of matters peculiarly within the knowledge of the person making them. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285.

Statement on Information Only.—Where a party with no real information makes a statement of material facts, if he would not be held responsible for fraud, he should warn the party to whom it is made that it is made on information only, so as to put him upon inquiry. *Crislip v. Cain*, 19 W. Va. 438.

For a representation of a fact by one to another contracting party should be fair and true; and if the former asserts to the latter a fact, the truth of which he has it in his power to ascertain but does not, and it turns out to be untrue, he shall be responsible himself for the consequences of that event, and the

party, to whom the representation is made, shall not be injured thereby. *Crislip v. Cain*, 19 W. Va. 438, 503; *Jolliffe v. Hite*, 1 Call 301.

Effect of Knowledge That Statements Are Made on Information.—If a representation of a material fact is made by a party to a contract on information and not of his own knowledge, and the other party understands that it is made merely on information, this is no ground for fraud if the latter had reason to believe and did believe the statement to be true, though it be proved to be untrue, and was relied upon by the other party, and misled him to his injury. *Crislip v. Cain*, 19 W. Va. 438.

2. Necessity for Fraudulent Intent.

"It is immaterial that an act was done in good faith and without fraudulent intent. If by it an advantage has been obtained which it is against good conscience to enjoy, a court of equity will relieve against it." *Thomas v. Jones*, 89 Va. 323, 330, 36 S. E. 382. See *Wilson v. Carpenter*, 91 Va. 183, 190, 21 S. E. 243.

If a party innocently misrepresents material facts by mistake, the effect is the same on the party who is misled by it, as if he who innocently made the misrepresentation knew it to be positively false. *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *McMullin v. Saunders*, 79 Va. 356. See *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243; *Herron v. Dibrell*, 87 Va. 289, 295, 12 S. E. 674; *Lowe v. Trundle*, 78 Va. 65; *Linhart v. Foreman*, 77 Va. 540; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *Grim v. Byrd*, 32 Gratt. 293; *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116; *Stuart v. Luddington*, 1 Rand. 403; *Alexander v. Sanders*, 9 Va. Law J. 97; *Brown v. Rice*, 26 Gratt. 467, 473; *Love*

v. Teter, 24 W. Va. 741; *Dickinson v. Railroad Co.*, 7 W. Va. 390, 438.

It is immaterial whether the misrepresentation was made innocently, or knowing it to be false, if the party to whom it was made believed it to be true, and was misled by it in making the contract. *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841.

Where an assignment of a mortgage was taken on the faith of a misrepresentation by the assignor, the balance due on his mortgage was a fact peculiarly within the knowledge of the assignor, and he was bound to make good his representation in that regard. Where rescission is claimed, and a restoration of the money paid, it would be only necessary to prove that there was such misrepresentation, and an adjudication that the mortgage was fraudulent and void. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been made by misrepresentation, can not stand. In such case the averment or proof of scienter is not necessary. *Robinson v. Welty*, 40 W. Va. 585, 22 S. E. 73, 79. See the title AS-SUMPSIT, vol. 2, p. 15.

3. Correction of Misrepresentation.

A misrepresentation may, at any time before the conclusion of the bargain, be removed by a just representation of the fact; but it must be clearly and explicitly removed; for, if it be equivocal only, the rule concerning misrepresentation, will prevail. *Crislip v. Cain*, 19 W. Va. 438, 503; *Jolliffe v. Hite*, 1 Call 301.

Thus, a conveyance will not be rescinded for false representations by the grantor that an improvement company had secured certain industries to be located near by, where, before the conveyance, the grantee heard the president of the company publicly state that no industries had been secured. *Beckley v. Riverside Land Co.*, 2 Va. Dec. 283.

But a misrepresentation without the scienter ceases to be innocent when the party who made it undertakes, after learning of its falsity, to maintain the advantage gained by means of it. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73, 76.

E. RELIANCE BY PARTY COMPLAINING.

See ante, "Knowledge and Intent," II, D.

1. Principle Stated.

• One of the fundamental principles in regard to fraudulent misrepresentations is that the false statement must be believed and relied on by the party to whom it is addressed; otherwise, however false or however fraudulent the intent, the false statement does not constitute any ground for the rescission of a contract. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Crislip v. Cain*, 19 W. Va. 438; *Dudley v. Minor*, 100 Va. 728, 42 S. E. 870; *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950; *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Watkins v. West Wytheville, etc., Co.*, 92 Va. 1, 22 S. E. 554; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Herron v. Dibrell*, 87 Va. 289, 295, 12 S. E. 674; *Lowe v. Trundle*, 78 Va. 65, 67; *Beckley v. Riverside Land Co.*, 2 Va. Dec. 283; *Stuart v. Luddington*, 1 Rand. 403; *Wamsley v. Currence*, 25 W. Va. 543; *Love v. Teter*, 24 W. Va. 741.

It is immaterial whether the party making the representation knew it to be false or fraudulent or not, neither does his belief in its truth affect the question, all that is necessary is for it to be false and material, and relied upon by the other party, as he had a right to do, without further inquiry. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Brown v. Rice*, 26 Gratt. 467, 473.

It was said in *Shoemaker v. Cake*, 83 Va. 1, 1 S. E. 387, that it was an

essential element of fraud that the artifices employed to deceive were successful.

"The real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it in entering into the contract. *Grim v. Byrd*, 32 Gratt. 293; *Linhart v. Foreman*, 77 Va. 540; *Wilson v. Carpenter*, 91 Va. 183, 31 S. E. 243." *Wren v. Moncure*, 95 Va. 369, 372, 28 S. E. 588; *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 164, 27 S. E. 841; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 491, 28 S. E. 909; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 78, 22 S. E. 845; *Herron v. Dibrell*, 87 Va. 289, 295, 12 S. E. 674; *McMullin v. Saunders*, 79 Va. 356; *Lowe v. Trundle*, 78 Va. 65; *Alexander v. Sanders*, 9 Va. Law J. 97; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922.

Thus where a widow conveyed the fee-simple interest that she had in a tract of land, it was no ground for setting the deed aside that the grantee represented that she had only a dower interest in the land, where she did not believe such representations, and was not induced by them to make the deed. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

In order to support action of deceit, or suit in equity for rescission, misrepresentations must be of a material fact inducing the purchase, and on which purchaser has a right to rely, and did rely, and whereby he was actually misled to his injury. *Lowe v. Trundle*, 78 Va. 65; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787. See *Grim v. Byrd*, 32 Gratt. 293; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Moore v. Barksdale*, 2 Va. Dec. 416.

Vendor's Statements as to Boundary.

—Where the vendors, in pointing out the boundaries of land, knowingly included a large tract which was not theirs, and the purchaser bought the land as a whole, in reliance on their representations, he is entitled to relief

in equity. *Spoor v. Tilson*, 97 Va. 279, 33 S. E. 609.

Prima Facie Case May Be Rebutted.

—A prima facie case of fraud on the part of a vendor in a contract, may be rebutted by showing that the vendee as a matter of fact did not rely upon the vendor's statement and was not induced thereby to purchase. *Crislip v. Cain*, 19 W. Va. 438.

Instruction.—It is proper to instruct the jury to find for the plaintiff if they find that the tobaccos were falsely represented to be "reordered and redried," and that that term imports to the trade that the tobaccos are sound and in keeping condition, and that the plaintiff purchased relying on these assurances. *Herron v. Dibrell*, 87 Va. 289, 12 S. E. 674.

2. Effect of Independent Inquiry.

A party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied. *Ludington v. Renick*, 7 W. Va. 273; *Houghton v. Graybill*, 82 Va. 573, 586.

"If the purchaser does not rely on the representations of the seller, but seeks information from other sources, the law will often impute to him all the knowledge necessary to a proper understanding of the facts." *Grim v. Byrd*, 32 Gratt. 293, 301.

"But it is equally true, if the purchaser has not equal means of information with the seller, if it be a case in which he had the right to rely upon the representation, the evidence to show that he did not rely upon it, but upon information obtained elsewhere, must be of the clearest and most satisfactory character. In such cases, there ought to be no room for inference on

mere implication." *Grim v. Byrd*, 32 Gratt. 293, 302.

Means of Knowledge—Opportunity to Investigate.—Although the guilty party to a contract obtained by false representations, can not rely upon the fact that the party defrauded might have learned the truth by proper inquiry, yet if the party defrauded institutes inquiry for himself, and ascertains the truth, or if the means of knowledge are pointed out to him and an opportunity is given to make the necessary investigation, and he thereby acquires some information concerning the actual facts, he can not rely upon the falsity of such representations. *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

But it is said in *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841, that a purchaser is not to be deprived of relief because he had the means of discovering that the representation was false. See also, *Wilson v. Carpenter*, 91 Va. 183, 31 S. E. 243. See post, "Right to Rely," II, E, 4.

3. Presumption of Reliance.

"When the seller has made a false representation, which from its nature might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to contract, and it does not rest with him to show that he, in fact, relied upon the representation. In order to displace this inference, the seller must prove either that the buyer had knowledge of facts which showed the representation to be untrue, or that he expressly stated in terms, or showed by his contract, that he did not rely upon the representation, but acted upon his own judgment." *Wilson v. Carpenter*, 91 Va. 183, 31 S. E. 243; *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841. See *Lowe v. Trundle*, 78 Va. 65, 69; *Beckley v. Riverside Land Co.*, 2 Va. Dec. 283.

Sale of Mining Stock.—In written proposals for a sale of stock in a min-

ing company, if the representations contained therein are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, then the contract founded on such representations is void, whether the vendors knew the representations to be false at the time they were made or not, and whether made with fraudulent intent or not. *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116, and note collecting authorities.

Defense of No Reliance Must Be Clearly Proven.—For one who has made a false representation in reference to a material matter to rely upon the defense that the transaction was not entered into on the faith of the representation, he must be able to prove to a demonstration that it was not relied on. *Linhart v. Foreman*, 77 Va. 540. See *Grim v. Byrd*, 32 Gratt. 293, 302.

See *Broyles v. Bee*, 18 W. Va. 514, where it is said: "Where a vendee relies upon misrepresentations as inducing him to enter into the contract, he must satisfactorily show, not only that he relied upon such representations, but also that they were false."

4. Right to Rely.

One to whom a representation has been made, is entitled to rely on it quoad the maker, and need make no further inquiry. *Lowe v. Trundle*, 78 Va. 65.

A contract may be rescinded for fraudulent misrepresentations, though the means of obtaining information were fully open to the party deceived, when from the circumstances he was induced to rely upon the other party's representations. *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922. See *Hull v. Fields*, 76 Va. 594.

Where the complainant owed the defendant no duty to investigate the condition of a firm, he had the right to rely upon the truth of the representa-

tions made by the defendant, and all that was required was that he should act when he discovered the fraud of which he was the victim. *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 940.

But see *Crislip v. Cain*, 19 W. Va. 438, where it is said, that the misrepresentation must not be equally open to the inquiry of both parties. And see ante, "Effect of Independent Inquiry," II, E, 2.

Effect of Fraud Being Apparent.—A vendee of a house and lot sued to set aside the sale on the ground that the vendor had informed her, prior to the sale, that her boundary line would fall at a certain place, and that a chimney in the hall of the house was more than two feet distant from a partition wall, so that the partition might easily be moved two feet, and the hall be enlarged, both of which representations were false. Inasmuch as the representations were of such a character that the truth or falsity was apparent, no rescission should be allowed. *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593.

And no damages were allowed for a deficiency in the amount of bottom land from what it was represented by the vendor at the sale, where the vendee had always lived near the land and went over it at the time of purchase. *Wamsley v. Currence*, 25 W. Va. 543.

Reliable Information Previous to Purchase.—There can be no doubt that if a person to whom false statements are made, afterwards is reliably informed that they are false, and nevertheless enters into a contract, he can not successfully claim that he contracted on the faith of such representations. *Beckley v. Riverside Land Co.*, 3 Va. Dec. 283 (1895); *Houghton v. Graybill*, 82 Va. 573, 586.

When the sale of timber on land is a contract of hazard, and prior to the purchase the vendee goes on the land

and expresses his satisfaction, and also after the sale; but prior to signing the contract, is shown the true amount of land, he can not claim an abatement in the purchase price. There was no fraud nor damage. *Shoemaker v. Cake*, 83 Va. 1, 1 S. E. 387.

5. Burden of Proof.

See post, "Presumption and Burden of Proof," V, D, 1.

F. DAMAGE.

Essential to Right of Action.—It is an ancient rule of the common law that in order for a party to be entitled to a right of action for fraud, it is necessary for it to be coupled with damage. *Shoemaker v. Cake*, 83 Va. 1, 1 S. E. 387; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787; *Crislip v. Cain*, 19 W. Va. 438; *Lowe v. Trundle*, 78 Va. 65; *Herron v. Dibrell*, 87 Va. 289, 295, 12 S. E. 674; *Wamsley v. Currence*, 25 W. Va. 543.

The intent of a party making the representation to induce a contract is wholly immaterial, but the question is whether the other party has been misled and injured. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243. See *Love v. Teter*, 24 W. Va. 741; *Stuart v. Luddington*, 1 Rand. 403. See also, *Fluharty v. Beatty*, 4 W. Va. 514, 528.

In order for concealment to amount to fraud, and bar the rights of the one concealing the facts, it must induce another to part with something of value. *Stuart v. Luddington*, 1 Rand. 403.

But the court will not inquire into the extent of the prejudice. It is sufficient if the party misled has been slightly prejudiced, if the amount is at all appreciable. *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922.

Amount Depends on Circumstances of Case.—In case of deceit in the sale of a slave, the purchase money with interest was not the proper value of damages, but the amount of damages depends on the peculiar circumstances

of each case. *Brown v. Shields*, 6 Leigh 440.

When to Be Ascertained.—Damages resulting from fraud in the procurement of a contract are to be ascertained and fixed as of the date of the contract, the time the fraud is alleged to have been committed, and not as of the date his plea was filed. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42.

In Plea under § 3299, Va. Code.—The defense set up in the plea under § 3299, Virginia Code, 1887, is an equitable one, allowed by the statute, in the nature of a cross action for the rescission of the contract; and in such a case, as in an action of deceit, the complainant must allege and prove (1) fraud, on the one side, and (2) consequent injury to the complainant, on the other; for fraud consists, not in mere intention, but in intention carried out by hurtful acts. It consists of conduct that operates prejudicially on the rights of others. *Lake v. Tyree*, 90 Va. 719, 721, 19 S. E. 787.

III. Manner of Perpetration.

A. FRAUD OF AGENT.

See the title AGENCY, vol. 1, pp. 259, et seq.; 269, et seq.

1. Between Principal and Agent.

Entitled to No Benefits of Agency in Absence of Good Faith.—It is well established that an agent, trustee, or other servant, standing in a confidential relation to another, can not entitle himself to benefits which that other may have conferred upon him, unless it appears that there has been entire good faith, a full disclosure of all the facts and circumstances affecting the transaction, and the absence of undue influence. *Triplett v. Woodward*, 98 Va. 187, 35 S. E. 455; *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67; *Neilson v. Bowman*, 29 Gratt. 732.

Agent Accountable for Profits.—An agent will be held accountable for all profits derived from a fraudulent breach of trust. *Segar v. Edwards*, 11 Leigh 213.

Contract Voidable.—Where an attorney or agent buys a claim from his principal while the relation exists, whether false representations were made or not, or even if the claim was sold for an adequate price, the sale is voidable at the option of the principal. *Lane v. Black*, 21 W. Va. 617.

No Trust Relation after Termination of Agency.—While it is true that a trustee or agent can not acquire an interest in a sale made by himself, and if he does acquire an interest at such sale, the sale will be avoided, yet after the termination of the agency he stands upon the same ground and has the same rights as any other person. *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203.

When Confirmation by Principal Inoperative.—If a principal's right to impeach a transaction made with his agent be concealed from him, or a free disclosure be not made to him of every circumstance which it is material for him to know, or if a confirmation of the transaction takes place under pressure, constraint, undue influence, or the delusive opinion that the original transaction is binding, or if it be merely a continuation of the original transaction, the confirmation operates as nothing. *Francis v. Cline*, 96 Va. 201, 31 S. E. 10; *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397; *Broddus v. McCall*, 3 Call 546.

Agent to Sell Purchasing for Self.—See the title AGENCY, vol. 1, pp. 262, 263.

2. As to Third Parties.

Binding on Principal.—An agent is employed by the owners of property to sell it, and he is given written proposals containing the terms of sale and a description of the property. Where the agent makes other representations as to the value and condition of the property, which are false, though the owners neither authorized, nor were informed of these representations, they are bound by them, and the contract is void. *Crump v. United States Min-*

ing Co., 7 Gratt. 352, 56 Am. Dec. 116. Baldwin, J., in this case said: "That a person professing to act as agent for another does so wholly without authority, or transcends the authority actually conferred upon him by his principal is no reason for enforcing the contract against the other party when obtained from him by false and fraudulent representations."

"And in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have that effect if proceeding from himself. Every species of fraud, misrepresentation or concealment, therefore, in the agent, affects the principal's right to recover." *Crump v. United States Mining Co.*, 7 Gratt. 352, 369, 56 Am. Dec. 116.

"That an agent to sell is restricted in the delegation of his authority by his principal from making any representations on the subject of the contract, whether true or false, has, it is true, a bearing upon the obligatory force of the contract; but it is as a question of fact, and not as a question of law. It may be used in evidence as tending to prove that the representations of the agent, though false and fraudulent, had not the effect of deceiving the purchaser. But this presupposes that the restraint upon the authority of the agent was known to the purchaser; and whether he knew it, and the effect of such knowledge in preventing him from being deluded, deceived and defrauded, are also questions of fact for the consideration of the jury." *Crump v. United States Mining Co.*, 7 Gratt. 352, 369, 56 Am. Dec. 116.

False Statement of Fact, Not Opinion.—See ante, "As to Existing or Past Fact," II, B.

A false statement by the agent of a corporation that it had procured and contracted for the building of a woolen mill and iron foundry upon its property, which induces one to subscribe

to its stock, affords a ground for damages against the corporation. *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950.

But a contract procured by the false representation of an agent is not voidable at the option of the party deceived, where it appears that the representation was the mere expression of an opinion, and did not amount to an engagement or undertaking that the fact was as represented. *Garber v. Bresee*, 96 Va. 644, 32 S. E. 39.

Principal Can Not Accept Benefits and Repudiate Representations.—A principal can not accept the benefit of a fraudulent purchase by his agent, and still repudiate the representations of his agent, on the ground that they were not authorized by him and were not within the scope of his authority. *Lane v. Black*, 21 W. Va. 617; *Crump v. United States Mining Co.*, 7 Gratt. 352, 369. See *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950.

Principal's Ignorance of No Effect.—A principal is not entitled to the benefit of any fraud committed by his agent, although the former was ignorant of its commission. *Gordon v. Jeffery*, 2 Leigh 410.

Concealment of Ownership.—Where the agents for the sale of land concealed from the purchasers the fact that they were part owners, and expressed an intention to purchase an interest themselves upon the same terms as they were offering it, such representation constitutes sufficient fraud to avoid the sale. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

Liability to Action of Deceit.—"To found an action at law for deceit, the fraud must be a personal one on the part of the person making the representation, or some fraud which another impliedly authorized him to be guilty of, and an action of deceit can not be brought against a principal for the fraudulent misrepresentations of his agents, unless he has impliedly authorized the agent to make the representa-

tions." *Buck v. Ward*, 97 Va. 209, 215, 33 S. E. 513.

3. Agent's Fraud Forfeits Right to Compensation.

See the title AGENCY, vol. 1, p. 266.

B. INCURRING DEBT WITH NO INTENTION TO PAY.

See ante, "Silence and Suppression of Facts," II, C; post, "Badges of Fraud," V, D, 3, b.

If one buys property on credit, with positive intention not to pay for it, whether he makes false representations as to his ability to pay or not, it is a fraud upon the vendor, and is a fraudulent contraction of a debt, giving ground of attachment. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

And an intention of a purchaser of property not to pay for it may be inferred by a jury from his circumstances, action, and conduct, not only in respect to the sale in question, but in other contemporaneous transactions. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

"The difference between buying without reasonable expectation or ground for expectation of paying, and buying with fixed intention of not paying, is not very plain. One who buys, with no present means, and with no reasonable ground to believe that he can raise a considerable sum to pay with, seems to contemplate, as a reasonable man, that he will not be able to pay. He would expect that, as a natural result. Still, there must be an intention not to pay, and whether there is, a jury must say, under all the circumstances." *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

But mere insolvency or inability to pay for property purchased, undisclosed to vendor, will not render the sale fraudulent on the purchaser's part, if he expects and intends to pay, and has reasonable ground for expecting to be able to pay. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

If he fraudulently misstates the facts—material facts—calculated to induce

seller to believe he will be paid, the sale is voidable. False statements as to what property he owns, what debts he owes, what amount of business he is doing, his ability to pay, that his property is unincumbered, etc., come within this class. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

So, where he conceals his insolvency. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203, 213.

A vendor sued to rescind sale of land on the ground that vendee misrepresented his ability to pay. Vendor was informed that vendee expected certain money. After the sale, but before vendee was put into possession, he told the former he was disappointed in his expectation. The cash payment was made, but not so the deferred payments. The vendor, knowing the vendee's disappointment, sought to enforce the contract. There was no evidence of fraudulent representations, though present insolvency was proved. *Chase v. Miller*, 90 Va. 323, 18 S. E. 277.

C. FRAUDULENT SALE.

See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; SALES.

In *Waddill v. Chamberlayne*, Jeff. 10, it was held, that an action of deceit would lie for the sale of a slave who had an incurable disease.

D. FRAUDULENT PURCHASE BY CREDITOR FROM DEBTOR.

See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

A creditor can not purchase the goods of his debtor at a price in excess of his debt, when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not. *Hart v. Sandy*, 39 W. Va. 644, 20 S. E. 665; *Murdoch v. Baker*, 46 W. Va. 78, 32 S. E. 1009.

E. FRAUDULENT SUPPRESSION OF BIDDING.

When a bidder is paid a consideration to refrain from bidding on the property of an insolvent debtor in order that the purchaser may obtain it at a reduced price, it is a fraud upon the rights of creditors. *Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363. See the titles AUCTIONS AND AUCTIONEERS, vol. 2, p. 174; ILLEGAL CONTRACTS.

F. FRAUDULENT ASSIGNMENT.

See the titles ASSIGNMENTS, vol. 1, p. 778; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799.

Fraudulent Transfer of Bond.—

There being a plea of usury in the transfer of a bond by the obligee to the assignee, if the assignee then transferred it with the knowledge that there was such usury, he was guilty of a deceit, and the right of action arose upon the transfer. *Fant v. Fant*, 17 Gratt. 11.

G. SUBSTITUTION OF DEED FOR WILL.

Where a deed of gift was executed without a knowledge of its real nature by the donor, it having been prepared by the donee without any instructions to prepare such deed, the donor believed it to be a will such as she intended to execute, it is sufficient ground to set it aside on the ground of mistake on the part of the donor and fraud on the part of the writer who was the donee therein. *Jones v. Robertson*, 2 Munf. 187.

H. REPRESENTING CONFEDERATE TREASURY NOTES AS LEGAL TENDER.

If the representation of a party was false, that the confederate treasury notes were a legal tender, and the creditor was, under circumstances which influenced his action and coerced his consent, thereby induced to receive them in payment of a debt, it was a fraud. *Mann v. McVey*, 3 W. Va. 232.

I. ADVANTAGE TAKEN OF DRUNKENNESS.

See the title DRUNKENNESS, vol. 4, p. 835.

J. FRAUD IN COMPROMISE.

See the title COMPROMISE, vol. 3, pp. 42, 46.

K. FRAUD OF PARTNER.

See the title PARTNERSHIP.

L. FRAUD IN EXECUTION AND JUDICIAL SALES.

See the title SHERIFFS' SALES.

M. FRAUD BETWEEN HUSBAND AND WIFE.

See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; HUSBAND AND WIFE.

N. FRAUD IN INSURANCE POLICIES.

See the title INSURANCE.

O. FRAUD IN LAND GRANTS AND PATENTS.

See the title PUBLIC LANDS.

P. FRAUDULENT OPTIONS.

See the title OPTIONS.

Q. FRAUDULENT PAYMENT TO ATTORNEY.

See the title ATTORNEY AND CLIENT, vol. 2, pp. 153, 154.

R. FRAUDULENT SALE OF INSANE PERSON'S PROPERTY.

See the title INSANITY.

S. IMPROVEMENTS ON ANOTHER'S PROPERTY AS FRAUD ON CREDITORS.

See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

T. SILENCE AND SUPPRESSION OF FACTS.

See ante, "Silence and Suppression of Facts," II, C.

IV. Operation and Effect.**A. MAKES TRANSACTION VOIDABLE.**

See post, "Presumption from Delay," V, B, 2, b, (3).

Fraud, when established, renders the contract which it taints voidable at the option of him who is injured by it. *University of Virginia v. Snyder*, 100 Va. 567, 42 S. E. 337; *Rowzie v. Daingerfield*, 97 Va. 708, 34 S. E. 899; *Francis v. Cline*, 96 Va. 201, 31 S. E. 10; *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556; *Dickinson v. Railroad Co.*, 7 W. Va. 390, 438.

"Fraud is an all-pervading vice, and whatever it touches it taints throughout. Part can not be bad and part good, but it is all bad; and it matters not how that fraud is made to appear. If the instrument is not on its face fraudulent, it may be shown that it is in fact so; that it was executed with a fraudulent intent." *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203, 212. See *Wampler v. Wampler*, 30 Gratt. 454, 459; *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556; *Bosher v. Richmond, etc., Land Co.*, 89 Va. 455, 16 S. E. 360, 461.

Any contract, the making of which is induced by fraud of either party, practiced upon the other at the time the contract is made, or while negotiations in regard to it are being carried on, is voidable, and may be rescinded at the election of the party defrauded. *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922.

Thus, a purchaser of land under general warranty deed will not be compelled to pay notes given for purchase money when there has been a decree cancelling the deed vesting title in his grantor because of fraud in such grantor in procuring such deed, and also cancelling, for such fraud, the deed to such purchaser from such grantor, and the evidence does not show him to have been implicated in such fraud. The notes will be cancelled. *Womelsdorf v. O'Connor*, 53 W. Va. 314, 44 S. E. 191.

Fraud in the sale does not absolutely avoid the contract, but only renders it voidable at the option of the party defrauded; though the fraud gives a

right to rescind, the property in the subject matter passes in the first instance to the vendee. And an innocent purchaser from the vendee may acquire an indisputable title to the property. *Wickham v. Martin*, 13 Gratt. 427, 436; *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492; *Martin v. South Selem Land Co.*, 94 Va. 28, 49, 26 S. E. 591; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 848; *Oberdorfer v. Meyer*, 88 Va. 384, 13 S. E. 756; *Shoemaker v. Cake*, 83 Va. 1, 5, 1 S. E. 387.

Fraudulent Title Remains in Vendee until Disaffirmance.—Although a vendee of property effects the contract and obtains possession by means of false and fraudulent representations, yet the title remains in him until the vendor does some act of disaffirmance. And when the vendee transfers the title thereto to an innocent transferee prior to such disaffirmance, the title is good. *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664.

Thus, A defrauds B of certain property and afterwards makes a deed conveying it to a trustee to secure a debt. The trustee sells the property, and C becomes the purchaser for valuable consideration, without notice of the fraud. C then conveys the property to D. D is entitled to hold property against B, whether he had notice of the fraud or not. In the former case, he holds a valid title under C; in the latter, he is himself a bona fide purchaser without notice of the fraud. *Montgomery v. Ross*, 1 Pat. & H. 5.

And where the owner of personal goods sells and delivers the same to a purchaser, a title to the property passes, though voidable and defeasible as between vendor and vendee, if obtained by false and fraudulent representations of the latter to the injury of the former, in regard to the consideration. In which case, the vendor may reclaim his property from the vendee; but not from a bona fide purchaser from or

under the vendee for value paid without notice of the fraud. *Williams v. Given*, 6 Gratt. 268; *Oberdorfer v. Meyer*, 88 Va. 384, 386, 13 S. E. 756.

This rule is not varied by the circumstance that the fraudulent purpose has been accomplished by the vendee's knowingly paying the consideration in counterfeit money, received by the vendor under the belief that it is genuine. *Williams v. Given*, 6 Gratt. 268.

B. FORFEITS RIGHT TO AID OF EQUITY.

See the title **SPECIFIC PERFORMANCE**.

A plaintiff who has been guilty of a fraudulent act, is not entitled to the countenance of a court of equity. *Smith v. Marks*, 2 Rand. 449.

Where the weight of the evidence is that a contract was obtained through fraud and misrepresentation such as could not have been detected by any reasonable diligence, such contract was unconscionable and could not be enforced in equity. *Davis v. Henry*, 4 W. Va. 571.

C. PROPERTY FRAUDULENTLY OBTAINED IMPRESSED WITH TRUST.

See the title **TRUSTS AND TRUSTEES**.

"Property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured." *Dickel v. Smith*, 38 W. Va. 635, 18 S. E. 721, 723.

Courts of equity will not only interfere, in cases of fraud, to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere, and treat the case exactly as if the acts had been done; and this they will do by converting the party who has committed the fraud, and profited by it, into a trustee for the party in

whose favor the act would otherwise have been done. *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143.

"This principle, of course, can not prevail against a purchaser in good faith for a valuable consideration, and without notice of any fraudulent influence." *Dickel v. Smith*, 38 W. Va. 635, 18 S. E. 721, 723.

D. EFFECT ON CONTRACT OF SURETYSHIP.

See the title **SURETYSHIP**.

When, with the knowledge and assent of the creditor, there is a misrepresentation of a material fact, which, had it been known, might reasonably have prevented the surety from entering into his contract of suretyship, such contract will not be binding on the surety, though such misrepresentation was not made with a fraudulent purpose. *Warren v. Branch*, 15 W. Va. 21.

Fraud or misrepresentation on the part of the principal in a note, inducing a surety to sign same, where it is not proved or alleged that the payee of the note participated in such fraud or misrepresentation, is not ground for relieving the surety from his obligation. *Griffith v. Reynolds*, 4 Gratt. 46.

E. LIABILITY OF OTHERS THAN THOSE GUILTY.

See ante, "Effect of Contract of Suretyship," IV, D.

Husband's Fraud Not Imputed to Wife.—The fraud of a husband in relation to a deed should not be imputed to the wife, by reason of her coverture, merely because of her participation in the deed. *Blanton v. Taylor*, *Gilmer* 209.

And the participation of a wife in the fraud of her husband will not impair her rights. *Quarles v. Lacy*, 4 Munf. 251; *Taylor v. Moore*, 2 Rand. 563; *Blanton v. Taylor*, *Gilmer* 209. See the title **HUSBAND AND WIFE**.

Responsibility for Acts of Joint Owner.—Freight (though by the terms of a charter party payable monthly if required) is not to be recovered, where

the voyage was never completed, but the vessel condemned by a foreign tribunal in consequence of a fraud attempted by one of the owners entrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act. *Hadfield v. Jameson*, 2 Munf. 53.

In such case, the copartners are not entitled to compensation for the loss, except against the fraudulent partner. *Hadfield v. Jameson*, 2 Munf. 53.

It seems, too, that the copartners collectively (as well as the fraudulent partner individually) are responsible to a third person for a loss occasioned by the fraud. *Hadfield v. Jameson*, 2 Munf. 53.

Person Furnishing Opportunity for Fraud.—Where the loss must lie between an innocent third person and the grantee who has put it into the power of the grantor to commit a fraud, the latter must bear the consequences. *Slater v. Moore*, 86 Va. 26, 9 S. E. 419. See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; MAXIMS.

Relief Only Had against Party to Fraud.—By representing that his debt is one-seventh of the real amount, in the presence of the sheriff, the debtor induces a third person to join him in a forthcoming bond, where a *fi. fa.* has been sued out against him. The third party is not entitled to any relief against his obligation on the ground of the fraud by which he was induced to execute it, as the creditor was no party to it, and the sheriff, who was, was not the agent of the creditor. *Gordon v. Jeffery*, 2 Leigh 410.

And a husband who induces his wife to unite with him in giving a deed of trust on their property to secure a note in bank, which he desires to renew and get an extension of time on, is not the agent of the bank, and the bank is not affected by his fraud in procuring her to join in the deed. *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1.

F. BANKRUPTCY AS DISCHARGE OF CLAIMS FOR FRAUD.

See the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 246.

G. CONSTRUCTIVE TRUSTS ARISING FROM FRAUD.

See the title TRUSTS AND TRUSTEES.

H. EFFECT OF FRAUD ON STATUTE OF LIMITATIONS.

See the title LIMITATION OF ACTIONS.

I. EFFECT ON DEEDS.

See the title DEEDS, vol. 4, p. 364.

J. EFFECT ON TAX TITLE.

See the title TAXATION.

K. ESTOPPEL TO SET UP FRAUD.

See post, "Affirmance and Recovery of Damages," V, B, 2. See the title ESTOPPEL, vol. 4, p. 191.

L. FRAUDULENT DEEDS OF TRUST.

See the title MORTGAGES AND DEEDS OF TRUST.

M. LIS PENDENS AS NOTICE OF FRAUD.

See the title LIS PENDENS.

N. RATIFICATION, WAIVER AND ESTOPPEL.

See post, "Affirmance and Recovery of Damages," V, B, 2.

V. Actions and Remedies.

A. JURISDICTION.

See the title JURISDICTION.

1. In Equity.

a. General Rule.

It may be stated as a general rule that equity has jurisdiction to give relief in cases of fraud. *Brown v. Bonner*, 8 Leigh 1, 31 Am. Dec. 637; *Tune v. Fallin*, 87 Va. 410, 12 S. E. 750; *Meek v. Spracher*, 87 Va. 162, 170, 12 S. E. 397; *West v. Logwood*, 6 Munf. 491; *Harvey v. Fox*, 5 Leigh 444; *Poore v. Price*, 5 Leigh 52, 27 Am. Dec. 582; *Jackson v. Turner*, 5 Leigh 119; *Hyde v. Nick*, 5 Leigh 336; *Jones v. White*,

Wythe 111; *White v. Jones*, 1 Wash. 116; *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143; *Western Mining, etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 406.

"Courts of equity have an original, independent and inherent jurisdiction to relieve against every species of fraud. Every transfer or conveyance of property, by what means soever it be done, is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments, or decrees may be the instruments to which parties may resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted by a court of equity to obstruct the requisition of justice. If a case of fraud be established, a court of equity will set aside all transactions founded upon it by whatever machinery they may have been affected, and notwithstanding any contrivance by which it may have been attempted to protect them." *Wampler v. Wampler*, 30 Gratt. 454, 459.

"Pomeroy, in discussing the jurisdiction of courts of equity in cases of fraud, says: 'It is impossible, especially in the United States, to formulate any universal rule concerning the extent or the exercise of the equitable jurisdiction in matters of fraud, since the decisions of different courts, and in different states, are directly at variance with respect to its existence and extent, and since its exercise must depend, to a great extent, upon the circumstances of particular cases, and even upon the temperaments and opinions of individual judges. The jurisdiction, where it exists, may be exercised by granting reliefs which are wholly pecuniary and therefore legal. In conferring those reliefs, which are purely equitable, and therefore exclusive, the powers of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar.' * * * 2 Pomeroy's Eq. Jur., § 910." *Vaught v. Meador*, 99 Va. 575, 39 S. E. 225.

And equity will relieve against fraud in a deed or contract in writing. *Allen v. Yeater*, 17 W. Va. 128.

Executed Contract.—As a rule an executed contract will not be disturbed in equity unless for fraud or mistake. *Vance v. Walker*, 3 Hen. & M. 288.

Plaintiff Should Be Guiltless.—As was said in *Parker v. Carter*, 4 Munf. 273, a plaintiff comes into equity with a bad grace to enforce a promise which was induced by unfounded and delusive representations on his own part. See post, "Rule of Par Delictum," V, B, 12.

Person Gives Jurisdiction.—In cases of fraud the jurisdiction of equity is sustainable wherever the person can be found, although lands not within the jurisdiction of the court may be affected by the decree. *Davis v. Morris*, 76 Va. 21.

Thus the courts of equity having jurisdiction of the parties, may administer full relief without regard to the nature or situation of the property, and may compel the conveyance of property which lies beyond its jurisdiction. *Vaught v. Meador*, 99 Va. 575, 39 S. E. 225; *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36; *Guerrant v. Fowler*, 1 Hen. & M. 4.

b. No Adequate Remedy at Law.

See the title ADEQUATE REMEDY AT LAW, vol. 1, p. 175.

Statement of Rule.—Equity will not take jurisdiction of a fraud where there is an adequate remedy at law. *Green v. Spaulding*, 76 Va. 411; *Buck v. Ward*, 97 Va. 209, 33 S. E. 513; *Kane v. Virginia, etc., Co.*, 97 Va. 329, 33 S. E. 627; *Laidley v. Laidley*, 25 W. Va. 525, 529.

The court of equity has jurisdiction to afford relief on the ground of fraud where there is no plain, adequate and complete remedy at law, and often affords the only appropriate remedy. *McMullin v. Saunders*, 89 Va. 356.

It is well settled that to give relief in cases of fraud is one of the elementary grounds of equitable jurisdiction. But this jurisdiction does not extend

to all cases in which the commission of fraud is involved, as in a case where there are no facts or circumstances which will give a court jurisdiction, save and except the charge of fraud. When therefore the party can have as effectual and complete a remedy at law as in equity, and that remedy is direct, certain and adequate, there can be no ground for a resort to equity. *Kane v. Virginia, etc., Co.*, 97 Va. 329, 33 S. E. 627; *Buck v. Ward*, 97 Va. 209, 33 S. E. 513; *Green v. Spaulding*, 76 Va. 411.

Adequate Remedy at Law as Original Ground.—In *Meek v. Spracher*, 87 Va. 162, 12 S. E. 397, it was held, that where the ground of relief, in a suit by the vendee of land for an abatement of the purchase price on account of deficiency in the quantity of the land, is that the vendor fraudulently misrepresented the quantity of the land in the tract sold, the fact that the plaintiff had adequate remedy at law did not oust the court of equity of jurisdiction, since fraud is an original ground of equitable jurisdiction.

Saying: "Fraud and misrepresentation are among the elementary grounds of equitable jurisdiction and relief. Where they exist, the question of 'an adequate remedy at law' can but rarely arise." *Meek v. Spracher*, 87 Va. 162, 12 S. E. 397.

This case is commented on in a later case, as follows: "'Richardson, J., in *Meek v. Spracher*, 87 Va. 162, 12 S. E. 397, does say that fraudulent misrepresentations of material matters, relied on by a party, inducing him to act to his injury, have always been regarded as matter of equitable jurisdiction and relief either by rescission or damages.' But it could not have been there meant, that every case of fraud, or where the cause of action arises out of fraud, is within the scope of the elementary jurisdiction of courts of equity, but only that, where the circumstances of the particular case bring it within this elementary jurisdiction, in such a case,

the jurisdiction of equity is not dependent upon the inadequacy of the legal remedy. Moreover, in that case the remedy sought was alternative; one by a rescission of the contract for the exchange of land because of fraud in its procurement; and the other by a decree for damages growing out of a deficiency in the quantity of land gotten by the complainant in the exchange." *Buck v. Ward*, 97 Va. 209, 214, 33 S. E. 513.

Thus it has been held, that the mistake of one party occasioned by the fraud of the other gives equity jurisdiction to render a decree for the value of the deficiency of land sold. This jurisdiction being elementary, it is immaterial that there is an adequate remedy at law. *Hull v. Watts*, 95 Va. 10, 27 S. E. 829. See post, "When Concurrent with Court of Law," V, A, 2.

Relief against Acknowledgment of Gift.—A bill for relief against a writing purporting an acknowledgment of a gift of property by the complainant to the defendant, on the ground of its having been obtained by fraud, presents a proper case for equitable jurisdiction, though a suit at law, founded upon such writing, might be defeated without coming into equity. *Johnson v. Hendley*, 5 Munf. 219.

Caveat—When Equity Does Not Take Jurisdiction.—Although a party may be let into a court of equity on grounds which he could not have used on the trial of a caveat, or upon a case suggesting and proving that he was prevented by fraud or accident from prosecuting his caveat, he is not to be sustained in equity on grounds which were or might have been brought forward on the trial of the caveat. *Noland v. Cromwell*, 4 Munf. 155. See the title PUBLIC LANDS.

c. Prevention from Resorting to Legal Remedy.

Where a defendant has been prevented from resorting to an adequate remedy which he had at law, by a fraud-

ulent representation or a promise of the plaintiff, he should be relieved in equity. *Poindexter v. Waddy*, 6 Munf. 418. See *Lee v. Baird*, 4 Hen. & M. 453.

d. Question More Properly Investigated in Equity.

Although there may be a remedy at law for fraud, if the question, under the circumstances, can be more properly investigated in equity, it is proper to resort to that court. *Henley v. Perkins*, 6 Gratt. 615.

e. To Reform Written Contract.

Equity has jurisdiction to reform a written contract when the real agreement of the parties was not expressed by reason of fraud, accident or mistake, which is alleged. *Crislip v. Cain*, 19 W. Va. 438; *Brown v. Bonner*, 8 Leigh 1, 31 Am. Dec. 637.

"Equity has jurisdiction to reform written instruments where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties." *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 351, 10 S. E. 239. See the title **RESCISSION, CANCELLATION AND REFORMATION**.

f. To Abate Purchase Price.

A court of equity clearly has jurisdiction to abate from the purchase money due, because of a deficiency in land, by which the vendee was injured by the fraud of the vendor in misstating the quantity of the land on the face of his contract or deed or by oral agreement. *Crislip v. Cain*, 19 W. Va. 438.

Abatement of Consideration.—Where the vendor has been guilty of fraud or misrepresentation, he may be compelled to abate the consideration, to the extent of such fraud or misrepresentation. *Silliman v. Gillespie*, 48 W. Va. 374, 37 S. E. 669.

g. To Set Aside a Grant.

Where one person fraudulently obtains a grant in preference to another, having a prior equitable title, a court of equity has jurisdiction of the case, and

can afford the most ample relief. *White v. Jones*, 1 Wash. 116; *Jones v. White*, *Wythe* 111. See the title **PUBLIC LANDS**.

h. To Set Aside Decree.

When a decree in equity has been obtained in such manner as to make it a fraud as to the defendant, the decree will be set aside in equity. *Keran v. Trice*, 75 Va. 690; *Evans v. Spurgin*, 11 Gratt. 615. See the title **JUDGMENTS AND DECREES**.

To Impeach Decree.—A superior court of chancery can not correct errors in a decree of an inferior court by an original suit, although in that way it may impeach a decree for fraud. *Banks v. Anderson*, 2 Hen. & M. 20.

i. To Decree Damages.

For Breach of Contract.—A bill, in any form, claiming damages for breach of contract, can not be entertained in equity; neither can unliquidated damages be set off in equity. *Robertson v. Hogshead*, 3 Leigh 667.

Upon a bill in chancery by vendee against vendor of land, after the contract fully executed by conveyance of the land and securities given for the purchase money, alleging fraud practised by vendor's agents on the vendee, in the original agreement, and praying that the contract may be rescinded for the fraud, and general relief; the court having held, that plaintiff under the circumstances of the case, was not entitled to a rescission of the contract, held, further, that he was not entitled to ask, that the damages he had sustained by reason of the alleged fraud, should be ascertained by the court of chancery, and decreed to him, in abatement from the purchase money. *Robertson v. Hogshead*, 3 Leigh 667.

Ascertainment of Unliquidated Damages.—When a party has been guilty of fraud in making a contract with another, a court of equity may set aside the contract, or award compensation for the injury by way of abatement, provided this latter amount can be as-

certained with certainty. But if the nature of the fraud prevents a definite ascertainment of damages, and they are in the nature of unliquidated damages, equity has no jurisdiction to make an abatement, but the injured party should be left to his remedy at law. *Crislip v. Cain*, 19 W. Va. 438.

And in *Armstead v. Hundley*, 7 Gratt. 52, where one party to an agreement was guilty of fraud in suppressing and failing to communicate certain facts to the other, against which the other was entitled to be relieved, but such other party had been guilty of laches in failing to make proper inquiries and promptly assert his claim, it was held, that the proper measure of relief under the statute was compensation for the injury instead of a rescission of the contract.

2. When Concurrent with Court of Law.

Concurrent jurisdiction exists at law and in equity in cases of fraud, and the latter court will not refuse to act merely because there is also a remedy in the former. *Poore v. Price*, 5 Leigh 52, 27 Am. Dec. 582; *Garland v. Rives*, 4 Rand. 282, 15 Am. Dec. 756; *White v. Jones*, 4 Call 253, 2 Am. Dec. 564; *Haden v. Garden*, 7 Leigh 157; *Meek v. Spracher*, 87 Va. 162, 12 S. E. 397.

"Courts of equity have concurrent jurisdiction with courts of law in case of fraud cognizable in courts of law, and exclusive jurisdiction in cases of fraud beyond the reach of courts of law." *Crislip v. Cain*, 19 W. Va. 438, 464. See *Campbell v. Lynch*, 6 W. Va. 17, 18.

And the evidence to sustain actual fraud must be the same, in substance and effect, in one forum that it is in the other. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104. See *Baltimore, etc., R. Co. v. Polly, Woods & Co.*, 14 Gratt. 447, 463.

Defense Must Be Made in Court Where Suit Brought.—In *Haden v. Garden*, 7 Leigh 157, it was held, that though courts of equity and courts of

law have a concurrent jurisdiction in cases of fraud, yet if a suit is first brought in a court of law, in which the question of fraud may be tried and determined, the party injured by the fraud must make his defense there, and if he neglects to do so, a court of equity has no jurisdiction to relieve him.

Fraud is a clear and uncontested subject of jurisdiction for a court of equity, but it is also true, that in many cases it is equally within the jurisdiction of the courts of law, and according to the decisions of this court, where a party, whether plaintiff or defendant, is fairly before a court of law which can give him adequate redress, or enable him to make full defense, he shall not be at liberty to transfer his cause to a different forum. *Harvey v. Fox*, 5 Leigh 444.

Equity Follows the Law.—In *Garland v. Rives*, 4 Rand. 282, 15 Am. Dec. 756, it was held, that in cases of actual fraud a court of equity has concurrent jurisdiction with a court of law in remedying the fraud, and that in these cases equity follows the law, and gives relief to the same extent as a court of law.

To Avoid Patent.—A court of law can avoid a patent for fraud, but in such case the remedy is more effectual in equity, which can do more complete justice between the parties. *White v. Jones*, 4 Call 253, 2 Am. Dec. 564. See the title PUBLIC LANDS.

Fraud in Execution of Deed and Prior Thereto.—In a trial at law fraud in the execution of a deed may be given in evidence to vacate it, but if the fraud relate to transactions preceding the execution of the instrument, it can not be averred or proved, and the remedy is in equity. *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746.

B. RIGHT OF ACTION AND RELIEF AFFORDED.

1. General Statement.

A false representation of a material fact, constituting an inducement to a

contract, on which the purchaser has a right to rely, is a ground for rescission by a court of equity, or an action at law, although the party making the representation is ignorant as to whether it was true or false. The real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true and was misled by it into entering into the contract. *McMullin v. Saunders*, 79 Va. 356; *Grim v. Byrd*, 32 Gratt. 293; *Linhart v. Foreman*, 77 Va. 540; *Lowe v. Trundle*, 78 Va. 65; *Crump v. Mining Co.*, 7 Gratt. 352; *Brown v. Rice*, 26 Gratt. 467, 473; *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841; *Hull v. Fields*, 76 Va. 594; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

Courts of equity interfere in cases of fraud not only to set aside acts done or contracts executed or executory, but they will also, if acts have been prevented by fraud from being done, interfere and treat the case, as if the acts, which ought to have been done, had actually been done, or will require the party committing the fraud to compensate the party defrauded, which last is the usual form of the relief furnished by courts of law. *Crislip v. Cain*, 19 W. Va. 438, 464.

Choice of Remedies.—A contract induced by fraud is not void, but voidable at the option of the party injured by the fraud. Upon its discovery he has, as a general rule, the choice of two remedies. He may elect to rescind the contract, if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back the consideration he has paid or given; or, if he has not paid or given anything, he may repudiate the contract, and rely, when sued, on the fraud as a complete defense; or he may elect to retain what he has received under the contract, and bring an action to recover damages for the injuries he has sus-

tained from the deceit. *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492. See also, *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *Hudson v. Waugh*, 93 Va. 518, 25 S. E. 530.

Exception in Case of Subscription to Stock.—While it is a general rule that a person, induced to enter into a contract by fraud, may either affirm or rescind, it is subject to an exception in the case of a subscriber to a joint-stock company, and the latter can not elect to retain the shares and sue the company for damages. A subscription in this case is not only an undertaking to the company, but with all other subscribers—that they shall all contribute rateably to the payment of the company's debts. To allow a subscriber to sue the company for fraud, would be to throw the burden of the debts and liabilities on the other shareholders, who are as innocent of fraud as he, a result which would be wholly at variance with his contract of membership. *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492.

Construction of Statutes.—Statutes against fraud are to be liberally expounded for the suppression of fraud. *Harden v. Wagner*, 22 W. Va. 356.

2. Affirmance and Recovery of Damages.

a. Rights of Party Defrauded.

Where a party has been induced to contract through the fraud of the other party, he need not attempt to rescind the contract, and thus be released from his obligations, but he is entitled to affirm the transaction, and sue for any damages he may have sustained, or defend an action at law on his undertaking by the other party, setting up the fraud. *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492; *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *Hudson v. Waugh*, 93 Va. 518, 25 S. E. 530.

"If A fraudulently makes a repre-

sensation which is false to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers damage, B may maintain an action against A for the deceit, there being here the conjunction of wrong and loss." *Zinn v. Mendel*, 9 W. Va. 580, 593.

b. Ratification—How Established—Effect.

(1) By Words or Acts.

The election to abide by a contract which a party might have avoided, may be shown by proof of acquiescence in it by words or acts, and any act which discloses an intention to abide by the contract will be sufficient to ratify it, provided the acquiescence or ratification was with knowledge of the facts which gave the right to repudiate it. *University of Virginia v. Snyder*, 100 Va. 567, 42 S. E. 337; *National Mut., etc., Assn. v. Blair*, 98 Va. 490, 496, 36 S. E. 513; *Campbell v. Eastern Bldg., etc., Assn.*, 98 Va. 729, 37 S. E. 350; *Rouzie v. Daingerfield*, 97 Va. 708, 34 S. E. 899; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Shoemaker v. Cake*, 83 Va. 1, 8, 1 S. E. 387.

A transaction, fraudulent in its inception, may be validated by subsequent ratification not obnoxious to objections which prevailed against it at first. *Mettert v. Hagan*, 18 Gratt. 231.

If a party entitled to impeach a transaction for fraud, do an act freely, with an intent to confirm same, which he knew, or might or ought with reasonable or proper diligence to have known, to be impeachable, it is binding. *Hutton v. Dewing*, 42 W. Va. 691, 26 S. E. 197, 200.

And where a man having been defrauded, with complete knowledge, chooses to come again in contact with the person who defrauded him, he abandons his right to abrogate the contract, and enters into a plain, distinct transaction of confirmation. *Davis v.*

Henry, 4 W. Va. 571, 583; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 938.

Can Not Accept Benefits and Repudiate Agency.—A plaintiff, who has accepted the fruits resulting from a contract procured by false representations, can not be heard to repudiate the agency of the person who procured the contract and made the representation. *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950.

(2) Evidence of Confirmation Must Be Clear and May Be Explained.

"When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence." *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243. See *Shuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 938; *Davis v. Henry*, 4 W. Va. 571, 583; *Francis v. Cline*, 96 Va. 201, 220, 31 S. E. 10.

Waiver Induced by Expectation That Fraud Would Be Expurgated.—Acts of acquiescence or affirmance relied upon by the plaintiff did not prejudice the defendant, if induced by the reasonable expectation on his part that the fraud of which he complained would be expurgated, or a satisfactory arrangement would be made with him in regard to it. *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

Thus, the renewal of notes after knowledge of fraud in the procurement of the original notes will not be deemed a ratification of the original transaction, where it satisfactorily appears that the maker did not thereby intend to waive his defense or ratify the transaction, in consequence of an understanding with the holder, that, in a certain contingency, he would surrender them. *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475.

Second Contract Annulling First Continuation of Fraud.—But where a contract is clearly fraudulent by reason of misrepresentation, a second contract annulling the first, made whilst under the influence of such misrepresentation, and a repetition thereof, is a continuation of the fraud, and is not a confirmation or condonation of the first fraud. *Davis v. Henry*, 4 W. Va. 571.

Saying: "Yet as the testimony in this case is not entirely satisfactory, but vague and indefinite as to the fact whether the party was fully informed at the time of making the second contract, that he had been defrauded, and that he intended the second contract to be a distinct transaction of confirmation, the case is remanded to the court below to settle that question by more definite testimony; or, as this is a case in which it would be eminently proper, by an issue out of chancery." *Davis v. Henry*, 4 W. Va. 571. See *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 938. See post, "Effect of Part Execution," V, B, 2, b, (4).

(3) Presumption from Delay.

(a) Principle Stated.

The right to rescind a contract on the ground of fraud must be promptly exercised on discovery of the fraud, or else it will be deemed to have been waived. *Campbell v. Eastern Bldg., etc., Ass'n*, 98 Va. 729, 37 S. E. 350; *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Rouzie v. Daingerfield*, 97 Va. 708, 34 S. E. 899; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Smith v. Henkel*, 81 Va. 524; *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909.

It is well settled that where a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud; or, if after the discovery he treats the contract as existing, he will be deemed to have waived his right of repudiation, and must then bring an action for damages for deceit. *Campbell v. Eastern*,

Bldg., etc., Ass'n, 98 Va. 729, 37 S. E. 350; *Rouzie v. Daingerfield*, 97 Va. 708, 34 S. E. 899; *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

(b) Promptness Necessary.

See ante, "Makes Transaction Voidable," IV, A.

"The right to disaffirm must be exercised promptly, without unnecessary delay, the time depending upon the circumstances of the particular case." *University of Virginia v. Snyder*, 100 Va. 567, 578, 42 S. E. 337.

"It is well settled that where a party desires to repudiate a transaction upon the ground of mistake or fraud, he must, upon the discovery of the fraud, or upon the discovery of facts and circumstances from which such knowledge would be imputed to him, assert his remedial rights with diligence and without delay. To delay instituting judicial proceedings, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiescence, and this may be, and generally will be, a bar to any equitable remedy. Great punctuality and promptness of action by the deceived party, upon his discovery of the fraud, is required. Unnecessary delay after such knowledge will defeat the equitable relief." *National Mut., etc., Ass'n v. Blair*, 98 Va. 490, 494, 36 S. E. 513. See *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 937; *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909; *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507; *McConaughy v. Camden*, 18 W. Va. 140; *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765; *Woods v. Stephenson*, 43 W. Va. 149, 27 S. E. 309; *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605; *Walker v. Ruffner*, 32 W. Va. 297, 9 S. E. 215; *Trader v. Jarvis*, 23 W. Va. 100; *Pusey v. Gardner*, 21 W. Va. 469.

And where a fiduciary's purchase of trust property is sought to be avoided for constructive fraud, the suit for the

entitled to rescind. *Slothower v. Oak Ridge Land Co.*, 2 Va. Dec. 506.

Where a purchaser thoroughly examined the lots purchased several months after buying them, and held them for speculation, though he might have sold them at an advance, any imperfection in the contract of purchase was waived. *Slothower v. Oak Ridge Land Co.*, 2 Va. Dec. 506.

And where one delayed three years after knowledge of all the facts attending the sale before bringing his suit, it was held that he was guilty of laches and relief was denied him. *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909. Similarly a purchaser of land lost his right to rescind the sale for fraud where he remained silent for nearly two years, and in the meantime the land had greatly depreciated in value, and an innocent third party had acquired a vendor's lien note given by the purchaser. *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831.

If the fraud complained of be false representations in the sale of real estate, the purchaser should promptly, on discovery of the fraud, notify the vendor of the cause of complaint, and offer to restore the title and possession of the property sold. It is too late to wait until sued for the purchase price, when the fraud was discovered long before that time, and the vendee has remained in possession without demanding a rescission. The vendee should act with promptness in discovering the fraud, and in repudiating his contract, when discovered. *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593.

(c) Whether Injury Results or No.

The duty to promptly disaffirm a fraudulent transaction is not dependent upon proof of injury, by the delay, to the other party. *West End Co. v. Claiborne*, 97 Va. 734, 735, 34 S. E. 900.

Whether a party seeking a rescission

of his contract has forfeited his right to it, by laches or misconduct, depends upon the facts and circumstances of the particular case. If the rights of creditors have intervened, or an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position of even the wrongdoer is affected, the party seeking rescission on the ground of fraud will be deemed to have waived his right to rescind. But if the delay has not prejudiced creditors, innocent third persons, nor the other party to the contract, and there has been no ratification of the contract by the party asking the rescission, relief should be afforded him. *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841.

"A contract procured by fraud is not void, but voidable only, at the option of the party defrauded. It is binding upon him until rescinded, and if, before he exercises the option to rescind, innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be prejudiced by its rescission, they may generally have it enforced for their benefit, although the party by whose fraud it was procured could not do so." *Martin v. South Salem Land Co.*, 94 Va. 28, 49, 26 S. E. 591.

(4) Effect of Part Execution.

"The party defrauded does not lose his right to rescind because the contract has been partly executed and the parties can not be fully restored to their former position; but he must do so as soon as circumstances permit, and must not go on with the contract after the discovery of the fraud, so as to increase the injury necessarily to be caused to the fraudulent party." *Shoemaker v. Cake*, 83 Va. 1, 8, 1 S. E. 387.

The execution of deeds in furtherance of an agreement, which agreement had been induced by fraud, within a short time afterwards, will not amount to a waiver of the right

to rescind such fraudulent agreement, where the conditions in relation to the knowledge and information of the parties imposed upon are practically the same as when the agreement was executed, although they may have consulted lawyers and friends, without obtaining information calculated to, enlighten them as to their rights. *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808. See ante, "Evidence of Confirmation Must Be Clear and May Be Explained," V, B, 2, b, (2).

(5) Election to Affirm by Defense by Special Pleas.

Where a vendee of land does not ask a rescission for fraud in the transaction, but defends an action at law for the purchase price, he may file special pleas under § 3299 of the Code, and claim the benefit of any set-off by way of damages to which he may be entitled, because of the fraudulent statements of the vendor. *Watkins v. West Wytheville Co.*, 92 Va. 1, 22 S. E. 554.

In an action on notes given for a patent right, if the defendant claims that he has been damaged by fraud or misrepresentation in the procurement of the notes, he may file a special plea under § 3299 of the Code, and have set-off against the plaintiff's demand, the amount of damages sustained by him in consequence of such fraud and misrepresentation. This does not require a rescission of the contract in suit and a reinvestment of the vendor with the title. *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

(6) Election to Affirm Is Final.

If a party who has been defrauded, elect, on the discovery of fraud, to affirm the contract, his election is final and conclusive. He has but one election to rescind, and having once elected to affirm the contract, he can not thereafter disaffirm it, but must abide by the decision he has made. *Wilson v. Hundley*, 96 Va. 96, 30 S.

E. 492; *University of Va. v. Snyder*, 100 Va. 567, 42 S. E. 337; *Campbell v. Eastern Bldg., etc., Ass'n*, 98 Va. 729, 37 S. E. 350; *National Mut., etc., Ass'n v. Blair*, 98 Va. 490, 496, 36 S. E. 513; *Rouzie v. Daingerfield*, 97 Va. 708, 34 S. E. 899; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *Hudson v. Waugh*, 93 Va. 518, 25 S. E. 530; *Shoemaker v. Cake*, 83 Va. 1, 5, 1 S. E. 387; *Hutton v. Dewing*, 42 W. Va. 691, 26 S. E. 197.

Subsequent Discovery of New Incidents in the Fraud.—A party who has elected to affirm a contract which was voidable for fraud in its procurement, can not afterwards elect to rescind it upon the subsequent discovery of new incidents in the fraud. Knowledge of the fraud puts the party defrauded to his election. Subsequent discovery of new incidents of the fraud simply confirms the previous knowledge, and does not confer a new right to rescind. *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 79, 22 S. E. 845.

(7) General Indebitatus Assumpsit.

An action of general indebitatus assumpsit, with a special statement, in the last count, of a legal liability growing out of and resting upon a representation, false within the defendant's knowledge, made by him to plaintiff, does not lie. The action was not a special assumpsit on the representation treated as an express collateral contract of warranty, in which the fraud and deceit would have been immaterial; such contract of warranty is not made the ground of plaintiff's claim of the right of recovery. *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80. See the title ASSUMPSIT, vol. 2, p. 6.

"It may be that the plaintiff would have had the right to treat the contract of assignment as rescinded on account of its fraudulent procurement, and recover back the money in general assumpsit on the count for money had and received, without proof of the scienter or guilty knowledge on the part

of the defendant; but that question does not arise in this case. See 1 Bigelow Frauds 520, 413." *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80, 82.

3. Rescission.

See the title RESCISSION, CANCELLATION AND REFORMATION.

a. General Principles Underlying the Right.

The law is well settled that a false representation of a material fact, constituting an inducement to a contract, on which the purchaser had a right to rely, is ground for the rescission of the contract by a court of equity, although the party making the representation was ignorant as to whether it was true or false. The real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it in entering into the contract. *Grim v. Byrd*, 32 Gratt. 293; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909; *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 27 S. E. 841; *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243; *Herron v. Dibrell*, 87 Va. 289, 12 S. E. 674; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743; *McMullin v. Saunders*, 79 Va. 356; *Lowe v. Trundle*, 78 Va. 65; *Linhart v. Foreman*, 77 Va. 540; *Hull v. Fields*, 76 Va. 594; *Alexander v. Sanders*, 9 Va. Law J. 97; *Moore v. Barksdale*, 2 Va. Dec. 416; *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116; *Lane v. Black*, 21 W. Va. 617.

"That fraud, practiced by the vendee in the procurement of the sale, may so far vitiate it as to confer on the vendor a right, on the discovery of the fraud, before the rights of innocent third parties have intervened, to avoid the sale and demand restitution of the property, is a proposition well established by decisions in England and in

this country." *Wickham v. Martin*, 13 Gratt. 427, 434.

As to effect of delay to rescind, see ante, "Presumption from Delay," V, B, 2, b, (3).

"No man is bound by a bargain into which he has been deceived by fraud or misrepresentation. Whenever a purchaser has been induced, by a material misrepresentation of the vendor, to buy, he has a right to repudiate the contract." *Wilson v. Carpenter*, 91 Va. 183, 187, 21 S. E. 243. See: *Shoemaker v. Cake*, 83 Va. 1, 5, 1 S. E. 387; *Oberdorfer v. Meyer*, 88 Va. 384, 13 S. E. 756.

Positive Statement of Material Fact.

—The misrepresentation, however, in order to constitute grounds for the rescission of the contract, must, as a general rule, be the positive statement of a material fact, made for the purpose of securing the contract, as distinguished from a mere matter of opinion, unless the parties are dealing upon unequal terms, and one has means of information not equally open to the other. *Grim v. Byrd*, 32 Gratt. 293; *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554; *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Slothower v. Oak Ridge Land Co.*, 2 Va. Dec. 506 (1897); *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588. See ante, "As to Existing or Past Fact," II, B.

Need Not Be Specifically Asked—

And where misrepresentation and fraud constitute the sole foundation for the relief sought, while the bill does not in terms ask for a rescission of the contract, it is, under the pleadings, only through rescission that the desired relief could be obtained. There is no other ground upon which the vendee could ask that his bonds be cancelled and the deed of trust annulled. *Rouzie v. Daingerfield*, 97 Va. 708, 711, 34 S. E. 899.

Vendee's Right Correlative with Vendor's.—When the purchaser has been induced by a material representa-

tion of the vendor to buy, he has a right to have the contract cancelled, correlative with that of the vendor to disaffirm or sell when he has been defrauded. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243; *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161, 164, 27 S. E. 841.

Right Extends to All Transactions Founded on Fraudulent One.—If a case of fraud be established, a court of equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. In conferring relief, equity will take into consideration all the circumstances of the case. *Furlong v. Sanford*, 87 Va. 506, 12 S. E. 1048.

Misrepresentation Must Be Part of Transaction.—A misrepresentation which will entitle a party misled to a rescission of the contract must have been made as part of the same transaction. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733.

Representation Peculiarly in Knowledge of Party Making It.—Courts of equity will cancel contracts for false representations of material facts which constitute an inducement to the contract and upon which the party has a right to rely, especially where such representations are of matters peculiarly within the knowledge of the party who makes them. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Wamsley v. Currence*, 25 W. Va. 543. See ante, "Knowledge and Intent," II, D.

Materiality—Reliance—Inducement.—To authorize a grantee to rescind a contract for false representations, it must be shown that they were material, were relied on by the grantee, and made to induce him to enter into the contract. *Beckley v. Riverside Land Co.*, 2 Va. Dec. 283 (1895). See ante, "Materiality," II, B, 2; "Reliance by Party Complaining," II, E.

b. Bill of Sale to Creditor without Notice of Fraud.

Fraudulent representations by a merchant as to his property and assets, by means of which he was enabled to purchase goods on credit, furnish no grounds for setting aside a bill of sale of the goods so obtained, executed by him to secure the bona fide debt of one who had loaned him money to invest in the business with no notice of the fraud. *Jones v. Christian*, 86 Va. 1017, 11 S. E. 984.

c. Stock Subscription—Rights of Third Persons.

A party who has been induced to subscribe for stock in a corporation by false or fraudulent representation as to a material fact, upon which he had the right to rely, and did rely, is entitled to have the contract rescinded in the same manner as if the question had arisen between two natural persons, provided the question arises between the contracting parties and the rights of third persons are not involved. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591; *Bosher v. Richmond, etc., Land Co.*, 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879; *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939. See the title STOCK AND STOCK-HOLDERS.

d. Cancellation and Recovery of Assessments.

Where a corporation, by false representations of material facts, induced a person to become a subscriber to its capital stock, and issued to him certificates therefor, he may enjoin actions at law on the contracts, and have the certificates cancelled, and, as incident to that relief, recover the amount of assessments paid thereon. *McClanahan v. Ivanhoe Land, etc., Co.*, 96 Va. 124, 30 S. E. 450; *Bosher v. Richmond, etc., Land Co.*, 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879.

Defense to Action.—Where fraudulent representations are used to ob-

tain stock subscriptions to a joint stock company, the contract is voidable at the election of the subscriber on discovering the fraud, and this is a defense to an action by the company to enforce the subscription, in the absence of a ratification by the subscriber. *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

Insolvency of Company — Action against Agent.—If a shareholder is debarred from a rescission of his contract by the insolvency of the company, or from any other cause, he is without remedy against the company, and is left to his action against the agent who induced him by fraudulent representations to subscribe for stock. *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492. See generally, the title **STOCK AND STOCKHOLDERS**.

e. Fraudulent Sales.

Land Contract Obtained by Fraud.—

If a vendor, to secure a good bargain, knowingly conceals or misrepresents defects or incumbrances on his title to a tract of land, and thereby induces the vendee to enter into a written contract for the purchase of such land, on the application of such vendee, promptly made on the discovery of such defects or incumbrances, a court of equity will rescind such contract. *Spencer v. Sandusky*, 46 W. Va. 582, 33 S. E. 221. See the title **VENDOR AND PURCHASER**.

Fraudulent Purchase of Stock Certificates.—If a man fraudulently purchased from another, certificates, by taking an improper advantage of the vendor, equity will set aside the sale, and decree restitution of the identical certificates, or, if the purchaser has parted with them, will decree him to furnish others of the like kind, or pay in specie the value of them, at the time the cause is tried. *Reynolds v. Waller*, 1 Wash. 164.

Where the bill is for a specific restitution of the certificates fraudulently obtained, therefore, if the applicant

had at any time offered to restore them, or will now do so, the other party must receive them, or their value; of course, the present value ought to be the rule of compensation, if the certificates themselves can not be restored. *Reynolds v. Waller*, 1 Wash. 164.

f. Abatement of Consideration.

See ante, "To Abate Purchase Price," V, A, 1, f.

g. Restoration of Consideration.

In Actions at Law.—"In decisions in actions at law arising from attempted rescissions of contracts for the sale or exchange of personal property, the language of the court is almost uniform in declaring that the defrauded party, in order to maintain his suit, must have restored or tendered in restoration whatever was received by him under the contract, because of the principle that the contract must be rescinded in toto, if at all; the plaintiff not being permitted to retain a benefit under an indivisible contract, which he repudiated. But even in actions at law there are exceptions to the rule. If the thing received by the defrauded party be of no value, or if by reason of the act of the fraudulent party a return be rendered impossible, a return or tender is unnecessary. So, also, where by natural causes or reasonable use, the value of the property is diminished, and perhaps where it is necessarily destroyed in discovering the fraud, the fraudulent party must receive it in its depreciated condition." *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 939.

"And if the bona fide buyer has expended work, money, or material in the improvement of the property before discovering the fraud, he may restore the property, and recover for the work and labor, money or material, put upon it." *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 939.

In Equity.—"But in equity the complainant does not necessarily rescind

and sue; he may sue for rescission. He is required to restore the consideration, not, however, as a condition of acquiring the right to sue, but because of the equitable maxim that he who seeks equity must do equity." *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 939.

"When courts can not place parties wholly in statu quo, they are not thereby precluded from granting relief against fraud. They may proceed to do so as nearly as possible, and make compensation." *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 940.

While it is a general rule that where a party seeks to cancel a contract for fraud in its procurement, the plaintiff must allege and show himself eager, ready and willing to place the other party to the contract in statu quo; yet in case of a wife who sues to annul a contract of separation and settling property rights between her husband and herself, it being alleged that the execution of the contract was procured from her by false and fraudulent representations of defendant and his agent, falsely representing that it was the purpose of the defendant to live with and support the wife, and the object of the contract to reconcile and restore their marital relations; and it sufficiently appears from said bill that plaintiff is not able to repay the money given her by the defendant to induce her to execute the contract, it is not error to overrule the demurrer to the bill. *Cheuvront v. Cheuvront*, 54 W. Va. 171, 46 S. E. 233.

h. Time for Rescission.

See ante, "Affirmance and Recovery of Damages," V, B, 2.

4. Injunction against Fraudulent Claims.

On a bill filed by the purchaser of a lot, to enjoin a holder for value of negotiable notes given for deferred payments from collecting the same, on the ground of fraud in the procurement

of the contract, if the proof fail to establish the fraud, but shows that the holder's debt exceeds the amount of the notes, the court, having all the parties before it, may at once render a personal decree against the makers for the amount of their notes, before enforcing a deed of trust given for their security, and without taking an account of the amount due to the holder, although the notes were transferred, along with those of others, as collateral security for a debt. No equity exists between the makers of the different sets of notes. The holder may proceed to judgment against one set irrespective of the course taken as to others. *Dudley v. Minor*, 100 Va. 728, 42 S. E. 870.

The simple fact that a party or his assignee sues on a false claim, or one which he knows had been previously adjudged invalid by a competent court, is not such a fraud upon the rights of the party thus sued, as entitles him to enjoin the prosecution of an action on such claims in a court of equity. *Evans v. Taylor*, 28 W. Va. 184. See the title INJUNCTIONS.

5. Restoration of Lien.

A lien discharged or released through fraud or mistake, will be restored in equity, unless innocent third parties are affected. *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953.

6. Relief against Bonds.

Equity will relieve against bonds executed by the maker upon the faith of a false representation made to him, and constituting a fraud. *Brown v. Rice*, 76 Va. 629, 663.

7. Relief against Judgment on Ground of Fraud.

See the title JUDGMENTS AND DECREES.

8. Assumpsit for Money Paid on Fraudulent Representations.

See the title ASSUMPSIT, vol. 2, p. 15. See also, p. 25.

9. Compensation for Fraudulent Deficiency in Land.

See the titles MORE OR LESS; VENDOR AND PURCHASER.

10. Fraud as Defense to Action of Assumpsit.

See the title ASSUMPSIT, vol. 2, p. 1.

11. For Fraudulent Assignment.

See the title ASSIGNMENTS, vol. 1, p. 778.

12. Rule of Par Delictum.

See the title ILLEGAL CONTRACTS.

a. General Principle.

"Parties having attempted to practice a fraud, they must be left to the consequences of their own iniquity. 'Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb.' 5 Rob. Pr., 543; 1 Pom. Eq., § 401; Hellsley v. Fultz, 76 Va. 671; Barnett v. Barnett, 83 Va. 504, 2 S. E. 733." Smith v. Chilton, 84 Va. 840, 843, 6 S. E. 142. See James v. Bird, 8 Leigh 510; Harris v. Harris, 23 Gratt. 737, 754; Starke v. Littlepage, 4 Rand. 368; Terrell v. Imboden, 10 Leigh 321; Owen v. Sharp, 12 Leigh 427, 429.

"Whenever a party, whether plaintiff or defendant, is compelled to allege his own fraud to protect himself, equity will refuse to hear him or grant any relief. Starke v. Littlepage, 4 Rand. 368." McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612, 616.

The rule that in "pari delicto potior est conditio possidentis," means that the possession must stand for the right in a controversy between parties equally guilty of a fraud. Clay v. Williams, 2 Munf. 105, 117; Austin v. Winston, 1 Hen. & M. 33.

b. Plaintiff Must Be Free from Fraud.

Before a party can recover back any money paid on a contract which has been wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any

fraud or illegal conduct in the transactions. Johnson v. Jennings, 10 Gratt. 1. See Almond v. Wilson, 75 Va. 613, where it was held, that the law did not so far countenance fraudulent contracts as to protect the perpetrator to the extent of his investment. So it was held, in Anderson v. Anderson, 2 Call 198, 205, that no person shall take advantage of his own fraud.

"Equity will not relieve a party from the consequences of his fraudulent act nor aid him in an effort to profit by it. McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612; Billingsley v. Menear, 44 W. Va. 651, 30 S. E. 61; Edgell v. Smith, 50 W. Va. 349, 40 S. E. 402. 'This rule applies not only to the original parties to the fraudulent transaction but also to their heirs and to all parties claiming under, or by title derived from, them, where no equitable rights intervene to protect such parties.' McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612." Poling v. Williams, 55 W. Va. 69, 71, 46 S. E. 704.

Equity will not interfere between parties to the relief of one against the other in a fraudulent transaction, but the maxim "in pari delicto potior est conditio defendentis" applies. Edgell v. Smith, 50 W. Va. 349, 355, 40 S. E. 402; Craig v. Craig, 54 W. Va. 183, 46 S. E. 371; Bank v. Wilson, 25 W. Va. 242; Stout v. Phillippi, Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571; Corrothers v. Harris, 23 W. Va. 177.

In a note to Montgomery v. Ross, 1 Pat. & H. 5, giving the opinion by Stanard, J., in the case of Owen v. Sharp, omitted from the report thereof in 12 Leigh 427, it was said that a title or defense can not be made by proof of the turpitude of the party who sets it up, and which is not sustained if the proof showing the turpitude be excluded. Citing Austin v. Winston, 1 Hen. & M. 33; Bishop v. Estes (unreported but cited in 4 Rand. 372, 377); Starke v. Littlepage, 4 Rand. 368; James v. Bird, 8 Leigh 510; Terrell v. Imboden, 10 Leigh 321.

Before a court of equity will assist in carrying into effect compositions of claims by executors or other fiduciaries, the party praying it must first unfold and disclose all the circumstances of the case that the court may see that there has been no fraud and that everything was fair. *Clay v. Williams*, 2 Munf. 105.

Executed and Executory Contracts.

—Where a contract has been made to accomplish a fraudulent purpose, a court of equity will not, at the suit of a party to the fraud—a *particeps doli*—if the contract is executory, either compel its execution, or decree its cancellation; nor, after it has been executed, set it aside, and thus restore to the plaintiff the property or other interest which he has fraudulently transferred. It will leave the parties in the position in which they have placed themselves. *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612.

Upon the question whether a fraudulent contract shall be enforced or not, there is no distinction between an executed and an executory contract. *Harris v. Harris*, 23 Gratt. 737.

The only equitable remedies which they can obtain are purely defensive. Upon the same principle, wherever one party, in pursuance of a prior arrangement, has fraudulently obtained property for the benefit of another, equity will not aid the fraudulent beneficiary by compelling a conveyance or transfer thereof to him; and, generally, where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves. *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612, 615, citing *Horn v. Star Foundry Co.*, 23 W. Va. 522.

c. Rule Applied to Defendant.

When a defendant is in *pari delicto*, and has not alleged fraud in his answer, he can not make the defense of fraud. *Welfley v. Shenandoah, etc., Mining Co.*, 83 Va. 768, 3 S. E. 376.

d. Relief Granted if Guilt Unequal.

On the other hand, although the defendant may rely on the maxim "*in pari delicto*," if it is established that the guilt of the parties is not equal, relief will be granted. *Wise v. Craig*, 1 Hen. & M. 578.

Thus, on a bill for restitution of a sum of money paid for certificates, which the vendor had no right to sell, the defendant relied on the maxim, "*in pari delicto potior est conditio defendentis*;" the money was decreed to be refunded, there not being, as between the plaintiff and defendant, *par delictum*. *Wise v. Craig*, 1 Hen. & M. 578.

In *Austin v. Winston*, 1 Hen. & M. 33, it was held, by a divided court, that, where a transaction between a debtor and his creditor is intended by them both to defraud the other creditors of the debtor, but the latter, under all the circumstances of the case, is not so culpable as the former, it would seem that a court of equity ought not, altogether, to refuse relief to the debtor, but to apportion the relief granted to the degree of criminality in both parties, so as, on the one hand, to avoid the encouragement of fraud and on the other, to prevent extortion and oppression.

Saying: "In cases of equal frauds committed against third persons (I mean where the parties thereto are equally guilty), although such frauds operate no injury to the rights of such third persons, and create no rights in favor of the parties thereto, yet in that case possession stands for the right; and one volunteer in such fraud, may, as against his equally guilty companion, retain any advantage he has gained. He may not only, as against him, retain money thus iniquitously acquired,

but retain, in absolute right, property which would otherwise be liable to redemption; but, in both cases, right is out of the question, and if the turpitude of his adversary is annihilated or done away, his possession or his advantage can not avail him. He does not stand on any merit of his own, but merely on the ground of the incompetency of his adversary to be received or countenanced in a court of justice, to set up a scandalous pretension, in which he is equally particeps criminis with himself; but whensoever the criminality of his adversary is held not to exist, and the transaction, as to him, ceases to be scandalous, equity does not refuse to hearken to his pretensions." *Austin v. Winston*, 1 Hen. & M. 33.

But in *Horn v. Star Foundry Co.*, 23 W. Va. 522, 534, Judge Green, who delivered the opinion of the court, in discussing the question as to whether equity will grant relief to a party to a fraudulent contract, cites the principal case as the first Virginia case on the subject, and after quoting the syllabus of the principal case, continues by saying: "The decision in this case was rendered by a divided court, and the conclusion reached by the majority of the court was one which evidently did not meet with the cordial approbation of even the majority, for Judge Carlington, one of the majority, concludes his opinion thus: 'So far as respects myself, it is not to be considered that any principle is here fixed so as to operate as a precedent in other cases. This decree is adopted to fit the present case only; and it is hoped so gross a fraud may not again be brought before this court.' See page 50. In subsequent Virginia cases this case was accordingly not regarded as settling the law, and when spoken of afterwards it was either impliedly disapproved or apologized for, because of the particular circumstances surrounding this particular case. I do not regard it as authority to be followed." See also,

Harris v. Harris, 23 Gratt. 737; *James v. Bird*, 9 Leigh 510; *Starke v. Littlepage*, 4 Rand. 368, 371. See post, "Exception to Rule," V, B, 12, h. And see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Question Is Who Alleges Fraud.—In order to apply the rule, in *pari delicto potior est conditio defendentis*, it is necessary to consider, not who is plaintiff or who is defendant, but by whom the fraud is alleged, or sought to be made a ground of defense or recovery. *Harris v. Harris*, 23 Gratt. 737.

Relative Guilt—Free Will Not Exercised.—In the application of the maxim, in *pari delicto melior est conditio defendentis*, equity does not consider the relative guilt of the parties as depending upon the strength of their understanding, but before relief will be given it must be shown that there was some undue influence or fraud so that the party did not exercise a free and intelligent will in assenting to the contract. *Smith v. Elliott*, 1 Pat. & H. 307.

e. Left to Legal Remedy.

Where a plaintiff in equity sues to take advantage of a contract found to be fraudulent, he is not to be sustained, even to recover back money paid on such contract, but ought to be left to whatever remedy he may have at law. *Sims v. Lewis*, 5 Munf. 29. See *Clay v. Williams*, 2 Munf. 105.

f. Admissions of Participation in Answer.

Where a suit in equity is brought to relieve a person from the effect of a fraud practiced upon him, relief may be granted to such party, but not to one, who on a prayer for affirmative relief in his answer, admits that he participated in the fraud complained of. *Maurice v. Devol*, 23 W. Va. 247.

g. Illustrative Cases.

Fraudulent Agreement between Bidders.—Where a fraudulent arrangement is made between an insolvent debtor, whose lands are about to be sold for his debts, and another party,

by means of which the latter becomes the purchaser at a price far less than the real value of the land, and in consideration of this the purchaser agrees to convey to the debtor a portion of the lot, the parties are in *pari delicto*, and specific performance of this contract should be refused although the fraudulent debtor has fully complied with the terms of the contract. *Horn v. Star Foundry Co.*, 23 W. Va. 522.

Bonds Given for Purposes of Fraud—Relief from Judgment.—When it appears in a suit for relief from a judgment on a bond, that the latter was made for the purpose of perpetrating a fraud on innocent strangers, and was not intended to be binding on the parties, a court of equity will grant no relief, as the parties are in *pari delicto*. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733. And see *Clay v. Williams*, 2 Munf. 105; *Harris v. Harris*, 23 Gratt. 737. In the latter case bonds executed by a son to his father, without consideration and to defeat creditors, were held valid and enforceable between the parties.

To Establish Resulting Trust for Heirs of Fraudulent Grantor.—A father purchased real estate, and had it conveyed to his son by an absolute deed. In a suit in equity by the heirs, after the father's death, to set up a resulting trust in their favor, they can not be permitted to show that the conveyance to the son was made for a fraudulent purpose by the father, in order to rebut the presumption that it was an advancement or gift to the son. *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612.

Resulting Trusts to Protect Fraudulent Investment.—One who has purchased a tract of land at a judicial sale, ostensibly for himself, but really and fraudulently in behalf of another, can not, when the land is to be subjected as the property of such third party to a lien against him, claim a resulting trust in the land by way of security for any money paid by him

for the other party. Neither can he share pro rata with the lien creditor in the proceeds. The law does not so far countenance fraudulent contracts as to protect the perpetrator to the extent of his investment. *Almond v. Wilson*, 75 Va. 613.

h. Exception to Rule.

Where Required by Policy of the Law.—The rule in *pari delicto potior est conditio defendentis*, does not apply, where the policy of the law requires that a fraudulent or vicious conveyance should be enforced. *Starke v. Littlepage*, 4 Rand. 368.

And, therefore, where a debtor makes a fraudulent conveyance of his property, for the purpose of protecting it from his creditors, the fraudulent grantee may enforce such conveyance in a court of law, and the debtor will not be allowed to defeat the claim, by proving the fraud. *Starke v. Littlepage*, 4 Rand. 368. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

"There is no case in equity, where relief has been given to the fraudulent grantor in such a case, except in that of *Austin v. Winston*, 1 Hen. & M. 33, decided by a divided court. The relief given in that case, was founded upon the fact, that the grantee, a creditor, the debtor being in distressed circumstances, had availed himself of his power over him, to induce the debtor to unite in the fraud; the creditor having proposed and urged the execution of the scheme, which was adopted for that purpose. No circumstance of that sort is suggested in this case." *Starke v. Littlepage*, 4 Rand. 368, 371.

"If it be necessary, in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done, though both the parties are in *pari delicto*. The party is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it when plaintiff in

equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transactions." *Starke v. Littlepage*, 4 Rand. 368, 372. See ante, "Relief Granted if Guilt Unequal," V, B, 12, d.

13. Limitations of Right to Relief.

Statute of Limitations.—Cases of fraud are not within the statute; at all events, in such case, the statute does not begin to run until the discovery of the fraud. *Massie v. Heiskell*, 80 Va. 789, 804; *Hunter v. Spotswood*, 1 Wash. 145; *Redwood v. Riddick*, 4 Munf. 222; *Rowe v. Bentley*, 29 Gratt. 756, 760. See ante, "Affirmance and Recovery of Damages," V, B, 2. See the title LIMITATION OF ACTIONS.

C. PLEADING AND PRACTICE.

1. Who May Sue.

Joinder of Plaintiffs.—Several persons who have been induced by the same fraudulent misrepresentations to subscribe to the stock of a corporation, have a common interest, and may join in a suit, for the benefit of themselves and all others similarly deceived, to cancel their subscriptions, and recover moneys paid thereon. *Bosher v. Richmond, etc., Land Co.*, 89 Va. 455, 16 S. E. 360; *Brown v. Bedford City Land, etc., Co.*, 91 Va. 31, 20 S. E. 968; *Rader v. Bristol Land Co.*, 94 Va. 766, 27 S. E. 590. Several complainants will be permitted to unite in one bill to set aside a contract for fraud, only where they have been deceived by the same fraudulent acts.

The representations must be common to them all. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

Distributees.—The distributees of a deceased person may maintain a bill in equity to impeach and set aside a deed of gift of personal estate made by the decedent in his lifetime, as fraudulent, and annul it; but the sub-

ject itself can only be decreed to the personal representative of the decedent, or to the distributees in a case in which the personal representative is a party. *Samuel v. Marshall*, 3 Leigh 567.

Enforcement by Innocent Third Parties.—A contract procured by fraud is not void, but voidable only, at the option of the party defrauded. It is binding upon him until rescinded, and if innocent third parties, in reliance on the fraudulent contract, have acquired rights previous to his exercise of the option, which rights would be prejudiced by its rescission, they may generally have it enforced for their benefit, although the party by whose fault it was procured could not do so. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

2. Pleading Fraud.

a. Fraud Must Be Expressly Charged.

To raise the question of fraud it must be alleged. Fraud can not be the subject of trial until it is brought in issue by the pleadings. *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978; *University of Virginia v. Snyder*, 100 Va. 567, 578, 42 S. E. 337; *Southall v. Farish*, 85 Va. 403, 7 S. E. 534; Va., etc., Co. v. Cottrell, 85 Va. 857, 9 S. E. 132; *Welfley v. Shenandoah, etc., Mining Co.*, 83 Va. 768, 3 S. E. 376; *Redd v. Dyer*, 83 Va. 331, 2 S. E. 283; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Gregory v. Peoples*, 80 Va. 355; *Brown v. Shields*, 6 Leigh 440; *Koger v. Kane*, 5 Leigh 606; *Thompson v. Jackson*, 3 Rand. 504, 507; *Knibb v. Dixon*, 1 Rand. 249; *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *Calwell v. Caperton*, 27 W. Va. 397; *Burley v. Weller*, 14 W. Va. 264. Especially when the act charged as a fraud may be innocent. *Loomis v. Jackson*, 6 W. Va. 613, 702.

In order to entitle a party to relief from liability on a contract by reason of statements or representations made by the other party to the contract, either by way of rescission or in dam-

ages for its breach, the matter relied on must be within the pleadings. *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918.

And the charge can not be made for the first time in the appellate court. *Pracht v. Lange*, 81 Va. 711.

In a suit in chancery where fraud is not put in issue by the pleadings, it can not be introduced by the depositions. *Knibb v. Dixon*, 1 Rand. 249; *Welfley v. Shenandoah, etc.*, Mining Co., 83 Va. 768, 3 S. E. 376; *Gregory v. Peoples*, 80 Va. 355.

When fraud is sufficiently alleged, with proper parties to a bill, a demurrer will not lie. *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. 288.

Averment and Proof Must Concur.—The burden of charging as well as proving fraud, or misrepresentation, is upon the party alleging it; and a plaintiff is no more entitled to recover without sufficient averment in his bill, than he is without the proof of his averment when properly made. The one is as essential as the other, and both must concur or relief can not be granted. *Pusey v. Gardner*, 21 W. Va. 469, 470; *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605; *Fleming v. Kerns*, 37 W. Va. 494, 16 S. E. 600, 602; *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

b. Grounds Must Be Specifically Stated.

(1) Principle Stated.

Where fraud is relied on, the bill must show specifically in what the fraud consists, so that the defendant may have the opportunity of shaping his defense accordingly, and since it must be clearly proved as alleged, it must be distinctly stated. A mere general charge is not sufficient. It will not do to state it argumentatively. The charge must be direct as the proof must be clear. *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330; *Southall v. Farish*, 85 Va. 403, 7 S. E. 534; *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123, 2 S. E. 909; *Steed v. Baker*, 13 Gratt. 380; *Hickman v. Trout*, 83 Va. 478, 490,

3 S. E. 131; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553; *Fleming v. Kerns*, 37 W. Va. 494, 16 S. E. 600, 602.

"In pleading a fraud, the pleader must by apt words allege in his pleading every act, fact and intent which necessarily enter into and constitute that particular fraud; and these essentials must be alleged with such precision and certainty as to exclude every construction except the fraudulent and wrongful purpose complained of; and if, from the face of the pleading, it is doubtful whether the allegations do in fact amount to that particular fraud or not, it is not well pleaded." *Loomis v. Jackson*, 6 W. Va. 613, 702.

It was held, in *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611, that fraud was the judgment of the law upon the facts and intents of the parties, and that a mere general charge of fraud was not sufficient, but that the bill must allege the specific acts or language which constitute fraud, or connect them with some specific act for which the defendant is in law responsible. And see *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123, 2 S. E. 909.

Fraud is a conclusion of law, and the facts relied upon to constitute it must be stated in the bill, and must, when taken together, be sufficient to make out a case of fraud. To charge fraud without stating the facts which constitute it is insufficient. To make statements in the bill, which if true would constitute fraud, and follow them by statements which are contradictory of, or inconsistent with, the statements which show fraud, although fraud be charged, is not sufficient. *Dickenson v. Bankers' Loan, etc., Co.*, 93 Va. 498, 25 S. E. 548.

Demurrer Lies Where Averments Are of Opinion and Promises.—A demurrer to a bill to set aside a contract for fraud will be sustained, where the

avermments of the bill attempt to predicate fraud upon representations of intentions and promises, and not upon representations made in regard to existing facts. *Love v. Teter*, 24 W. Va. 741. See ante, "As to Existing or Past Fact," II, B.

Count Invalid.—In an action for deceit, in the sale of a slave, in respect to the title, the first count in the declaration charged deceit. The second count charged that the defendant represented the slave to be an absolute slave, when he was in fact only a slave for a term of years, without charging fraud or deceit. This count was held invalid in not charging fraud. *Brown v. Shields*, 6 Leigh 440.

Bill to Impeach Decree—Allegations.—A bill to impeach a decree for fraud is an original bill in the nature of a bill of review, and should state the decree and the proceedings which led to it, with the circumstances of fraud on which it is impeached. *Keran v. Trice*, 75 Va. 690; *Davis v. Landcraft*, 10 W. Va. 718.

(2) Averring Scienter.

See ante, "Knowledge and Intent," II, D; post, "Plea and Answer," V, C, 4.

Necessity for Averment.—At law it is well settled that an averment of the scienter is necessary in an action for fraud or deceit. *Mason v. Chappell*, 15 Gratt. 572; *Proctor v. Spratley*, 78 Va. 254; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73, 76. But in equity such averment is not necessary, and even at law the scienter may be rather constructive than actual. *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *McMullin v. Saunders*, 79 Va. 356; *Lowe v. Trundle*, 78 Va. 65; *Linhart v. Foreman*, 77 Va. 540; *Hull v. Fields*, 76 Va. 594; *Grim v. Byrd*, 32 Gratt. 293; *Brown v. Rice*, 26 Gratt. 467; *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116. See

Lile's Notes to 1 Min. Inst., 1st Ed., p. 58, 2d Ed., p. 134.

If a count, by reason of its want of an averment of a scienter—the guilty knowledge on the part of the assignor of a mortgage—does not allege facts creating a liability for deceit, we can not, by leaving it out, make a good count on the express contract of warranty, where the scienter would be wholly immaterial. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73, 76.

But it can not be said that it is defective in this regard, where it avers that a false representation was fraudulently made—that is, was deliberately made with intent to deceive; and besides avers that defendant had notice of all the facts set forth; and the fact of the mortgage being fraudulent and void, without consideration, and made with intent to hinder and delay creditors, is so alleged as to make it a matter of special knowledge, which it was defendant's duty to know, such positive affirmation of such facts comprehends an averment of the scienter. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73, 76.

If defendant obtained money from plaintiff by the false and fraudulent representation that the mortgage was a valid and subsisting claim to that extent, then, according to the cases, he is bound to refund it, where the mortgage was voidable, and had been held to be void and worthless; for the only object he had in view in buying it, and the consideration which induced plaintiff to pay the sum of money, has wholly failed. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73, 76.

(3) Averment of Legal Conclusion.

Generally, fraud should be charged by setting forth the particular manner in which the act was done, and the end and design to be accomplished. If these show that fraud was designed and perpetrated, it is not necessary to aver the legal conclusion that they constitute fraud. A mere allegation

imputing motives of fraud is not enough, but the charge that a deed was made with intent to hinder, delay, and defraud creditors is not the mere statement of a legal conclusion, but a charge of a material fact. *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523. See *Almond v. Wilson*, 75 Va. 613.

Fraud must be expressly charged, but it is enough to charge it by charging circumstances which involve fraud. *Engle v. Burns*, 5 Call 463, 478.

(4) When Particular Errors Need Not Be Specified.

But in cases of fraud it is not necessary for the plaintiff, either at law or in equity, to specify the particular errors in a settlement of which he complains. *Varner v. Core*, 20 W. Va. 472, citing *Ruffner v. Hewitt*, 7 W. Va. 585. But see *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

(5) Not Necessary to Spread Evidence in Pleadings.

The burden of proving fraud is on the party alleging it, and while it is not necessary or proper that he should spread out in his pleadings the evidence on which he relies, he must aver, fully and explicitly, the facts constituting the alleged fraud; mere conclusions will not avail. *Hale v. West Virginia Oil, etc., Co.*, 11 W. Va. 229; *Fleming v. Kerns*, 37 W. Va. 494, 16 S. E. 600, 602; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553; *Point 5 Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123, 2 S. E. 909.

(6) Numerous Parties Impleaded to One Fraud.

In cases involving the question of fraud, a very great latitude is allowed in pleading, and circumstances, however various, may be set forth, and parties, however numerous, may be impleaded in the same bill, so long as one connected scheme of fraud is alleged.

Jordan v. Liggan, 95 Va. 616, 29 S. E. 330.

c. Under Common Counts.

Although there is no allegation of fraud or mistake in the declaration, warranting any proof impeaching the measurement of lumber made by defendant's agents as it was shipped on the cars, fraud in measurement may be shown under common counts. *Sigler v. Beebe*, 44 W. Va. 587, 30 S. E. 76, 78, citing *Baltimore, etc., R. Co. v. Lafferty*, 14 Gratt. 478; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447, 463; *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104. See the title **CONTRACTS**, vol. 3, p. 414.

d. Illustrative Cases.

The charge of fraud is sufficiently specific when it is alleged that vendor assured vendee that the tract contained 800 acres, whereof 300 were cleared; that vendee, relying on the assurance, made the purchase; that the tract contained only 700 acres, whereof only 158 were cleared, and that vendor knew this assurance was false. *Meek v. Spracher*, 87 Va. 162, 12 S. E. 397.

It is also sufficient where a declaration sets out a contract for the excavation of a tunnel, in which it was provided that charges should be \$1.75 and \$3.50 per cubic yard, according to the thickness of a certain vein of coal through which it ran; that the estimates upon which the payment was based should be approved by the engineer of the defendant, whose decision should be final; that there should be a final settlement of the work when the engineer made a certificate to that effect, when the balance should be paid in thirty days, upon a release of liens by the plaintiffs; and it was further charged that in a large part of the tunnel the width of the vein of coal entitled the plaintiffs to \$3.50 per cubic yard; that the work had been accepted by the engineer; and that defendant refused to pay but \$1.75 per cubic yard, because the engineer so certified;

and that the estimates made by the latter were in violation of the contract; and that the mistake was so gross as to amount to a fraud, and that he knew of the mistake. The defendant demurred because the certificate of the engineer was conclusive on both parties in the absence of fraud, and that the declaration only charged as a conclusion of law that the engineer made a mistake so gross as to amount to fraud. It was held, that the declaration set forth such violation of the agreement by the engineer as to amount to fraud. *Mills v. Norfolk, etc., R. Co.*, 90 Va. 523, 19 S. E. 171.

Where a bill alleged that a contract obtained from an intoxicated person was in violation of the rights and good faith which should prevail between partners, and charges that the same was obtained through fraud, and for the purpose of delaying and defrauding the plaintiff from obtaining his full rights in said copartnership, it is error to sustain a demurrer to such bill. *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737.

And a bill alleging that parties had obtained the possession of certain bonds or promissory notes executed by themselves to the plaintiff, and which were left in the hands of the plaintiff's agent, through false or fraudulent representations, with the design to cheat and defraud the plaintiff, and had destroyed them, shows sufficient grounds on its face for the jurisdiction of a court of chancery. *Campbell v. Lynch*, 6 W. Va. 17.

e. In Plea and Answer.

See post, "Plea and Answer," V, C, 4.

3. Cross Bill.

To obtain a rescission of a contract and a return of the price, because of fraud, in a suit to enforce a vendor's lien, the purchaser must file a cross bill. *Spoor v. Tilson*, 97 Va. 279, 33 S. E. 609. See the title CROSS BILLS, vol. 4, pp. 100, 107.

4. Plea and Answer.

See the titles ANSWERS, vol. 1, p. 389; PLEADING.

Statutory Plea.—In both Virginia and West Virginia, in any action on a contract, the defendant may file a plea alleging fraud in the procurement of the contract, such as would entitle him either to recover damages at law from the plaintiff, or to relief in equity, in whole or in part, against the application of such contract, and every such plea must be verified by affidavit. Section 3299, Va. Code, 1887; § 5, ch. 126, W. Va. Code, 1889. *Brown v. Rice*, 26 Gratt. 467; *Fleming v. Toler*, 7 Gratt. 310; *Shiflett v. Orange Humane Soc.*, 7 Gratt. 297; *Isbell v. Norvell*, 4 Gratt. 176; *Pence v. Huston*, 6 Gratt. 304; *Watkins v. Hopkins*, 13 Gratt. 743; *Burtner v. Keran*, 24 Gratt. 42; *Keckley v. Winchester Union Bank*, 79 Va. 458; *Black v. Smith*, 13 W. Va. 780, 803; *Wellsburg First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Morrow v. Bailey*, 2 W. Va. 326; *Jarrett v. Nickell*, 4 W. Va. 276; *Fisher v. Burdett*, 21 W. Va. 626; *Quaker City Nat. Bank v. Showace*, 26 W. Va. 48; *Douglass v. Central Land Co.*, 12 W. Va. 502; *Bias v. Vickers*, 27 W. Va. 456; *Watkins v. West Wytheville Land, etc., Co.*, 92 Va. 1, 22 S. E. 554; *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475.

But in an action on a bond given for the purchase money of land, the act of 1831 (Code of 1887, § 3299) does not authorize a plea of failure of consideration upon equitable grounds which would require a rescission of the contract out of which the bond originated, and a reinvestment of the obligee with the interest in the land alleged to have been sold to the obligor. *Shiflett v. Orange Humane Soc.*, 7 Gratt. 297; *Mangus v. McClelland*, 93 Va. 789, 22 S. E. 364; *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42; *Watkins v. Hopkins*, 13 Gratt. 743, 745. See also, *Strickland v. Graybill*, 97 Va. 602, 604, 34 S. E. 475; *Watkins v. West Wytheville Land*.

etc., Co., 92 Va. 1, 22 S. E. 554, where the above cases are approved and distinguished.

Sealed Contracts—Independent Action at Common Law.—It was not permitted at common law, in an action upon a contract under seal, to prove fraud in its procurement, but the defendant had to resort to his independent action for relief. *Wyche v. Macklin*, 2 Rand. 426; *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009. It is only by virtue of § 3299 of the Virginia Code that such defenses can be made in an action upon such a contract. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42.

When Defective.—In an action for the price of goods, a plea averring untrue representations of quality is defective, and properly rejected, if it does not aver a warranty of the quality of the goods, nor knowledge by the plaintiff of the falsity of his representation, nor the use by him of any fraud or art to disguise or conceal the true quality of the goods. *Cunningham v. Smith*, 10 Gratt. 255, 60 Am. Dec. 333. See ante, "Knowledge and Intent," II, D.

So in an action of debt on a bond, a plea that the bond was obtained by fraud without saying whether the fraud was in the consideration of the bond, or in its execution, is immaterial. *Tomlinson v. Mason*, 6 Rand. 169.

In Execution or Procurement.—Fraud in the execution of a contract may be shown under the plea of non est factum. But when the defense is that it was procured by fraudulent acts or representations, it can only be made by special plea, under the statute. *Hayes v. Virginia, etc., Ass'n*, 76 Va. 225.

Averring Scier.—See ante, "Knowledge and Intent," II, D; "Averring Scier," V, C, 2, b, (2).

The objection to the plea that it does not in its terms aver scier can not be sustained, where it is an equitable

plea under the statute, and contains all the necessary averments. It has the positive statements of facts, averred to have been falsely and fraudulently made for the purpose of procuring the contract; that they were material; that they were untrue; that the party to whom they were made relied upon them and was by them induced to enter into the contract. *Max Meadows Land, etc., Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Strickland v. Graybill*, 97 Va. 602, 605, 34 S. E. 475.

Averments at Law and in Equity.—In an action at law upon a contract, a plea which presents the defense of fraud in the procurement of the contract, must as a general rule aver the guilty knowledge and consequent intent to deceive the plaintiff. But in equity no such averment is necessary. *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

For a distinction between the necessary allegations in an action at law and a suit in equity for fraud or deceit, see Lile's Notes to 1 Min. Inst. (2d Ed.) 134, 1st. Ed., p. 58, with full collection of authority.

Averring False Warranty.—A plea substantially avers false warranty and damages for its breach when it avers that the seller's representations of the quality of the goods sold, upon which the defendant relied in purchasing, were untrue, and that the seller knew them to be untrue at the time of making them, and knowingly made them with intent to defraud the defendant, and sets out various particulars in which the representations prove to be untrue. *Cunningham v. Smith*, 10 Gratt. 255, 60 Am. Dec. 333.

Suit to Cancel Lease—Defense of Purchaser for Value without Notice.—

In a suit to cancel a lease on the ground of fraud, in order for the defendant to take advantage of the defense of being a purchaser for value without notice, such defense must be set out in his plea or answer, includ-

ing the statement that his vendor was in possession of the premises at the time of the transfer. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285.

Insurance—Sufficient Averment of Fraud.—An allegation in an answer that a policy of insurance had been procured by the suppression of a material fact, and that the agent of the company entered into a conspiracy with the assured to obtain the desired insurance from the defendant company, is a sufficient averment of fraud to admit of evidence to prove the facts. *National, etc., Ass'n v. Hopkins*, 97 Va. 167, 33 S. E. 539.

5. Verdict and Decree.

See the titles JUDGMENTS AND DECREES; VERDICT.

What Sufficiently Certain.—Issue being joined on a plea that a bond was obtained by fraud, a verdict "for the defendant because the jury believe the bond was obtained by fraudulent means," is sufficiently positive and certain. *Chew v. Moffett*, 6 Munf. 120.

Finding of Fraud in Special Verdict.

—It is not necessary in a special verdict that fraud be found expressly eo nomine, if facts amounting to fraud in legal construction be found. *Robertson v. Ewell*, 3 Munf. 1.

On Demurrer to Evidence.—There being a demurrer to defendant's evidence on the defense of false representations to an action on a note, the verdict should not be for a certain sum for plaintiff, subject to the opinion of the court on the demurrer, but, "We, * * * on the issues joined, find for defendant, and assess his damages at * * *, subject to the opinion of the court on plaintiff's demurrer; and if, on demurrer, * * * the law be with plaintiff, we find for plaintiff the issues joined, and assess his damages at * * *." *South Roanoke Land Co. v. Roberts*, 99 Va. 487, 39 S. E. 133. See the title DEMURRER TO THE EVIDENCE, vol. 4, p. 514.

Joint and Several Decree against All.

—If defendants have jointly participated in all of the fraudulent acts which entitle a complainant to a decree against them, the decree should be joint and several, with the right to the complainant to collect from either or all as he may be able, and should not undertake to segregate the sum which each defendant is to pay. *Anderson v. Smith*, 102 Va. 697, 48 S. E. 29.

D. EVIDENCE.

1. Presumption and Burden of Proof.

a. Fraud Never Presumed but to Be Proved.

It is a rule of universal recognition that, except in particular cases, he who alleges fraud must clearly and distinctly prove it, whether by circumstantial or direct evidence. The law does not presume fraud, but on the contrary the presumption is always in favor of innocence and not of guilt, and unless the allegations of fraud are proven, relief will be denied, although it may appear that the defendant has not been perfectly clear in his dealings. *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 255; *University of Virginia v. Snyder*, 100 Va. 567, 578, 42 S. E. 337; *Virginia, etc., Chemical Co. v. Carpenter*, 99 Va. 292, 38 S. E. 143; *Gardner v. Gardner*, 98 Va. 525, 36 S. E. 985; *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475; *Hazlewood v. Forrer*, 94 Va. 703, 706, 27 S. E. 507; *Taylor v. Cussen*, 90 Va. 40, 43, 17 S. E. 721; *Jeffries v. Southwest Va. Imp. Co.*, 88 Va. 862, 14 S. E. 661; *Tune v. Fallin*, 87 Va. 410, 12 S. E. 750; *Saunders v. James*, 85 Va. 936, 9 S. E. 147; *Keagy v. Trout*, 85 Va. 390, 394, 7 S. E. 329; *Welfley v. Shenandoah, etc., Mining Co.*, 83 Va. 768, 777, 3 S. E. 376; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Miller v. Rutledge*, 82 Va. 863, 1 S. E. 202; *Matthews v. Crockett*, 82 Va. 394; *Gregory v. Peoples*, 80 Va. 355; *Crebs v. Jones*, 79 Va. 381; *Rixey v. Moorehead*, 79 Va. 575; *Brown v.*

Rice, 76 Va. 629, 661; *Bain v. Buff*, 76 Va. 371; *Tebbs v. Lee*, 76 Va. 744; *Williams v. Lord*, 75 Va. 390; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Moore v. Sexton*, 30 Gratt. 505, 508; *Herring v. Wickham*, 29 Gratt. 628; *White v. McGannon*, 29 Gratt. 511, 530; *Hord v. Colbert*, 28 Gratt. 49; *Dance v. Seaman*, 11 Gratt. 778; *Curtis v. Lunn*, 6 Munf. 42; *Gibson v. Randolph*, 2 Munf. 310; *Hurley v. Oakley*, 2 Va. Dec. 319; *Moore v. Triplett*, 2 Va. Dec. 238; *Noble v. Davis*, 1 Va. Dec. 633, 639; *Jones v. White*, Wythe 111; *White v. Jones*, 1 Wash. 116; *S. C.*, 4 Call 253; *Enslow v. Sliger*, 51 W. Va. 405, 41 S. E. 173; *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617; *Blubaugh v. Loomis*, 48 W. Va. 666, 37 S. E. 794; *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203; *Bronson v. Vaughn*, 44 W. Va. 406, 29 S. E. 1022; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560; *First Nat. Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Curry v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *Harden v. Wagner*, 22 W. Va. 356; *Floyd v. Jones*, 19 W. Va. 359; *McMechen v. McMechen*, 17 W. Va. 683; *Jarrett v. Jarrett*, 11 W. Va. 584; *Loomis v. Jackson*, 6 W. Va. 613, 702.

This rule applies with a special force where a contract has been executed by the delivery of deeds between the contracting parties. *Houghton v. Graybill*, 82 Va. 573.

Fraud, whether established by circumstantial evidence or by direct testimony, in either case, must be clearly and satisfactorily proved. It will not be presumed from doubtful evidence, or circumstances of suspicion. The law never presumes fraud, but the presumption is always in favor of innocence and honesty. *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475; *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 255; *Gregory v. Peoples*, 80 Va.

355, 359; *Herring v. Wickham*, 29 Gratt. 628; *Hord v. Colbert*, 28 Gratt. 49; *White v. Perry*, 14 W. Va. 66; *Lockhard v. Beckley*, 10 W. Va. 87.

The general principles applicable to fraudulent representations are well settled. Fraud is never presumed, and, where it is alleged, the facts sustaining it must be clearly made out. *Wood v. Harmison*, 41 W. Va. 376, 386, 23 S. E. 560, 563; *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203; *Smith v. Henkel*, 81 Va. 524, 530; *Knott v. Seamands*, 25 W. Va. 99, 107.

Neither in courts of law or equity will any relief be afforded from fraud unless the allegations be clearly and distinctly proven. *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743; *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507; *White v. Jones*, 4 Call 253, 2 Am. Dec. 564; *Vanbibber v. Beirne*, 6 W. Va. 168; *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475; *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 255.

Fraud must be proved by strong and clear evidence, and will never be presumed from facts which are consistent with honesty on the part of a person implicated by a charge of fraud. And such is especially the case when the person so charged is a person of excellent general character. *Preston v. Stuart*, 29 Gratt. 289, 298.

Merely denouncing a transaction as a fraud does not make it such, and especially does it not make it such a fraud as it is peculiarly the province of a court of equity to take cognizance of. *Meek v. Spracher*, 87 Va. 162, 170, 12 S. E. 397.

Rule Explained and Qualified.—But while the court will be just to the rights of the person charged with fraud and cautious not to lend too ready an ear to the charge, the question must be justly and fairly considered, with due regard to the rights of all parties. *Tune v. Fallin*, 87 Va. 410, 411, 12 S. E. 750.

"It is often said that fraud must be

proved and is never to be presumed. This is true only when understood as affirming that a contract or conduct apparently honest and lawful must be treated as such until it is shown to be otherwise by evidence, either positive or circumstantial; but fraud may be inferred from facts calculated to establish it, and fraud should be so inferred when the facts and circumstances are such as to lead a reasonable man to the conclusion that the property of a debtor, has been attempted to be withdrawn from the reach of his creditors, with the intent to prevent, them from recovering their just debts; and if, prima facie, such fraudulent attempt is thus established, it will be regarded as conclusively established, unless it is rebutted by facts and circumstances which are proven. See *Martin v. Rexroad*, 15 W. Va. 512; *Knight v. Capito*, 23 W. Va. 639, 644." *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 786, 6 Am. St. Rep. 664. See *Bronson v. Vaughn*, 44 W. Va. 406, 29 S. E. 1022; *Sturm v. Chalfant*, 38 W. Va. 248, 18 S. E. 451, 456; *Harden v. Wagner*, 22 W. Va. 356; *Hedrick v. Walker*, 17 W. Va. 916, 927; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 W. Va. 321.

Reliance.—As to reliance on misrepresentation, see ante, "Presumption of Reliance," II, E, 3.

b. Burden of Proof.

On Party Alleging Fraud.—Where fraud is relied upon, either by the plaintiff in his bill or declaration, or by a defendant, the burden of proof is upon the one alleging it, and if it is not clearly and strictly proven as alleged, no relief will be granted. *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Francis v. Cline*, 96 Va. 201, 31 S. E. 10; *Engleby v. Harvey*, 93 Va. 440, 445, 25 S. E. 255; *Jefries v. Southwest Va. Imp. Co.*, 88 Va. 862, 868, 14 S. E. 661; *Jones v.*

Degge, 84 Va. 685, 5 S. E. 799; *Hickman v. Trout*, 83 Va. 478, 490, 3 S. E. 131; *Matthews v. Crockett*, 82 Va. 394; *Gregory v. Peoples*, 80 Va. 355; *Crebs v. Jones*, 79 Va. 381; *Moore v. Triplett*, 2 Va. Dec. 238; *Herring v. Wickham*, 29 Gratt. 628; *Hord v. Colbert*, 28 Gratt. 49; *Gibson v. Randolph*, 2 Muf. 310; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303, 308; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960; *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Wood v. Harmon*, 41 W. Va. 376, 23 S. E. 560, 567; *Fleming v. Kerns*, 37 W. Va. 494, 16 S. E. 600, 602; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Clay v. Deskins*, 36 W. Va. 350, 15 S. E. 85; *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. 250; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Calwell v. Caperton*, 27 W. Va. 397; *Harden v. Wagner*, 22 W. Va. 356; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Hale v. West Virginia Oil, etc., Co.*, 11 W. Va. 229.

"Although the party against whom relief is sought may not have been perfectly clear in his dealings." *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203, 207.

By Preponderance of Evidence.—See post, "Sufficiency and Weight," V, D, 3.

And where fraud is charged and denied, and the evidence as to the alleged false representations is conflicting, such false representations will not be considered as established unless they are clearly shown by a preponderance of evidence. *White v. McGannon*, 29 Gratt. 511, 520.

So, where fraud and misrepresentation on the part of the plaintiff are alleged in the answer of the defendant, and denied by the plaintiff, in order that the defendant should sustain such defense, he must preponderate in the evidence. *Fleming v. Kerns*, 37 W. Va. 494, 16 S. E. 600; *Knott v. Seamands*, 25 W. Va. 99.

Analogous Questions.—Where it is

not a question of the proof of fraud, but it is analogous, being the question of an agreement of a corporation to obtain a preference contrary to the statute and the consummation of that agreement, and the actual appropriation to its own use of money which the statute declares shall belong to all the creditors, it certainly requires, not more, but less, proof, in such a case, than in an effort to charge the corporation with fraud. *Drug Co. v. Faulconer*, 52 W. Va. 581, 591, 44 S. E. 204.

Settlement Made and Balance Struck.

—Where parties have made a settlement and struck a balance, which has been adjusted by cash or note, it is incumbent on the party complaining of fraud or mistake to allege it specially in his bill, and establish it by proof. *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *Calwell v. Caperton*, 27 W. Va. 397. And the proof of fraud in such case must be clear. *Neff v. Wooding*, 83 Va. 432, 2 S. E. 731.

Shifting the Burden.—Although the burden of proof rests on the party who alleges it, circumstances may exist to shift such burden from the party impeaching such transaction on to the party upholding it, as where a prima facie case of fraud is shown. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960; *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Hickman v. Trout*, 83 Va. 478, 490, 3 S. E. 131; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303, 308; *Harden v. Wagner*, 22 W. Va. 356; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Hedrick v. Walker*, 17 W. Va. 916, 927; *Farley v. Bateman*, 40 W. Va. 540, 22 S. E. 72. See *Campbell v. Lynch*, 6 W. Va. 17, where it is said that with respect to all matters not alleged with due certainty in a bill taken for confessed, or subjects which, from their nature, require an examination, the burden of proof still rests on the plaintiff.

Indicia of Fraud Shown.—The burden of proving fraud is primarily on

him who charges it, but where indicia of fraud are clearly shown the burden is shifted to the other side as to the bona fides of the transaction. *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523.

And if indicia of fraud are proved, so that the fraud may be presumed from the circumstances and condition of the parties, or their intimate and confidential relations one to the other, as parent and child, or in any other way, the burden of proof shifts to the defendant, and he is obliged to repel the presumption of fraud and undue influence arising from the circumstances of the transaction and the relation of the parties by strong and clear evidence. *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517.

But until the facts and circumstances relied on and proved to establish fraud, make out a case from which fraud will at least be presumed, the defendant to a bill to set aside a transaction as fraudulent is not required to explain such facts and circumstances, although they are not altogether free from suspicion. *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497.

Subsequent Misconduct of Beneficiary.—And if the bona fides of a transaction is fixed, the subsequent misconduct of the beneficiary can not render it fraudulent. *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48.

2. Competency.

a. A Question of Law.

Whether the evidence tends to show fraud, is a question of law. *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, 628.

b. Admissibility in General.

No Evidence in Absence of Allegation.—There can be no doubt that before a plaintiff can introduce evidence of fraud he must allege fraud. The allegata and probata must correspond, and when a case, as proved, materially differs from that alleged, no recovery can be had, however strong a case it

may show. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588; *Southall v. Farish*, 85 Va. 403, 7 S. E. 534; *Virginia Fire, etc., Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132; *Thompson v. Jackson*, 3 Rand. 504; *Knibb v. Dixon*, 1 Rand. 249; *Welfley v. Shenandoah, etc., Mining Co.*, 83 Va. 768, 3 S. E. 376; *Leath v. Watson*, 89 Va. 722, 17 S. E. 4. See ante, "Pleading Fraud," V, C, 2.

Evidence of Acquiescence in Contract as Estoppel.—Evidence of acquiescence in a contract procured by fraud can not be used by way of estoppel for the purpose of excluding evidence showing that the same was procured by false and fraudulent representations. *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116.

Misrepresentations to Part of Plaintiffs Only.—Where several complainants unite in one bill, by which they seek to have their contracts of purchase of real estate rescinded on the ground of fraudulent representations, the representations must be common to all the complainants. This is the ground upon which they are allowed to unite in one suit. Misrepresentations to some only of the complainants are not admissible in evidence. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

c. Other Frauds.

General Rule.—Where fraud in the sale or purchase of property is in issue, evidence of other frauds of like character, committed by the same parties at or near the same time is admissible. Its admissibility is based upon the ground that where other transactions of a similar character are executed by the same parties, and closely connected in point of time, the inference is reasonable that they proceeded from the same motive. Large latitude is always given to the admission of evidence where the issue is fraud. *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505.

"In civil cases the decisions are

abundant which hold that on the question of intent to defraud by false pretenses other acts or representations of a like character, done at or about the same time with that in issue, are admissible with a view to the *quo animo*." *Trogon v. Com.*, 31 Gratt. 862, 874. See the title FALSE PRETENSES AND CHEATS, vol. 5, p. 825.

Similar Statements of Agent.—In a suit to cancel a contract for false representations made by an agent, evidence of similar statements made by him to other people at other times, though not competent to prove what occurred when the contract in question was made, may be introduced to show the bent of the agent's mind. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243.

Of Other Agents.—But, in an action to rescind a conveyance for alleged false representations, the fact that other land agents, in attempting to sell lands similarly located, made similar representations to others, was held immaterial. *Beckley v. Riverside Land Co.*, 3 Va. Dec. 283 (1895). See the title AGENCY, vol. 1, p. 240.

d. Parol Evidence.

See the title PAROL EVIDENCE.

Exception to General Rule.—The general principle is well established that evidence of a contemporaneous parol agreement is not admissible to vary or contradict the terms of a valid written instrument, except in cases of fraud or mistake, when it may be shown. *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544. See also, *Towner v. Lucas*, 13 Gratt. 705; *Woodward v. Foster*, 18 Gratt. 200; *Martin v. Lewis*, 30 Gratt. 672; *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890; *Ratcliffe v. Allison*, 3 Rand. 537, 540.

It may be received to prove fraud, mistake or surprise, in the execution of it, but, in the latter case, the evidence must be strong and clear. *M'Mahon v. Spangler*, 4 Rand. 51.

"It is admitted, not to vary an agreement, as it is expressed, open to no

objection, and therefore, upon the letter, binding; but to show circumstances of fraud, making it unconscientious in the party to insist upon, and unjust in the court to decree, the performance." *Ratcliffe v. Allison*, 3 Rand. 537, 541.

Contemporaneous Incidents—Collateral Circumstances.—Parol evidence, in the absence of fraud or mistake, will not be received to engraft upon, or incorporate with, a valid contract an incident occurring contemporaneously therewith and inconsistent with its terms. But collateral circumstances attending the agreement, and mistake or fraud in the procurement or execution of the agreement, may be proved by parol evidence. *Campbell v. Fetterman*, 20 W. Va. 398.

To Impeach Evidence under Seal.—Parol evidence is admissible to impeach evidence under seal, on the ground of fraud, contrary to the general rule. If the defense, grounded on the alleged fraud, was admissible, then the evidence to prove the fraud was also admissible. *Starke v. Littlepage*, 4 Rand. 368.

Admissible to Establish or Rebut Fraud of Vendor.—In a suit to abate the purchase money for a fraudulent statement of the quantity of land which is sold, the court may consider all kinds of parol evidence to establish or to rebut the fraud, or to prove or disprove the reliance of the vendee on the statement, or the inducement to purchase. This evidence is admissible, not to contradict the written contract or deed, but to prove that the vendor's statement did, as a matter of fact, deceive the vendee to his injury, and in this way establish the fact in issue, the fraud of the vendor. *Crislip v. Cain*, 19 W. Va. 438.

Res Gestæ.—Declarations at the time of making a contract are part of the *res gestæ* and may be given in evidence in an action to enforce it, where the defense is that it was procured by false

and fraudulent representations. *Crump v. United States Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116.

But declarations made by an agent after completion of a sale of land, and hence after the termination of its agency, are inadmissible to rescind a sale for fraud. *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787. See the title *RES GESTÆ*.

Subsequent Declarations of Donor.—Proof of subsequent declarations and acts of the donor (though not admissible taken singly), may be received (under total absence of testimony applying to the time of the contract, and in connection with corroborating circumstances) to show that the writing was misunderstood, or misrepresented at the time of the signature. *Jones v. Robertson*, 2 Munf. 187. See the title *DECLARATIONS AND ADMISSIONS*, vol. 4, p. 325.

e. Record of Former Suit.

See the title *RECORDS*.

Plaintiff Not a Party.—At the suit of a creditor a deed is set aside as fraudulent to an extent more than sufficient to pay the creditor's debt. Then another judgment creditor of the grantor files a bill in which he states his debt, and the decree in the former suit, and asks that his debt be paid out of the balance remaining in that suit, and he files a copy of the record in the first case. The defendant answers and denies that the deed was fraudulent and objects to the former suit as evidence. It was held, that if the bill was considered as charging fraud in the deed, the answer put that fact in issue, and the plaintiff not having been a party or privy to the first suit, the record was not competent evidence. *Winston v. Starke*, 12 Gratt. 317.

Pauper Suit—Eviction of Title.—In an action of case against a vendor of a slave for deceit in respect to the title, the record of a pauper suit brought by the slave against the vendee to recover his freedom, is admissible evidence to

prove eviction of title. *Brown v. Shields*, 6 Leigh 440.

f. Evidence of Sharer in Fraud.

See the title WITNESSES.

Quære, whether the evidence of a person employed, by both parties, as an attorney or scrivener, to write a bond for a fraudulent purpose, be admissible to prove the fraud. *Clay v. Williams*, 2 Munf. 105. "It seems from Brooke's and Tucker's opinions in the case, that they considered such testimony admissible. Roane is pointedly contra; and Fleming said nothing upon the point. Ideo quære?" Note in original edition.

"A particeps fraudis is not only liable for costs, but may be otherwise liable, and is not permitted, by his own evidence, to repel the charge of fraud in which he participated." *Taylor v. Moore*, 2 Rand. 563, 580.

Testimony Fixing Fraud on Witness.

—The testimony of a witness, tending to fix a fraud upon himself, ought not to be regarded. *Claiborne v. Parrish*, 2 Wash. 146.

3. Sufficiency and Weight.

a. Amount of Evidence Necessary to Establish Fraud.

Overcoming Presumption.—It is impossible to lay down any arbitrary rule so as to show just how much evidence is necessary to establish fraud, but perhaps the most satisfactory general rule that can be laid down on the subject is, that the quantity of evidence must be sufficient to satisfy the conscience of the court. Thus, where the facts and circumstances of a case, which have been distinctly proven, are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof which the law requires. It need not be proved beyond a reasonable doubt. *Moore v. Ullman*, 80 Va. 307, 311; *Hickman v. Trout*, 83 Va. 478, 490, 3 S. E. 131; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Herring v. Wickham*, 29 Gratt. 628; *Hord v. Colbert*, 28 Gratt. 49; *Moore v. Gainer*, 53 W. Va. 403, 44 S.

E. 458; *Knight v. Nease*, 53 W. Va. 50, 44 S. E. 414; *Ballard v. Chewning*, 49 W. Va. 508, 519, 39 S. E. 170; *White v. Perry*, 14 W. Va. 66; *Lockhard v. Beckley*, 10 W. Va. 87.

But an instrument, not fraudulent on its face, may be shown to be so in fact, and to have been executed with fraudulent intent. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203, 212.

It is not necessary that fraudulent intent be proved beyond doubt, so that a case of fair and reasonable probability be established, not readily explainable on any other hypothesis. *Vandevort v. Fouse*, 52 W. Va. 214, 43 S. E. 112; *Horner v. Huffman*, 52 W. Va. 40, 51, 43 S. E. 132; *Lockhard v. Beckley*, 10 W. Va. 87; *Livesay v. Beard*, 22 W. Va. 585; *Sturm v. Chalfant*, 38 W. Va. 248, 249, 18 S. E. 451.

Before a Jury.—It is as competent for a jury to investigate fraud as a chancellor; the evidence to sustain actual fraud must be the same, in substance and effect, in one forum that it is in the other. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104. See *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447, 468.

Qualification of Rule of Presumption, and Instances.—"We must not carry the rule that fraud is never presumed, but must be fully proved, too far. We must not require evidence of fraud beyond reasonable doubt. If we do this, fraudulent conveyances and covinous transactions will walk triumphant over the just right of others; a premium will be given to fraud. The distinguished and lamented Judge Green, in *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664, said, in enunciating the true principle: 'I suppose that the real trouble in reaching correct decisions in these cases is that the rules of law which have been laid down have been misapprehended, though this court has endeavored to make them clear. Yet some seem still to think and act as though to establish fraud in cases

like the one before us required evidence almost as strong as the evidence required to convict in a criminal prosecution; and when fraud is established by direct proof or necessary inference, they seem to think that the slightest evidence ought to be regarded as sufficient to explain and rebut the facts which establish the fraud.'" *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892. See *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170; *Vandevort v. Fouse*, 52 W. Va. 214, 43 S. E. 112.

After a positive denial in an answer, of a charge made against the respondent in the bill, at least two witnesses, or one witness and corroborating circumstances, are required to sustain the charge; and a fortiori does this rule apply when the charge, as it is in this case, is one of fraud. *Preston v. Stuart*, 29 Gratt. 289, 298.

Alleged fraud must be proven, and it is not sustained by evidence of mistaken additions on the face of a store account always open to inspection, and long settled by note. *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617.

The law does not presume fraud, but, when charged, it must be clearly and distinctly proved. Where the defendant is charged with bad faith in refusing to accept certain rock which it had agreed to accept if, upon test, it proved satisfactory, and circumstances were relied upon to show that the rock was really satisfactory, and that the refusal to accept was purely arbitrary, they fail to establish bad faith with the clearness and distinctness required by law. *Virginia, etc., Chemical Co. v. Carpenter*, 99 Va. 292, 38 S. E. 143.

The fact that the bid of a contractor upon a work of great magnitude was far below that of the next lowest bidder, is not a circumstance from which a fraudulent purpose must be deduced. *University of Virginia v. Snyder*, 100 Va. 567, 568, 42 S. E. 337.

Evidence of Justice Taking Acknowledgment.—The complainant alleges that a deed which she executed to her

deceased nephew was obtained by fraud, she intending to convey to deceased and another, and for a different interest or estate. The complainant being incompetent to testify, the only evidence was that of the justice who took the acknowledgment, to the effect that she said she knew what she was signing, i. e. her interest in the estate to the deceased. It was held, that there was no fraud established. *Curlett v. Newman*, 30 W. Va. 182, 3 S. E. 578.

Misrepresentation as to Value.—Time of Purchase.—Not of Trial.—Under § 3299, authorizing the obligor of a bond to plead the obligee's fraud in inducing him to execute it, as a defense to an action thereon, he, having pleaded that he was induced to give same for land by misrepresentations as to the value of the land, must prove such value as of the time of the purchase, not at the time of trial. *South Roanoke Land Co. v. Roberts*, 99 Va. 487, 39 S. E. 133.

Loose Declarations.—When an answer under oath emphatically denies the charge of fraud as alleged in the bill, fraud is not proven, when all the evidence adduced by the plaintiff consists in loose declarations. *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743.

Mixed Question of Law and Fact.—There being evidence tending to show fraud, it is generally said to be a mixed question of law and fact, and therefore one for the jury or commissioner. *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, 628, citing *Hooe v. Marquess*, 4 Call 416. See the title ISSUES TO THE JURY.

"Fraud is a question of fact to be determined by the jury from all the circumstances of the case." *Proctor v. Spratley*, 78 Va. 254, 267.

Evidence at Law as in Equity.—It is as competent for a jury to investigate fraud as a chancellor; the evidence to sustain actual fraud must be the same, in substance and effect, in one forum as it is in the other. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

b. Badges of Fraud.

Among the badges of fraud as laid down by the court in *Harvey v. Pecks*, 1 Munf. 518, were going to the house of one of the grantors, a married woman, with a deed already prepared and a commission to take the relinquishment of her right in the land, and with two magistrates to take her privy examination, before any contract was made or treated for; manifest inadequacy of price; extreme old age; weakness, and imbecility of the grantors; and the giving of ardent spirits to them prior to the completion of the business.

"Certain circumstances are often referred to as indicia of fraud, because they are usually found in cases where fraud exists. Even a single one of them may be sufficient to stamp the transaction as fraudulent. When several are found in the same transaction, strong and clear evidence will be required of the upholder of the transaction to repel the conclusion of fraudulent intent." *Hickman v. Trout*, 83 Va. 478, 491, 3 S. E. 131.

It was held, in *Whitehorn v. Hines*, 1 Munf. 557, that fraud might be presumed from certain strong circumstances, such as gross inadequacy of consideration; breach of trust and confidence; the exertion of undue influence, especially over a young and weak person by a near relative; and over-diligence and assiduity in guarding against objections. See generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Labored Simulation of Regularity.—Wherever there appears to be connected with the transaction, circumstances indicating excessive effort to give it the appearance of fairness or regularity, which are not usual attendants of such business, the courts will regard such circumstances as badges of fraud. *Hart v. Sandy*, 39 W. Va. 644, 20 S. E. 665.

Relationship as a Badge—Scrutiny of Transactions.—Relationship is not a

badge of fraud, and there is no law which forbids persons standing in near relationship of consanguinity, affinity, or business, from dealing with each other, or which requires them to conduct their business with each other differently from the manner in which they deal with other persons, though, when fraud is charged, their dealings with each other will be closely scrutinized, as they may strengthen a presumption arising from other circumstances. *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497; *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748; *Todd v. Sykes*, 97 Va. 143, 147, 33 S. E. 517.

Institution of Suit by Preferred Creditor.—A preferred creditor's instituting, immediately after the judgment was confessed, his suit in chancery to subject debtor's land to its payment, and prosecuting it as rapidly as possible without defense or delay on debtor's part, are of little or no value in making out a case of fraud. The creditor was merely exercising his legal rights, and in the manner provided by law. *Johnson v. Lucas*, 103 Va. 38, 48 S. E. 497.

Unfitness of Slave for Purpose of Hire.—On a contract for the hire of a slave, fraud can not be inferred from the unfitness or unsuitableness of the slave for the purpose for which he was hired, and a knowledge of such unfitness by the owner. *Howell v. Cowles*, 6 Gratt. 393.

Financial Embarrassment.—See ante, "Incurring Debt with No Intention to Pay," III, B.

It is not sufficient to establish fraud in the sale of personal property to show that the purchaser was at the time financially embarrassed, though his insolvency is a factor to be considered along with the other circumstances of the case. *University of Virginia v. Snyder*, 100 Va. 567, 568, 42 S. E. 337.

Where a subcontractor furnishing building materials to a general contractor to be used in the construction of certain buildings upon which the

latter was engaged, under a contract by which title to such materials passed to the general contractor upon delivery, became suspicious of the general contractor's solvency, and made inquiries in respect thereto of the owner of the buildings, and the latter truthfully replied that he knew of no trouble that the general contractor was in, whereupon the subcontractor continued to furnish materials under his contract, but the general contractor soon after failed and surrendered his contract and conveyed all his materials, tools, etc., to the owner of the building, who completed the work, it was held, that the subcontractor, who had taken no steps to avoid his contract with the general contractor on the ground of fraud, and who had not demanded restitution of the property delivered, could not recover from the owner materials delivered to the general contractor, and not paid for by him, nor could he recover damages from the owner in an action of deceit. *University of Virginia v. Snyder*, 100 Va. 567, 568, 42 S. E. 337.

c. Circumstantial Evidence.

See the title CIRCUMSTANTIAL EVIDENCE, vol. 2, p. 817.

It is difficult to define just what kind of evidence is necessary to establish fraud. But there can be no doubt that it is not necessary that it shall be proven by direct and positive proof, but like any other fact it may be proven by circumstantial evidence, and from the very nature of the subject this kind of evidence is, generally, the only proof that can be adduced in reference to it. *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Alsop v. Catlett*, 97 Va. 364, 367, 34 S. E. 48; *Francis v. Cline*, 96 Va. 201, 31 S. E. 10; *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507; *Ferguson v. Daugherty*, 94 Va. 308, 26 S. E. 822; *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 255; *Tune v. Fallin*, 87 Va. 410, 12 S. E. 750; *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475; *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748; *Arm-*

strong v. Lachman, 84 Va. 726, 6 S. E. 129; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Hickman v. Trout*, 83 Va. 478, 491, 3 S. E. 131; *Moore v. Ullman*, 80 Va. 307; *Brown v. Rice*, 76 Va. 629, 661; *Parr v. Saunders*, 1 Va. Dec. 724, 731; *Colston v. Miller*, 55 W. Va. 490, 497, 47 S. E. 268; *Moore v. Gainer*, 53 W. Va. 403, 44 S. E. 458; *Knight v. Nease*, 53 W. Va. 50, 44 S. E. 414; *Vandevort v. Fouse*, 52 W. Va. 214, 43 S. E. 112; *Ballard v. Chewning*, 49 W. Va. 508, 519, 39 S. E. 170; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *Bronson v. Vaughn*, 44 W. Va. 406, 29 S. E. 1022; *Farley v. Bateman*, 40 W. Va. 540, 22 S. E. 72; *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Davis Sewing Machine Co. v. Dunbar*, 29 W. Va. 617, 2 S. E. 91; *Parker v. Valentine*, 27 W. Va. 677; *Livesay v. Beard*, 22 W. Va. 585; *Harden v. Wagner*, 22 W. Va. 356, 366; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Martin v. Rexroad*, 15 W. Va. 512; *White v. Perry*, 14 W. Va. 66; *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 W. Va. 321. See also, *Hord v. Colbert*, 28 Gratt. 49; *Herring v. Wickham*, 29 Gratt. 628.

"It is not, however, necessary, in order to establish fraud, that direct, affirmative, or positive proof of fraud shall be produced. Concerning the actions of men, and especially when prompted by the secret, unexpressed, hidden motives of the actors, demonstrative certainty is not attainable, nor is it required. As is the case with respect to knowledge on other matters, fraud may be inferred from facts that are established. It is enough if facts be established from which it would be impossible for the mind fairly and reasonably to conclude anything other than that there must have been fraud

in the transaction." *Hickman v. Trout*, 83 Va. 478, 490, 3 S. E. 131; *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 267; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664.

Fraud may be deduced from deceptive assertions, and from incidents and circumstances evincing a fraudulent intent. *Sturm v. Chalfant*, 38 W. Va. 248, 18 S. E. 451.

Discrepancies in Calculations and Estimates.—Fraud may be inferred from great discrepancies in calculations and estimates hard to reconcile with honest mistake. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104; *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556.

Conclusive unless Rebutted.—Fraud may be presumed from the facts and circumstances of a case, and if they be such as to make a prima facie case of fraudulent intent, they will be taken as conclusive evidence of such intent, unless rebutted by other facts and circumstances in the case. *Parker v. Valentine*, 27 W. Va. 677; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Harden v. Wagner*, 22 W. Va. 356; *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 W. Va. 321; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *Livesay v. Beard*, 22 W. Va. 585, 593; *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816, 820. These facts, incidents and circumstances may be trivial in themselves, but may, in a given case, be often decisive of the fraudulent design. *Goshorn v. Snodgrass*, 17 W. Va. 717. See *Martin v. Rexroad*, 15 W. Va. 512.

A fraud may appear from an instrument itself, or be proved by evidence aliunde. Whenever it is apparent on the face of the instrument, it is called constructive or legal fraud; and, in such case, the fraud is adjudged by law to be conclusively established, and can not be disproved by other evidence. The mere badges of fraud, whether they appear on the instrument or from evidence aliunde, may always be re-

pelled by other evidence. *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Gordon v. Cannon*, 18 Gratt. 387; *Hughes v. Epling*, 93 Va. 424, 25 S. E. 105; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131. See *Parker v. Valentine*, 27 W. Va. 677, where the prima facie evidence of fraud was held to be clearly rebutted.

Transaction May Outweigh Answer and Evidence of Witnesses.—A transaction may of itself and by itself furnish the most satisfactory proof of fraud, so conclusive as to outweigh the answer of defendant and even the evidence of witnesses. *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Parr v. Saunders*, 1 Va. Dec. 724 (1880).

d. Inadequate Consideration.

See the title CONTRACTS, vol. 3, p. 377, et seq.

So Gross as to Shock the Conscience.—It is only in those cases where the inadequacy of price is so gross as to lead to the irresistible inference of fraud, that a sale made without imposition, between competent parties standing on equal terms, will be rescinded by a court of equity. This inadequacy must be so strong and manifest as to shock the conscience and confound the judgment of a man of common sense. *Matthews v. Crockett*, 82 Va. 394; *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Lowe v. Trundle*, 78 Va. 65; *Atkinson v. College*, 54 W. Va. 32, 46 S. E. 253; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Conaway v. Sweeney*, 24 W. Va. 643, 650; *Bradford v. McConihay*, 15 W. Va. 732; *Hale v. Wilkinson*, 21 Gratt. 75, 81; *Mayo v. Carrington*, 19 Gratt. 74; *Ballard v. Whitlock*, 18 Gratt. 235; *Cribbins v. Markwood*, 13 Gratt. 495, 508; *Greer v. Greers*, 9 Gratt. 330.

Mere inadequacy of consideration, not so gross as to be unconscionable,

is not proof of fraud in itself. *Powers-Taylor Drug Co. v. Faulconer*, 52 W. Va. 581, 586, 44 S. E. 204; *Horn v. Star Foundry Co.*, 23 W. Va. 522; *Cain v. Cox*, 23 W. Va. 594; *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612; *Stout v. Phillippi Mfg., etc., Co.*, 41 W. Va. 339, 23 S. E. 571; *Corrothers v. Harris*, 23 W. Va. 177; *Blubaugh v. Loomis*, 48 W. Va. 666, 682, 37 S. E. 794; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560. See *Knott v. Seamands*, 25 W. Va. 99, 107.

But mere inequality or inadequacy of consideration, not so gross as to be in itself proof of fraud, while not alone sufficient to establish fraud, is yet a circumstance entitled to great weight. *Taylor v. Moore*, 2 Rand. 563, 579.

Applies to Executed and Executory Contracts.—In the absence of all other circumstances, when the inadequacy of price is so gross as to shock the conscience, and furnish satisfactory and decisive evidence of fraud, it will be a sufficient ground for canceling a conveyance or contract, whether executed or executory. *Bresee v. Bradfield*, 99 Va. 331, 38 S. E. 196.

Coupled with Weakness of Mind.—Inadequacy of consideration of itself is no ground for the rescission of a contract, but when coupled with great weakness of mind, a court of equity will set aside a transaction when these facts appear, as from them imposition or undue influence will be inferred. *Crebs v. Jones*, 79 Va. 381; *Jones v. Degge*, 84 Va. 685, 5 S. E. 799. See *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575.

Gross inadequacy of consideration, coupled with evidence tending to prove incompetency, will invalidate the deed on the ground of fraud and undue influence. *Arnold v. Arnold*, 11 W. Va. 449, 460. See the title **UNDUE INFLUENCE**.

Connection with Fraud or Fiduciary Relation.—Parties buying and selling are left to fix their own prices,

and, in the absence of fraud, misrepresentation, and imposition, the courts sustain the prices fixed by the parties themselves. Neither inadequacy or redundancy of price will vitiate a deed or contract unless there is fraud or mutual mistake connected with it, or there is some fiduciary relation between the contracting parties. *Smith v. Henkel*, 81 Va. 524.

Contract of Hazard.—In a contract of hazard for the sale of real estate, \$500 as the consideration of an interest in land worth \$230,000, which interest depends on a defect in an acknowledgment, which might render it void, is not so inadequate as to warrant a rescission of the sale. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

For in reference to contracts of hazard, the factor of risk and hazard is such a disturbing element in the estimation of value that courts of equity, when inadequacy alone is in question, will refuse to interfere. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

Must Be Established at Date of Contract.—The inadequacy of consideration, which will warrant a court of equity in setting aside a deed, must be established as of the date of the contract. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

Intoxication—Inadequacy of Price.—In *Reynolds v. Waller*, 1 Wash. 164, it was held, that when a party entered into a contract when he was intoxicated, inadequacy of price in favor of the other party is direct evidence of fraud. See the title **DRUNKENNESS**, vol. 4, p. 835.

Sale at Public Auction.—When there are no ingredients in a case of suspicious character, and no peculiar relation of parties, mere inadequacy of price will not be considered by a court as any reason for setting aside a sale or contract, unless where the inadequacy of price is so gross as of itself to prove fraud. But the case would have to be very strong to justify the

court in holding a purchaser at a public auction, between whom, and the vendor, there had been no previous communication affecting the fairness of the sale, as chargeable with fraud, merely because the property has been knocked down to him at a small price. To set aside a sale for inadequacy of price under such circumstances, the inequality must be so gross, that the mere stating of it must shock the conscience of a man of common sense and afford evidence of fraud. *Bradford v. McConihay*, 15 W. Va. 732, 763.

Illustrative Cases.—Where, by the fraudulent representations of the defendants, the plaintiffs purchased for \$1,500 in cash a claim for \$3,400, the latter are entitled to a rescission of the contract, and can recover back their money. *Hyer v. Smith*, 48 W. Va. 550, 37 S. E. 632.

Circumstances of misrepresentation may furnish grounds for rescinding an assignment of judgments worth \$1,350 in consideration of \$200. *Lowe v. Trundle*, 78 Va. 65.

Inadequacy of price, youth, inexperience, indebtedness, distress, are circumstances to be looked to and weighed in determining whether a bargain for the sale of a reversion in real estate, is not so unconscionable as to demonstrate some gross imposition, circumvention, or undue influence, and so as to justify relief on the ground of fraud. In the absence of such proof of actual fraud, it is not incumbent on the purchaser of such an expectant interest to make good the bargain, by showing that a full and adequate consideration was paid. *Cribbins v. Markwood*, 13 Gratt. 495, 508.

In the absence of evidence tending to impeach the fairness of a sale, it can not be set aside for inadequacy of price, unless it be so inadequate as to justify the presumption of fraud and collusion, and, to justify such presumption from this inadequacy alone, it must be so strong and manifest an inadequacy as to shock the conscience

and confound the judgment of any man of common sense. Half the estimated value of such property is not such an inadequacy. *Bradford v. McConihay*, 15 W. Va. 732; *Atkinson v. College*, 54 W. Va. 32, 46 S. E. 253; *Conaway v. Sweeney*, 24 W. Va. 643, 650.

Where the evidence shows that the property sold yields from 12 to 22 per cent. annually in rent, the purchase could not be considered the result of an unconscionable bargain. *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749.

e. Weight of Jury's Finding.

"When the question of fraud has been passed upon by the jury, an appellate court will never infer it and grant a new trial." *Proctor v. Spratley*, 78 Va. 254, 267. See *Barnum v. Barnum*, 83 Va. 365, 5 S. E. 372. See the title JURY.

And where, from great discrepancies in calculations and estimates, a jury was justifiable in presuming fraud, a motion to set aside a verdict and grant a new trial, because the verdict was contrary to evidence, was properly refused. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104. See *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447, 463.

f. Weight of Findings of Commissioner.

Where the charge of fraud in the suppression of a will was distinctly and clearly made in complainant's bill, and is supported by the documentary evidence filed in the cause, and by the report of an experienced commissioner in chancery, who examined the witnesses and heard them testify and also considered the documentary evidence, this finding of the commissioner was approved by the trial court, and is now approved by this court. *Anderson v. Smith*, 102 Va. 697, 48 S. E. 29. See the title REFERENCE.

g. Weight of Finding of Lower Court.

When the evidence relating to fraud is conflicting and tends to support the

decree of the circuit court, such decree will not be disturbed unless plainly wrong. *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420; *Barnum v. Barnum*, 83 Va. 365, 5 S. E. 372; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575. See the title **APPEAL AND ERROR**, vol. 1, p. 609.

h. To Rebut Presumption.

A positive statement by a vendor, on his own knowledge of a tract of land, that it contains a certain number of acres, when in fact it contains a smaller number, is *prima facie* fraudulent, and the testimony of the vendor that he believed such unqualified representation to be true will not rebut the presumption of fraud. *Crislip v. Cain*, 19 W. Va. 438.

Where fraud and undue influence are presumed from the circumstances of a case, this inference is not repelled by the allegation that the deed was the consummation of a previously declared purpose on the part of the grantor, when the evidence establishes inconsistent declarations. *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575.

i. Undue Influence.

See the title **UNDUE INFLUENCE**.

j. Issue Out of Chancery to Try Question of Fraud.

See the title **ISSUES TO THE JURY**.

K. DAMAGES.

See the title **DAMAGES**, vol. 4, p. 162.

"In case for deceit there is, perhaps, no fixed rule for the assessment of damages; they are not limited, however, as in an action on the warranty; if so, they may go beyond those recoverable in an action on the warranty. *Rice v. White*, 4 Leigh 474; *Brown v. Shields*, 6 Leigh 440." *Boyles v.*

Overby, 11 Gratt. 202, 205. The purchase money, with interest, is not a proper measure, but the circumstances of the particular case determine the damages. *Brown v. Shields*, 6 Leigh 440.

VI. Criminal Fraud.

Buying or Receiving Railroad Brass—Code, § 3715.—In a prosecution under § 3715 of the Code of Virginia, 1884, as amended (acts, 1889-90, p. 30), forbidding any person "to buy or receive" railroad iron, brass, etc., with intent to defraud, and declaring that possession, unless bought or received from certain persons enumerated in the statute, shall be *prima facie* evidence of such intent, it is incumbent on the commonwealth to prove, as an essential element of the offense, that such articles were bought or received in the manner forbidden by the statute before any presumption will arise from the possession of such articles. The presumption declared by the statute to arise from possession is of the intent, and not of the fact that the articles were bought or received. *Goldman v. Com.*, 100 Va. 865, 42 S. E. 923.

Criminal Possession.—In the case at bar, if it be conceded that the corpus delicti was proved, the prisoner's guilt has not been established by the evidence. He was indicted for buying and receiving railroad brasses with intent to defraud. Giving full weight to the evidence of the commonwealth, as on a demurrer to the evidence, it only establishes that the prisoner had the mere custody of the brasses for the purpose of delivering them at the depot to be shipped to the consignee. Such custody alone does not amount to guilty possession within the meaning of the statute. *Goldman v. Com.*, 100 Va. 865, 42 S. E. 923. See the title **RECEIVING STOLEN GOODS**.

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I. Scope.

This article excludes part performance on one part as ground for compelling performance of an oral con-

tract on the other part. See the title SPECIFIC PERFORMANCE. It also excludes conveyances, and parol gifts, void as to creditors and purchas-

ers. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**. It also excludes the necessity of writing to create trusts. See the title **TRUSTS AND TRUSTEES**.

II. In General.

History of Statute.—There has been great doubt as to who was the author of the famous statute of frauds and perjuries, which had for its object the "prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." The statute, 29 Char. II, ch. 3, was enacted in England in 1677, during the reign of Charles II. It was prepared as early as 1673, and after being discussed at several sessions of Parliament, received royal assent on April 16, 1677. It is generally conceded that Lord Hale and Lord Nottingham are both to be credited in part with its authorship. Clark on Contracts, p. 90; 8 Am. & Eng. Ency. Law 657.

Passage in Virginia.—The statute was first passed in Virginia in 1785, and took effect the first day of January 1787. See 1 Rev. Va. Code, ch. 10, p. 15; § 2840, Va. Code, 1887; ch. 98, W. Va. Code, 1899; note to *Beasley v. Owen*, 3 Hen. & M. 449, 453.

Salutary Law.—The statute of frauds was held to be a wise and salutary law in *Cutler v. Hinton*, 6 Rand. 509, and it was said that it should be fairly and fully carried into execution by the courts.

Founded in Wisdom and Sound Policy.—“The statute of frauds was founded in wisdom and sound policy. Its primary object was to prevent the settling up of pretended agreements, and then supporting them by perjury. But besides these direct objects, there is a manifest policy in requiring contracts of so important a nature as the sale and purchase of real estate, to be reduced to writing; since, otherwise, from the imperfection of memory and

the honest mistakes of witnesses, it must often happen either that the specific contract is incapable of exact proof, or that it is unintentionally varied from its original terms.” *Wright v. Pucket*, 22 Gratt. 370; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742.

III. Contracts within Statute.

A. PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.

1. Object of Statute.

The object of the statute manifestly was to secure the highest and most satisfactory species of evidence in a case where a party, without apparent benefit to himself, enters into stipulations of suretyship, and where there would be great temptation on the part of the creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of the debtor—a father, son, or brother—by means of false evidence, by exaggerating words of recommendation, encouragement, or forbearance, and requests for indulgence, into positive contracts. *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

2. Construction of Statute.

The section of the statute, with reference to an agreement to answer for the debt of another, contemplates a gratuitous verbal promise by one to pay the debt which he does not owe, and is not liable for, but which is owed by another; and the intent and purpose of the statute is to compel the reduction of the evidence to writing of such voluntary promise, for the protection, alike, of promisor and promisee by reason of the uncertainty of any demand on such contract without consideration. *Skinker v. Armstrong*, 86 Va. 1011, 11 S. E. 977.

“The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising

has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promisor is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute.' Shaw, C. J., in *Nelson v. Boynton*, 2 Metc. 396." *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

3. Must Be in Writing.

A promise to pay the debt of another must be in writing. *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604.

Guarantor of Nonnegotiable Note.—

It is indispensable under the statute of frauds and perjuries, that the plaintiff in an action of assumpsit against the guarantor of a nonnegotiable note should prove on the trial that the promise was in writing, it being for the debt or default of another. *Watson v. Hurt*, 6 Gratt. 633, 643.

4. Consideration Necessary.

Need Not Be Expressed.—A promise of one person to pay the debt of another, though in writing, must be founded on consideration, to make it binding, but under the statute of frauds in Virginia, the consideration need not be expressed in the written promise. *Colgin v. Henley*, 6 Leigh 86; *Beers v. Spooner*, 9 Leigh 153.

"Debt, Default, or Misdoing" of Another Not Sufficient Consideration.—

An unconditional verbal promise to pay a written order is an acceptance of such order, and if founded on a sufficient legal consideration is binding on the acceptor. But the debt, default, or misdoing of another is not a sufficient consideration to exempt such promise from the operation of the statute of frauds. *Barnett v. Boone Lumber Co.*, 43 W. Va. 441, 27 S. E. 209; *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

5. Promise to Indemnify.

"Original" and "Collateral" Promise.

—The terms "original and collateral promise," though not used in the statute, are convenient enough to distin-

guish between the cases where the direct and leading object of the promise is to become the surety or guaranty of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest, or purpose of his own. *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

Third Person's Liability Must Continue.—

Thus where the consideration of a defendant's undertaking or promise to pay the debt of another is for money or property to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money or property, or from whom the consideration proceeds, such promise or undertaking is collateral, and under the statute of frauds will not bind the defendant, unless it be in writing. *Radcliff v. Poundstone*, 23 W. Va. 724; *Ware v. Stephenson*, 10 Leigh 155.

Thus, the lessee of property undertakes to put certain improvements thereon and makes a contract for the work. The contractor after doing part of the work, becomes dissatisfied and refuses to complete the contract. The lessor tells him to finish the work and he will pay him. The lessee not having been released from his liability, the promise of the lessor is a collateral one, and not being in writing, is void by the statute of frauds. *Noyes v. Humphreys*, 11 Gratt. 636; *Radcliff v. Poundstone*, 23 W. Va. 724, 734; *Waggoner v. Gray*, 2 Hen. & M. 603; *Cutler v. Hinton*, 6 Rand. 509; *Ware v. Stephenson*, 10 Leigh 155.

Promise in Consideration of Debt to Another.—

—And where a party in consideration of his debt to another verbally promises to pay the debt of that other to a third party, the promise is a collateral undertaking which is void under the statute of frauds. *Waggoner v. Gray*, 2 Hen. & M. 603.

Promise of Wife to Pay Husband's Debt.—In a case brought by a creditor of a husband against the husband and wife, to charge the estate of the wife with her husband's debt upon her promise to pay the same, it was held that her promise was collateral, and not being in writing was void by the statute of frauds. *Radcliff v. Poundstone*, 23 W. Va. 724.

Promise to Pay for Goods Sold to Another.—If a person authorizes his agent to say to a merchant, "That he would pay for any goods sold to his son-in-law," or to any merchant of whom his son-in-law "might purchase," or "might wish to purchase goods, that he would pay for the son-in-law" a certain sum; this was held, in *Cutler v. Hinton*, 6 Rand. 509, to be a collateral promise, and being verbal, was void, under the statute of frauds.

Promise between Cosureties.—It was decided in *Wolverton v. Davis*, 85 Va. 64, 6 S. E. 619, that a promise by one to indemnify another, who has become cosurety with him in an official bond, at the promisor's request, falls within the statute of frauds, and when merely verbal, is incapable of enforcement.

Contract of Insurance.—In *Croft v. Hanover, etc., Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, it was decided that an oral executory contract for fire insurance was valid, and that the statute of frauds had no application to such contract.

From Damages by Milldam.—A verbal promise to indemnify against loss caused by the erection of a milldam, is not within the statute of frauds, and is valid and binding. *Chapman v. Ross*, 12 Leigh 565.

Unauthorized Verbal Promise by Agent.—A verbal promise by an agent to answer for the debt of his principal, being out of the line of his duty and unauthorized, is void; and even if authorized, being a purely collateral undertaking, the principal's liability on the debt is not in any wise extinguished

or reduced, and no action can be brought thereon under the statute. *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 225.

Statute Inapplicable to Assignor of Bond.—A bond is assigned for the purpose of enabling the assignee to purchase goods on that credit. The undertaking of the assignor is not an undertaking to pay the debt of another, to which the statute of frauds and perjuries will apply. *Hopkins v. Richardson*, 9 Gratt. 485. See also, *Wright v. Smith*, 81 Va. 777; *Skinker v. Armstrong*, 86 Va. 1011, 1015, 11 S. E. 977; *Noyes v. Humphreys*, 11 Gratt. 636, and note.

6. Promise on New Consideration.

In General.—Where the promise to pay the debt of another arises out of some new or original consideration, it is not within the statute of frauds. *Noyes v. Humphreys*, 11 Gratt. 636; *Radcliff v. Poundstone*, 23 W. Va. 724; *Waggoner v. Gray*, 2 Hen. & M. 603; *Cutler v. Hinton*, 6 Rand. 509; *Ware v. Stephenson*, 10 Leigh 155; *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104; *Hopkins v. Richardson*, 9 Gratt. 485, 494; *Wright v. Smith*, 81 Va. 777; *Skinker v. Armstrong*, 86 Va. 1011, 1015, 11 S. E. 977.

Where Object Is to Subserve Purpose of Promissor.—It may be stated, as a general rule, that whenever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form the promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another. *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

Original Undertaking Not within Statute.—Two sons, with their respective fathers as indorsers, executed a note to a bank to obtain money with which to start in a partnership business. The fathers at the time of the

execution of the note, each one as an inducement for the other's indorsing thereof, agreed to be bound for his son's moiety, and to indemnify the other indorser and maker against the same. Such agreement was an original undertaking on the part of the father, and was not a promise to answer for the debt, default or misdoing of another, within the purview of the statute of frauds. *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915.

Novation of Debt.—Where there is a new and original consideration, and a novation of the debt, for a promise to pay the debt of another, it takes it out of the letter and spirit of the statute of frauds. *Skinker v. Armstrong*, 86 Va. 1011, 11 S. E. 977; *Rosenbaum v. Goodman*, 78 Va. 121; *Hopkins v. Richardson*, 9 Gratt. 485, 494.

Personal Pledge of Agent.—A pledge or promise by an agent of his own liability, founded on a sufficient consideration, makes the agent personally liable, and is not an obligation to pay the debt of another, but an obligation, which the agent assumed for a consideration, and is not within the statute of frauds. *Sayre v. Edwards*, 19 W. Va. 352.

Debt Part of Consideration.—Where property is purchased for a valuable consideration, which is by the terms of sale to be conveyed to a third party, and is so conveyed, and the third party promises in consideration thereof to pay a debt of the vendor, this promise although not in writing is binding if assented to by the debtor. *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937.

7. Effect When Promise Entire.

Part Void Makes Whole Void.—Where a verbal promise to answer for the debt of another is entire, and relates in part to a matter which renders it necessary under the statute of frauds that the promise should be in writing, the whole promise is void. *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 225.

Thus a parol promise by a land-

owner to pay a builder for improvements, begun under a contract with his tenant, for which the tenant is unable to pay, is void under the statute as to the portion of the debt already incurred; and, where the promise was entire, an agreement to pay for what had been done and what was to be done, the invalidity of a portion of it invalidated the whole. *Noyes v. Humphreys*, 11 Gratt. 636.

8. Promise Need Not Be on Request.

In order for the promise of one person to pay the debt of another to be binding, it is not necessary that it should be made at the request of the person whose debt the promisor assumes, or at the request of the creditor. *Colgin v. Henley*, 6 Leigh 86.

9. Promise to Pay for Board, etc., Furnished to Married Woman.

A plaintiff in assumpsit is entitled to recover upon a parol agreement of the defendant, that, if the plaintiff would furnish and supply a certain married woman and her infant children, with board, washing and lodging for a certain time, he, the defendant, would pay him for it; averring and proving that he furnished the board, washing and lodging accordingly; and this, although the woman's husband be in the commonwealth at the time, and bound to furnish her and the children with necessaries; and the defendant be not morally or legally bound, but by his said promise. *Lanier v. Harwell*, 6 Munf. 79.

B. PROMISES BY EXECUTORS OR ADMINISTRATORS.

1. To Pay Out of Estate of Testator.

In *Collins v. Row*, 10 Leigh 114, it was held, construing the section of the act to prevent frauds and perjuries, in relation to a promise by an executor or administrator to pay any debt out of his own estate, that a promise by an executor to pay for goods delivered to him for the use of his testator's widow and legatees out of his testator's estate, and on proof that the as-

sets are sufficient for that purpose, was binding upon him in his individual capacity, although the promise was not in writing.

2. When Made in Consideration of Forbearance to Enforce Decree.

A parol agreement by an executor to pay a legacy out of his own estate, is not void under the act to prevent frauds and perjuries, if a decree was previously obtained for the legacy to be satisfied out of certain property, appointed by the testator; for part of which property the executor was accountable under the decree, and responsible de bonis propriis; and such agreement was made in consideration of forbearance to enforce the decree. *Patton v. Williams*, 3 Munf. 59.

C. AGREEMENTS IN CONSIDERATION OF MARRIAGE.

Distinction between Promise and Actual Gift.—A verbal promise, before marriage, to make a gift of personal property to a daughter in consideration of the marriage, can not be enforced by the husband, either against the father or the creditors; and if voluntarily executed by the father after the marriage, is void against all existing creditors. Any other rule would supersede the statute of frauds. However a verbal gift under such circumstances, when delivery is made prior to the marriage, is valid against the creditors. *Hayes v. Jones*, 2 Pat. & H. 583. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Subsequent Marriage Not Sufficient Part Performance.—Under § 1, ch. 140, of the Virginia Code of 1873, which provides that no action shall be brought upon any agreement made in consideration of marriage, unless the same be in writing, a parol agreement that certain property should go to the survivor of the marriage is void. In the absence of fraud or any agreement to reduce the settlement to writing, there can be no departure from the rule of subsequent marriage not being such

part performance as will take the case out of the statute. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157.

Includes Antenuptial Contracts.—The section of the statute, which says that no action shall be brought upon any agreement made upon consideration of marriage, was construed in *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157, to include antenuptial contracts.

Promise by Father before Marriage.—A parol promise by a father to his daughter's husband before the marriage, is a sufficient consideration to sustain a written agreement for the conveyance of a tract of land made after the marriage, if such written agreement be otherwise sufficient under the statute of frauds. So, also, if the marriage be had on the father's request. *Argenbright v. Campbell*, 3 Hen. & M. 144.

Specific Performance.—In *Foster v. Foster*, 4 Call 231, a contract made in consideration of marriage, was specifically enforced in equity upon parol evidence, although the plaintiff might have had redress at law. And see the title SPECIFIC PERFORMANCE.

D. CONTRACTS RELATING TO LAND.

1. Agreements Purporting to Pass Title.

a. General Rule.

Void if Verbal.—At law, a parol contract for the sale of land, even though a well-defined and concluded agreement, is void. *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Dunsmore v. Lyle*, 87 Va. 391, 393, 12 S. E. 610; *Blow v. Maynard*, 2 Leigh 29; *Perry v. Ruby*, 81 Va. 317. And see post, "Operation and Effect of Statute," IV.

b. Instances.

By Trustee.—Where a sale of real estate is made by a trustee, and no memorandum is made in writing by the trustee, such sale is void under the statute of frauds. *Ralphsnyder v. Shaw*, 45 W. Va. 680, 21 S. E. 953.

Thus, a trustee sells land and bids

it in for the creditor, but no conveyance or memorandum in writing of the purchase is made, nor is possession taken, but the possession remains in the former owner, under an agreement with the trustee, who is the agent of the creditor, that the owner shall take it at the bid. The purchase is not valid, being in direct contravention of the statute of frauds, and the creditor will not be charged with the land at the price at which it was bid in. *William & Mary College v. Powell*, 12 Gratt. 372.

Auction Sales in the Statute.—It was held, in *Brent v. Green*, 6 Leigh 16, that sales at auctions, in general, were within the statute of frauds.

c. Exceptions to Rule.

Assignment of Dower.—It is not indispensable to an assignment of dower, that it should be made by instrument in writing. *Gay v. Lockridge*, 43 W. Va. 267, 27 S. E. 306.

Dedication of Land.—A dedication of land to the public need not be made in writing so as to make it valid, as it is not a case falling within the statute of frauds. *Skeen v. Lynch*, 1 Rob. 186.

Judicial Sales.—Judicial sales made by chancery courts through its commissioners, are not within the statute of frauds, and are binding upon the bidder or purchaser without any written contract or memorandum of sale signed by him, or his agent. *Robertson v. Smith*, 94 Va. 250, 26 S. E. 579.

"Auction sales, except those under decrees of courts of chancery, are generally held to be within the statute of frauds requiring a memorandum in writing to make them valid. 'It was at one time thought that by reason of their publicity, sales of land or goods at auction did not come within the statute; but, whatever may formerly have been the rule, it is now well settled that such sales not only come within the letter, but also within the spirit of the statute. And no exceptions are made in this respect,

except in favor of what are strictly judicial sales. That is, sales made under an order or decree of a court of chancery, or subject to its confirmation and control.' Wood on Stat. Frauds, page 457. Some of the courts view sales by trustees, administrators and other persons, standing in a representative relation as quasi judicial sales, requiring no memorandum, and Browne on the Statute of Frauds at § 264, says there are differences of opinion and decision, turning upon the fact of their being regarded, or not, as quasi judicial sales. But the more lengthy discussion of the subject found in Wood on the Statute of Frauds indicates that by the weight of authority such sales are within the statutes." *Atkinson v. Washington and Jefferson College*, 54 W. Va. 32, 39, 46 S. E. 253.

2. Agreements between Joint Purchasers.

To Admit Third Person as Partner.—The statute to prevent frauds and perjuries applies to an agreement between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments by the parties. *Henderson v. Hudson*, 1 Munf. 510; *Walker v. Her-ring*, 21 Gratt. 678, 8 Am. Rep. 616.

Where Partner's Name Added without His Consent.—Two persons agreed to make a joint purchase of land to be sold at an auction. In pursuance of this agreement one of the parties bids in the property, and the auctioneer makes a memorandum in his name of the purchase. On a subsequent day a partner of the latter adds the name of the other party to the agreement, without any authority from him, and he refuses to fulfill his part of the agreement. In an action to recover a loss which results from a resale, it was held, that the agreement was within the

statute of frauds, and that the memorandum did not take it out of the statute, and that it was not binding upon the party whose name had been added without his consent. *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 616.

Prima Facie Entitled to Equal Parts.

—Where there is a joint purchase of land by two, to whom it is conveyed, and who gave their bond for the purchase price, they are prima facie entitled to equal parts of the land, and parol evidence is not admissible to prove an agreement between them for an unequal division. If there was any such understanding it is void by the statute of frauds and perjuries. *Jarrett v. Johnson*, 11 Gratt. 327.

3. Nature of Property.

Growing Trees.—Growing trees are a part of land, and a sale of them must be in writing under the statute of frauds. An oral sale of them is revocable until executed, but when executed by cutting the trees, they become chattels, and belong to the purchaser. *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509.

"It seems to me that the question turns on the nature of the trees as being a part of the realty, and not on when they are to be severed. Our statute of frauds and perjuries in the sixth clause of ch. 98 of the Code says that no action shall lie to charge any one 'upon any contract for the sale of real estate, or the lease thereof for more than a year,' unless the contract be in writing, whereas the English act requires a writing for a contract for the sale of lands 'or any interest in or concerning them;' and the omission from our act of these words has been thought to bear on the question, and make an oral contract good under our act, though not so under the English act. 2 Lomax Dig., ch. 3, p. 31, note. I see no force in this distinction. If trees are part of the land, they are 'land' under this act; not an interest,

not an entity to be separated in law from the soil, when we are talking about sales of land." *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521.

"Land includes everything belonging or attached to it, above and below the surface. It includes the minerals buried in its depths, or which crop out of its surface. It equally includes the woods and trees growing upon it. Rooted and standing in the soil, and drawing their support from it, they are regarded as an integral part of the land just as are the coal, the iron, the gypsum, and the building stone which enter so largely into the business of commerce. Attached to the soil, they pass with the land as a part of it. A conveyance of the land carries with it to the grantee the right to the forests and trees growing upon it. In the dealings of men, growing timber is ever regarded as a part of the realty. Upon the death of the ancestor they pass with it to his devisee, or descend with it to his heir, and not to his executor, or administrator. They are not treated as personality. They are not subject to levy and sale under execution. And so, upon principle, sound reason, and authority, we are of opinion, that they constitute an interest in, or are a part of, the land, and must be so treated by the courts." *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509.

Growing Crop of Wheat.—It was held, in *Kerr v. Hill*, 27 W. Va. 576, that a growing crop of wheat was realty, and under the statute of frauds could only be sold by a contract in writing.

Building.—An oral promise by the owner of land to give an interest therein to one who contributes money to build a house thereon is within the statute of frauds. *Walker v. Tyler*, 94 Va. 532, 27 S. E. 434.

Coal on Land.—Where there was a written agreement for the sale of land that the purchaser should search for coal a limited time, and that, if it be

found in certain quantities within that time, the purchaser should pay an additional sum, a parol agreement, varying these terms, is within the statute of frauds, and will not be enforced in equity. *Heth v. Wooldridge*, 6 Rand. 605, 18 Am. Dec. 751.

Right of Drainage.—The right of drainage through the land of another is an easement requiring for its enjoyment an interest in such lands which can not be conferred except by deed or conveyance in writing. *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399. And see generally, the title EASEMENTS, vol. 4, p. 851.

4. Nature of Contract.

Agreement to Devise Land.—A parol agreement to devise land is within the statute of frauds. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

To Give Widow Dower.—Where the verbal evidence of an agreement to give a widow dower in an equitable estate in fee simple, is contradictory, the statute of frauds ought especially to apply against it. *Rowton v. Rowton*, 1 Hen. & M. 92.

To Rescind Written Contract.—A written contract for the sale of land may be rescinded by a subsequent parol agreement by the parties, but to make such agreement effectual it must have been fully executed and be established by clear and conclusive proof. *Ballard v. Ballard*, 25 W. Va. 470; *Phelps v. Seely*, 22 Gratt. 573; *Jordan v. Katz*, 89 Va. 628, 630, 16 S. E. 866; *Straley v. Perdue*, 33 W. Va. 375, 10 S. E. 780.

To Recover Compensation for Fraudulent Representations.—A suit to recover compensation for the fraud of a purchaser at a judicial sale in representing that certain judgments against the land were paramount to the widow's contingent right of dower, whereby the plaintiff was induced to take the purchase off the defendant's hands, is not a suit on a contract for the sale of lands, within the statute of

frauds. *McMullin v. Sanders*, 79 Va. 356.

To Pay Costs of Appeal.—A parol agreement was made between the owner of real estate, who was involved in a law suit with reference to his rights thereto, and another, that if the latter would pay one-half of the costs necessary to an appeal of the case, he would be given one-half interest in the land. This was held in *Woods v. Ward*, 48 W. Va. 652, 37 S. E. 520, to be within the statute of frauds.

To Give Option on Land.—A. empowers C. to purchase lands for him; M. empowers B. to sell lands for him, with directions to give C. a refusal. A. informs B. that he and C. are the same person, and offers 2s, saying if M. will not take that price he will give more than any other person. B. promises C. and A. a refusal; but afterwards, without informing M. of their offers, purchases for himself. In such a case, as the transactions between A., C. and B. were not in writing, B. may plead the act, to prevent frauds and perjuries. *Buck v. Copeland*, 2 Call 218.

Before or after Execution of Deed.

To Partition Land.—Where a deed conveys land by well-defined boundaries, a parol agreement, made before the execution of the deed, that other adjoining lands beyond these boundaries shall be included in it, or an agreement, after its execution, that it shall extend to and include other adjoining lands, can not have the effect of embracing those lands within the deed. *Pasley v. English*, 5 Gratt. 141.

Land Bought by Agent.—Where a man merely employs an agent to buy an estate, who buys it for himself, and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he can not compel the agent to convey the estate to him, as that would be in violation of the statute of frauds. *Nash v. Jones*, 41 W. Va. 769, 24 S. E. 592.

To Take Bargain of Another.—In

order for a verbal agreement to be valid between a purchaser of land and another, by which the latter agrees to take the former's bargain, the transaction must occur before the legal title passed to the original purchaser; otherwise it will have to be in writing, to be valid. *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329.

To Convey Remainder.—On a parol contract for the sale of land, the vendor executes a deed by which he conveys a part of the land purchased to the vendee. A parol agreement that the deed was in only part execution of the contract, and that the vendor would convey the remainder at another day, could only be relied on as an independent contract, and must either have been in writing, or there must have been part performance. *Broughton v. Coffer*, 18 Gratt. 184.

Promise of Agent to Reduce Agreement to Writing.—The fact that the agent promised to reduce it to writing and did not do so is of no avail to avoid the statute, nor was he guilty of any fraud in not doing so. For it is a presumption of law that the parties equally knew the law and the necessity of reducing the agreement to writing to make it valid, and therefore it was the legal fault of Gould and his firm that they did not obtain a valid contract. *Parkersburg Mill Co. v. Ohio River R. Co.*, 50 W. Va. 94, 40 S. E. 328.

5. Parol Gifts of Land.

See the title SPECIFIC PERFORMANCE.

6. Trusts.

See generally, the title TRUSTS AND TRUSTEES.

Were Not Enacted in Virginia.—The provisions of the 7th and 8th sections of the English statute of frauds never were enacted by our legislature and were never in force in Virginia; and the law here, in relation to declarations of trust, is and always has been, the same that it was in England before the

statute. *Hancock v. Talley*, 1 Va. Dec. 433.

May Be Established by Parol.—The sections of the English statute of frauds in relation to trusts, are not embodied in our statute of frauds, and it is well settled that where land is purchased and paid for by one party, and the conveyance is taken in the name of another, a trust will be raised for the benefit of the real purchaser which may be proved by parol testimony. *Bank of U. S. v. Carrington*, 7 Leigh 566; *Fluharty v. Beatty*, 4 W. Va. 514.

The law is settled in Virginia that express, as well as implied trusts, may be proved by parol testimony, and that the statute of frauds and perjuries has no application to either. So it was held, in *Walraven v. Lock*, 2 Pat. & H. 547, that the statute had no application to a case, where land was bought under a parol agreement that it was for the benefit of another, and the trust was allowed to be established by parol testimony.

T. is the owner in fee of the remainder in a valuable farm, the deed of conveyance of which has been set aside by decree of the circuit court. I. sets up and attempts to prove a parol agreement made between T. and I. whereby, in case I. would join T. in appealing the cause to the supreme court of appeals, and pay one-half of the fees, expenses, and costs thereof, and if they succeeded in reversing the decree and restoring T. to his rights in the land, T., in consideration thereof, was to convey to I. one-half of his interest in the land. I. paid no money, and no part of the fees, expenses or costs. Held, that no resulting trust could arise in favor of I., and, further, that the right of I., being solely dependent on the verbal promise of T., is within the statute of frauds. *Woods v. Ward*, 48 W. Va. 652, 37 S. E. 520. See the title TRUSTS AND TRUSTEES.

E. AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR

1. Incapable of Performance.

Statement of Rule.—It is settled law that a verbal contract which can not be fully performed for more than one year, including the day of making thereof, comes within the provisions of the statute of frauds and is invalid. *Parkersburg Mill Co. v. Ohio River R. Co.*, 50 W. Va. 94, 40 S. E. 328; *Kimmins v. Oldham*, 27 W. Va. 258; *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237.

Construction of Statute.—It was held, in *Kimmins v. Oldham*, 27 W. Va. 258, that the 7th clause of the statute of frauds, ch. 98 of the Code of West Virginia, did not include an agreement which was simply not likely to be performed, nor one which was merely expected to be performed, within the space of one year; but did include any agreement, which by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, did not admit of performance according to its language and intention within a year from the time of its making.

Contract for Personal Services.—An agreement to employ a person as an agent, which was not to be performed within a year, must be in writing under the statute of frauds, or some memorandum thereof must be in writing signed by the party to be charged or his agent. *Rahm v. Klerner*, 99 Va. 10, 37 S. E. 292.

To Begin in Future.—A parol contract for personal services, made in August, for the term of one year, to begin on the first day of the ensuing October, was held in *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, to be a contract not capable of being fully performed in one year, and hence was not capable of being enforced, not being in writing.

Recovery on Quantum Meruit.—A contract to render personal services

for a longer term than one year is void, under the statute of frauds, and no action can be maintained upon the contract itself; but after performance of the service, there may be a recovery of its worth upon a quantum meruit. *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237.

Agreement between Maker and Indorser of Note.—Where a note is by its terms incapable of performance within the year from its date, and a verbal agreement between plaintiff and defendant, whose names appear thereon indifferently as makers and indorsers, to refund in equal proportion any loss suffered thereby, being likewise incapable of performance within a year, it is inoperative and void under the statute of frauds. *Kimmins v. Oldham*, 27 W. Va. 258.

Contract between Sheriff and Deputy—Acceptance of Bond—Statute Not Applicable.—Where a bond was executed by a deputy sheriff to his principal, which recited on its face as a part of the condition, that the deputy was to act as such during the term of the sheriff's office, and was accepted by the sheriff, in an action on such bond, it was claimed that the contract was void, under the statute of frauds, because verbal, which could not be performed according to the intent of the parties within a year. The statute was held inapplicable to the case. The execution and acceptance of the bond was held a contract. *Davis v. Baker*, 45 W. Va. 456, 32 S. E. 239.

2. Possibility of Performance.

Not within Statute.—A contract capable of performance, and which may be required to be performed, within one year, does not fall under that clause of the statute of frauds requiring an agreement that is not to be performed within a year to be in writing. *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604.

Contracts for Services during Life of Promisor.—Similarly, an agreement

to leave a person a support after the death of the promisor, in consideration of services to be rendered by the promisee during the balance of the latter's life, full performance of the contract being dependent upon a contingency that may happen within a year, is also not within the provisions of the Virginia Code. *Thomas v. Armstrong*, 86 Va. 323, 10 S. E. 6, 5 L. R. A. 529.

Contract to Terminate on Reasonable Notice.—A parol agreement between a manufacturer and his agent, by which the former agrees to furnish the latter with goods to be sold in a territory, which arrangement is to continue so long as either party may choose, until the party desiring to put an end to it shall give the other reasonable notice of terminating the agreement, is a valid one although it is verbal, as it does not come within the statute of frauds, requiring an agreement which is not to be performed within a year to be in writing. The agreements contemplated by this provision of the statute are such as were to have their performance postponed a year or more, and not such as might or might not chance to be performed within that time. *Sterling Organ Co. v. House*, 25 W. Va. 64; *Jordan v. Miller*, 75 Va. 442.

Contract for Stock on Call.—For instance a contract to sell certain stock at the end of three years, with an option to the purchaser to call it at any time, may be performed within a year, and is therefore not within the statute. *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337.

Performance Dependent on Contingency.—When an agreement is to be performed upon a contingency, and is to be performed after the year, then writing is not necessary, for the contingency might happen within the year. If by its terms, or by reasonable construction, a contract not in writing can be fully performed within a year, although it can be done only by the occurrence of some improbable event, it

is not within the statute; so if it can be performed on one side within the year. *Thomas v. Armstrong*, 86 Va. 323, 10 S. E. 6, 5 L. R. A. 529; *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337; *Jordan v. Miller*, 75 Va. 442.

Contract of Partnership for Indefinite Time.—Where a contract of partnership was made by parol, and no time was fixed for its continuance, and the business may be completed within a year, it does not fall within the provisions of a statute, which prohibits the bringing of an action upon any agreement that is not to be performed within a year, unless in writing, and signed by the party to be charged or his agent. The agreements contemplated are such as by their terms have performance postponed beyond one year, and not such as may or may not chance to be performed within that period. *Jordan v. Miller*, 75 Va. 442.

3. Possibility of Defeasance.

Contract between Carriers for Erection of Gate.—An oral contract made on behalf of a street railway, by its officer, with another carrier, to jointly erect gates and maintain a flagman at a crossing of their respective tracks is not a contract not to be performed in a year although no time is fixed within which it is to be performed. A change of circumstances surrounding the parties would at any time have terminated the contract. *Richmond, etc., R. Co. v. Richmond, etc., R. Co.*, 96 Va. 670, 32 S. E. 787.

Distinction between "Defeasance" and "Performance."—Although it is possible for a contract to be defeated within a year, if it is one by its terms to be performed beyond the year, it is within the statute. Cases of this kind can not be compared with those cases contemplated by the statute, which provides for agreements "not to be performed within a year," and not agreements not to be defeated in that time. See, for full discussion *Seddon v.*

Rosenbaum, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337.

4. Performance on One Side.

A contract that may be performed on either side within one year is not within the statute of frauds. It is not necessary that it should be performable on both sides in order to take it out of the statute. *Reed v. Gold*, 102 Va. 37, 45 S. E. 868; *Thomas v. Armstrong*, 86 Va. 323, 10 S. E. 6, 5 L. R. A. 529.

5. Parol Lease of Land to Continue More than One Year.

Upon the trial of a writ of unlawful detainer, defendant sets up title in himself. Plaintiff may prove that the defendant entered on the premises under a parol lease from himself; though the lease proved was to continue more than one year. *Adams v. Martin*, 8 Gratt. 107.

F. SALES OF GOODS.

Statute Has Not Been Adopted.—It was held in *Chapman v. Campbell*, 13 Gratt. 105, that the 17th section of 29 Char. II, ch. 3, which requires that in order for a contract for the sale of goods, wares and merchandise, for the price of ten pounds sterling and upwards, to be good, the buyer shall accept and actually receive in whole, or in part the thing sold, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum of the bargain be made and signed by the parties or their agents, had not been adopted in this state.

G. LOANS OF PERSONAL PROPERTY.

See the title LOANS.

H. REPRESENTATIONS AS TO CREDIT.

In *Lang v. Lee*, 3 Rand. 410 (1825), it was held, by two judges out of a court of three, two judges being absent, that where one man recommends another to a third, as being worthy of trust, by which credit is obtained, the party recommending shall be answer-

able for any loss incurred thereby, if he knew at the time that the man for whom he vouched was not trustworthy.

The above case was decided before the Virginia statute concerning representations as to credit was enacted, and of course the rule would be otherwise now.

I. RATIFICATION BY INFANT UPON COMING OF AGE.

No particular form of words is necessary to constitute a ratification after coming of age of a contract made during infancy, but the words must import an unequivocal and unconditional recognition and confirmation of the previous engagement, though they need not amount to a direct promise to pay. The memorandum of writing must recognize the debt as binding on the person who signs it, and must, in express terms or by fair construction, refer to the contract to be ratified, and treat it as still subsisting. If, however, it be such a writing as would bind a principal, who was an adult, as a ratification of the act of a party acting as his agent, it will be sufficient. *Ward v. Scherer*, 96 Va. 318, 31 S. E. 518. See the title INFANTS.

IV. Operation and Effect of Statute.

A. IN GENERAL.

Contracts Not Void but Can Not Be Enforced.—In *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875, § 2840 of the Code was construed not to make void the contracts therein mentioned, but that simply no action shall be brought upon them. Testimony in regard to them is admissible in a collateral action.

"A parol contract is not void by the statute of frauds, though its obligation may be repelled by the party sought to be bound by it. The protection is introduced for his benefit by the statute and may of course be renounced by him. If he is willing to abide by it, if disdaining the mala fides of breaking his plighted faith, merely

because the ceremonies of the law have been neglected, he recognizes the contract and confesses its obligation, shall it not be enforced?" *Fire, etc., Ins. Co. v. Morrison*, 11 Leigh 354, 365, per Tucker, P.

But there are numerous statements, apparently loose and illconsidered, by the courts of both Virginia and West Virginia, to the effect that contracts within the statute are void, and not simply unenforceable. See, for instance, *Cutler v. Hinton*, 6 Rand. 509; *Adams v. Martin*, 8 Gratt. 107; *Noyes v. Humphreys*, 11 Gratt. 636; *Dunsmore v. Lyle*, 87 Va. 391, 393, 12 S. E. 610; *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Radcliff v. Poundstone*, 23 W. Va. 724; *Kimmins v. Oldham*, 27 W. Va. 258; *Ralphsnyder v. Shaw*, 45 W. Va. 680, 31 S. E. 953.

Not Retrospective.—The statute of frauds has no application to a contract made prior to its passage. *Williams v. Lewis*, 5 Leigh 686.

B. EFFECT OF PERFORMANCE ON BOTH SIDES.

Executed Contracts.—An agreement concerning the purchase of lands, perfected by the execution of a conveyance on the part of the seller, and by acceptance thereof and payment of the purchase money, or execution of a bond or bonds for the same, on the part of the purchaser, is final and conclusive between the parties and their heirs, in law; and ought not to be disturbed in equity, unless some note or memorandum in writing be made, pursuant to the statute of frauds and perjuries (if subsequent to that statute) at the time, or after the execution of such conveyance or bond, whereby it may appear that the parties had agreed to some further explanation or modification of the terms of the agreement as therein expressed. *Vance v. Walker*, 3 Hen. & M. 288. See also, in support, *Walker v. Aicklin*, 2 Munf. 357.

Even as to those executory contracts

which are within the statute, it is now well settled that when they have been fully executed the statute has no power over them and no effect upon the rights, duties, and obligations of the parties. *McMullin v. Sanders*, 79 Va. 356.

C. EFFECT OF PART PERFORMANCE.

1. Rule at Law.

At law, part performance of a parol agreement for the sale of land, will not exempt it from the operation of the statute of frauds. *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Anthony v. Leftwich*, 3 Rand. 238.

2. Rule in Equity.

a. In General.

Character of Acts.—In order for acts of part performance to take an alleged parol agreement for the sale of real estate out of the statute of frauds, they must be shown to be of that positive and substantial character, which is required to bring such a case within the well-recognized principles of equity jurisdiction. *Hudson v. Max Meadows, etc., Co.*, 99 Va. 537, 39 S. E. 215. See *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 183.

Acts of part performance to take a parol contract out of the statute of frauds, must be of such unequivocal nature as of themselves to be evidence of the existence of an agreement; as for example, where, under parol agreement to sell land, the purchaser is put in possession, and makes improvements. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

b. Payment of Purchase Money Alone.

The payment of the purchase money is not of itself such part performance as will take the case out of the statute of frauds. *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297.

A purchaser of land by parol contract, having acquired an equitable title therein by part performance of the contract, such as will take the contract out of the statute of parol contracts

and entitle him in equity to have the contract specifically performed, may assert, as against the creditors of the vendor, his prior equity; but mere payment of the purchase money is not such part performance as will vest in him such equitable title and superior equity. *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530.

Where Vendor Insolvent.—It was held, in *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391, that in the case of verbal contract for the sale of land, the payment of the purchase money was not of itself such performance as would take the case out of the statute of frauds, although the vendor had become insolvent. See *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Anthony v. Leftwich*, 3 Rand. 238, 255; *Jackson v. Cutright*, 5 Munf. 308.

c. Possession and Improvement.

Where a married woman, who is the owner of a tract of land lying on a creek, for a valuable consideration, gives her verbal assent that a party may build a tramroad along said creek, through her said lands, for the purpose of transporting timber from lands lying above hers to market, and in pursuance of said verbal assent said party, at considerable expense, under her immediate observation, constructs such road, and operates the same for some time, a court of equity will restrain her, by injunction, from obstructing said road, and thereby defeating its use as aforesaid. *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793. See generally, the title INJUNCTIONS.

d. Payment of Purchase Money with Possession and Improvement.

In the case of a verbal contract of the sale of real estate, where there is receipt of purchase money by the vendor, delivery of possession to the vendee, who continues to hold possession and improve the property for many years, with the knowledge and acquiescence of the vendor, it was held, that there was sufficient part perform-

ance to take the case out of the statute. *Hedrick v. Hern*, 4 W. Va. 620.

The delivery and taking possession of land by the purchaser under a parol contract, at the time of the purchase and in execution of it, where the purchase money has been paid, is such part performance as to take it out of the statute, especially where, if the sale were vacated, the vendees would be unable to get their money back, and a pleading of the statute of frauds by the vendor would operate as a fraud on the vendee. *Long v. Hagerstown, etc., Mfg. Co.*, 30 Gratt. 665.

e. Joint Possession.

Joint Possession of Vendor and Purchaser.—When the possession is the joint possession of the vendor and purchaser, it can not be relied on as a part performance to take a parol contract of sale out of the statute. *Wright v. Pucket*, 22 Gratt. 370.

Possession of Joint Purchasers.—Where two parties jointly purchase land, and they enter into joint possession of the property and remain for many years, an attempt by one of the purchasers to defraud the other by pleading the statute of frauds, will not apply as there is such part performance of the verbal contract as will take it out of the operation of the statute. *Brown v. Brown*, 77 Va. 619.

f. Making of Mutual Wills.

The making of mutual wills, in accordance with a parol agreement between two sisters to leave each other all their property, is not such a part performance as will take the case out of the operation of the statute of frauds. To do this, the acts of part performance must be of such an unequivocal nature as of themselves to be evidence of the existence of an agreement, without any other information or evidence of the existence of a contract, the terms of which equity requires, if possible, to be ascertained and enforced. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

D. EFFECT OF PERFORMANCE BY ONE PARTY.

Although an agreement to devise real property is unilateral, yet having been performed by the other party, the agreement is binding, and will be enforced. *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992.

By Vendee.—Thus, it is not necessary for the vendees of certain timber rights to sign and acknowledge the contract conveying the same to them, to render them legally bound. Acceptance and operation thereunder binds them to all its conditions and stipulations. *Merchants' Coal Co. v. Billmeyer*, 54 W. Va. 1, 46 S. E. 121.

E. EFFECT OF FRAUD.

Fraud Most Often Attempted to Be Perpetrated.—"The fraud," says Judge Wells in *Glass v. Hulbert*, 'most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the party is held, by force of his acts or silent acquiescence which have misled the other to his harm, to be estopped from setting up the statute of frauds.'" *Potts v. Fitch*, 47 W. Va. 63, 34 S. E. 959, 961.

Purpose of Statute.—The statute for the prevention of frauds has been universally considered as an exposition of the common law and was intended to avoid deeds contrived and devised fraudulently for the delaying and defrauding of creditors in those cases only, where both parties participate in

the fraud. The grantor may intend a fraud, but if the grantee is a fair bona fide and innocent purchaser, his title is not to be affected by the fraud of his grantor. *Goshorn v. Snodgrass*, 17 W. Va. 717.

Statute Not Allowed to Defeat Purpose for Which Enacted.—At an early day the courts established the doctrine that a statute which had been enacted for the purpose of preventing and suppressing frauds and perjuries could not be allowed to become itself an instrumentality or engine for the perpetration of fraud. *Richardson v. McConaughy*, 55 W. Va. 546, 47 S. E. 287, per Poffenbarger, P.

Notice Necessary to Vitiating Innocent Purchaser's Title.—Under our statute of frauds, as well as the English statute of 13th Elizabeth, a bona fide purchaser for value having no notice of covin, fraud, collusion, etc., will be protected. To vitiate a conveyance, there must be a fraudulent design in the grantor and notice of that design in the grantee. *Goshorn v. Snodgrass*, 17 W. Va. 717.

Not Available to Enact Fraud.

One of two joint purchasers or vendees of property can not take a conveyance to himself for the property, and thereby defraud his copurchaser by the plea that there was no contract in writing between them and their vendor, and that the contract was therefore void, as the statute of frauds was enacted for the purpose of preventing fraud, and in such a case can not be pleaded successfully. *Brown v. Brown*, 77 Va. 619.

It was said by Anderson, J., in *Lester v. Lester*, 28 Gratt. 737, 741, "With regard to parol contracts whilst this court has ever regarded the statute of frauds as dictated by wise and sound policy, and to be firmly enforced, yet it must be with that equitable construction which has been given to it and which is coeval with the statute itself; to wit, that it was designed to prevent

frauds, and should not be interpreted and enforced so as to be made an instrument of fraud."

Of No Effect Where Suit Is to Obtain Relief from Fraud.—The statute of frauds is of no effect where the cause is a suit, not upon a contract for the sale of land, but to obtain relief from the results of false representations of a party which have induced the plaintiff to enter into a contract by which he has suffered pecuniary loss. *McMullin v. Sanders*, 79 Va. 356.

F. EFFECT OF WAIVER OF PROTECTION OF STATUTE.

1. In General.

If an answer admits an oral contract for the sale of land, the same, or substantially the same, as that alleged in a bill, and the statute of frauds is not relied upon as a defense, no proof of the contract, or of delivery of possession under it, is required, and no writing is required to attest the contract. *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998.

No Proof of Agreement Necessary.

"Where a defendant, without pleading the statute of frauds, or relying on it in his answer, confesses the agreement as stated in the bill, and allows the bargain to be complete, and does not insist on any fraud, circumvention or surprise in obtaining it, it may be truly said there can be no danger of perjury; because he might, according to my construction, have protected himself from answering, by pleading the statute, had he chosen to do so; and because having waived the benefit of that protection, which he must be presumed to have done voluntarily, he hath, by his own acknowledgment taken away the necessity of proving the agreement." Per Tucker, J., in *Argenbright v. Campbell*, 3 Hen. & M. 144.

When a plaintiff, seeking to avoid a sale, admits in his bill that it was made, but does not set up the statute of frauds, nor claim the benefit thereof, he is taken to have admitted an agree-

ment which is either good under the statute, or otherwise binding upon him; and the contract will be held good, although it does not appear that such memorandum was made and signed. *Atkinson v. Washington and Jefferson College*, 54 W. Va. 32, 46 S. E. 253.

Effect of Parol Agreement to Waive Forfeiture as Defense to Action.—A parol agreement on the part of a vendor of land, who has put the purchaser in possession while the contract remains executory, to waive the forfeiture of the contract which the purchaser has incurred, would be of no effect as a defense to an action at law by the vendor to recover possession, and could be enforced in equity only where there has been part performance. *Williamson v. Paxton*, 18 Gratt. 475.

2. Withdrawal of Waiver.

Where a defendant has by his answer waived the statute of frauds and substantially admitted the agreement as set out in the bill, and, on appeal from a decision of the circuit court, this court decides that the plaintiff is entitled to relief founded upon said agreement, the defendant, when the case is sent back, should not be permitted to withdraw his waiver, and file a new plea setting up the statute of frauds. *Barrett v. McAllister*, 35 W. Va. 103, 12 S. E. 1106.

G. REMEDIES WHERE STATUTE IS SET UP.

1. At Law.

Recovery on Implied Contract.—It is a general rule that where one has rendered services, paid a consideration, or sold and delivered goods in execution of an oral contract, which on account of the statute can not be enforced against the other party, such one can in a court of law recover the value of the services or of the goods upon a quantum meruit or valebant. *Kimmins v. Oldham*, 27 W. Va. 258.

When defendant by parol contract

employed plaintiff to build a house, agreeing to pay him in money, merchandise, and land, and subsequently repudiated the contract, it was held, that the plaintiff could not recover on the special contract, it not being in writing, but could recover on an implied contract for work done and materials furnished. *McCrowell v. Burson*, 79 Va. 290.

Assumpsit.—Where a contract of sale of real estate is not by deed, and no conveyance has been made, a vendee can recover back in an action of assumpsit what he has paid on the contract, when the conditions have failed, or the contract has been rescinded, or the vendor refuses to comply with his part of the contract. *Bier v. Smith*, 25 W. Va. 830.

2. In Equity.

a. In General.

Equity will not relieve against the simple moral wrong of refusing to perform an agreement which the statute forbids the courts to enforce. To do so would be to utterly repudiate the statute, and the law is well settled that such refusal is not a fraud against which equity can give relief. *Pusey v. Gardner*, 21 W. Va. 469.

b. Specific Performance.

"It has long been the practice in this state to enforce against the vendor, who alone has signed, a title bond for the sale and conveyance of real estate in favor of the vendee and his assignee, for if the vendee has performed his part of the agreement, is ready and willing to perform it, or has been prevented from performing it by the wrongful act of the vendor, the vendee will not be confined to his action at law for the amount of the penalty, but may choose his remedy in equity for specific performance. See our statute of frauds as to verbal agreements (ch. 98, p. 715, Code, 1891)." *Monongah Coal, etc., Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201, 202. See the title SPECIFIC PERFORMANCE.

V. The Writing.

A. SIGNATURE OF MEMORANDUM.

1. In General.

The whole contract, referred to in the statute of frauds, including the consideration, need not be in writing. But so much as is required to be embodied, memorized or noted in writing, must be signed by the party to be charged by the contract, or his agent. *Capehart v. Hale*, 6 W. Va. 547.

2. By Party to Be Charged.

When Signed by Vendor Need Not Be Signed by Buyer.—A contract in writing for the sale of real estate, in order to be binding on the seller, is not required to be signed by the buyer who has accepted it, if it is signed by the vendor, the one making the written contract of sale, and the one sought to be charged thereby. No writing signed by the vendee is required to prove the vendee's obligation to pay the consideration price, or to make it binding upon him. See ch. 98, W. Va. Code, 1891; *Monongah Coal, etc., Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201. And see *Capehart v. Hale*, 6 W. Va. 547.

3. By Agent.

a. In General.

Agent May Be Authorized to Sell.—A person owning land may authorize another to make a contract for the sale thereof, and if a contract be made under such authority, the owner of the lands may be charged by virtue of the contract, provided there be a memorandum thereof in writing signed by the person authorized to make it. *Conaway v. Sweeney*, 24 W. Va. 643.

How Authorized.—The West Virginia statute of frauds requires the memorandum of the purchase of the lands to be in writing, and signed by the agent, to be binding. But it does not require the agent to have been authorized in writing to sign such contract of purchase, and he may be au-

thorized verbally to make such contract, while by the English statute of frauds the agent must be thereunto lawfully authorized in writing. *Kennedy v. Ehlen*, 31 W. Va. 540, 8 S. E. 398; *Conaway v. Sweeney*, 24 W. Va. 643; *Brown v. Brown*, 77 Va. 619; *Yerby v. Grigsby*, 9 Leigh 387.

Authority Need Not Be Sealed.—Neither the statute of frauds nor the law of agency requires that the authority of an agent to make a parol contract, whether oral or written, shall be in writing. The authority to make a deed, or contract under seal, must be under seal, but a contract for the sale of lands need not be under seal, the statute of frauds only requiring that such contract shall be in writing and signed by the parties to be charged or their agents. *Campbell v. Fetterman*, 20 W. Va. 398.

Principal Bound Though Only Agent's Name Signed.—A person owning lands may by parol authorize another to make a contract for the sale thereof; and if a contract be made under such authority, the owner of the lands may be charged by virtue of the contract, provided there be a memorandum thereof in writing, signed by the person authorized to make it. It is sufficient if the agent sign his own name to the memorandum—the statute not making it indispensable that he should sign the name of the party to be charged therewith. *Yerby v. Grigsby*, 9 Leigh 387. And such contract is just as binding on the owner as if he had made it himself, provided there was no fraud or collusion between the agent and the vendee. *Conaway v. Sweeney*, 24 W. Va. 643.

b. Special Agent.

But a special agent for the sale of land is not such an one as has power to bind his principal by signing a contract for the sale of real estate. *Chapman v. Jewett*, 2 Va. Dec. 336.

c. Auctioneers.

Auctioneer as Agent.—In auction

sales, the auctioneer is the agent of both the buyer and the seller, and his entry of the sale is a sufficient note in writing of the agreement, signed by a person duly authorized by the purchaser, within the meaning of the statute of frauds. The entry may be made as well by the clerk as by the auctioneer. *Smith v. Jones*, 7 Leigh 165, 30 Am. Dec. 498; *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 616; *Capehart v. Hale*, 6 W. Va. 547, 551; *Brown v. Butler*, 87 Va. 621, 13 S. E. 71.

Deputy Sheriff.—So at an auction by the deputy sheriff, he is the agent for both parties, and his entry of the sale is a sufficient memorandum in writing, according to the requisition of the statute of frauds. *Brent v. Green*, 6 Leigh 16.

When Parol Evidence Admissible to Alter Auctioneer's Memorandum.—In suit by vendors of land sold at public auction, against purchaser to compel him to comply, parol evidence is admissible to prove that the written memorandum of contract signed by the auctioneer, does not contain a stipulation relied on as an essential condition. *Averett v. Lipscombe*, 76 Va. 404.

d. Member of Firm.

In *Kyle v. Roberts*, 6 Leigh 495, it was held, in the lower court, that a lease of property, signed by one member of a partnership, was a sufficient note in writing of the agreement for the lease to the partnership, to take the case out of the statute of frauds. On appeal the case was reversed and remanded on other grounds.

e. Clerk of Court.

A release entered of record, by a verbal direction in open court, is valid under the statute of frauds; for the clerk who makes the note or memorandum is to be considered as the agent of both parties. *Boykin v. Smith*, 3 Munf. 102.

4. Time of Signature.

Signature Should Be Made at Time of Sale.—In *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 616, it was

doubted whether the auctioneer by writing his name to the terms of the sale after the sale was completed, could bind the purchaser on the contract.

B. REQUISITES AND SUFFICIENCY.

1. Completeness.

Must Contain Every Essential of Agreement Except Consideration.—It is essential for the memorandum, relied upon to take a contract out of the operation of the statute, to contain every essential term of the agreement, except the consideration. And when such memorandum of a contract for personal services as a salesman failed to show the territory in which the plaintiff was to sell, the defect could not be supplied by parol proof. *Rahm v. Klerner*, 99 Va. 10, 37 S. E. 292.

2. Certainty.

Must Be Certain or Capable of Being Made So.—Every agreement required by statute of frauds to be in writing must be certain in itself, or capable of being made so by reference to something else whereby the terms can be ascertained with reasonable certainty, and in contracts for the sale of lands the court may go outside of the writing for the purpose of identifying and ascertaining the land sold, where general words of description capable of being made certain are used in the writing. *White v. Core*, 20 W. Va. 272.

3. Consideration.

It is not necessary that the consideration should be expressed in the writing. *Rahm v. Klerner*, 99 Va. 10, 37 S. E. 292.

4. Illustrations.

Statement of Dates and Amounts of Payments and Description of Land.—The preparing and signing a deed by the vendor, which states the dates and amounts of the payment, and describes the land, is a sufficient memorandum in writing of the contract for the sale of the real estate, to satisfy the statute of frauds, in a suit for specific perform-

ance, although the deed was never delivered, but was retained by the vendor. *Bowles v. Woodson*, 6 Gratt. 78; *Parrill v. McKinley*, 9 Gratt. 1. See *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216, 228.

Letter Promising to Make Deed "According to Contract."—A letter promising to make a deed for a tract of land, "according to contract," is a sufficient memorandum or note in writing, under the act to prevent frauds and perjuries, notwithstanding the terms of such contract are not mentioned, if the party claiming the conveyance can prove by the testimony of one witness, what price was agreed to be given for the land. *Johnson v. Ronald*, 4 Munf. 77.

Resolution of Board of Directors Containing Terms of Contract.—It was decided in *Central Land Co. v. Johnston*, 95 Va. 223, 28 S. E. 175, that the resolution of a board of directors duly signed by its president and secretary, which sufficiently sets forth the terms of a contract, is a compliance with the statute of frauds. Affirmed in *Newport News, etc., Development Co. v. Newport News, etc., R. Co.*, 97 Va. 19, 32 S. E. 789.

When, however, such a resolution is relied on as the evidence of a written agreement, it must show on its face a complete and concluded agreement between the parties. Nothing must be left open for future negotiation and agreement, otherwise it can not be enforced. *Newport News, etc., Development Co. v. Newport News, etc., R. Co.*, 97 Va. 19, 32 S. E. 789. See *Virginia Hot Springs v. Harrison*, 93 Va. 569, 25 S. E. 888; *Berry v. Wortham*, 96 Va. 87, 30 S. E. 443; *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457.

Entering Name of Stockholder on Company's Lists.—If a person verbally agrees to take stock in a joint stock company to be paid for in installments covering a period of more than one year, and the company accepts him as a stockholder, and enters his name on

the roll of its stockholders, this is sufficient to bind him on his contract of subscription. Such action on the part of the company is all that it is required to do, or can do, to clothe the party with the character of a stockholder, and all that is necessary to be done for that purpose. *Reed v. Gold*, 102 Va. 37, 45 S. E. 868.

C. SEPARATE WRITINGS.

Must Show Their Connection with Contract.—While it is well settled that a complete contract, binding under the statute of frauds, may be gathered from letters and writings between the parties, the letters and writings of themselves must show their relation to the contract. If the court can not ascertain from the letters themselves, or from some other writing therein referred to, the essential terms of the contract, the writing does not take the case out of the statute. Any such defect can not be supplied by parol proof, for that would introduce all the mischiefs which the statute was intended to prevent. *Rahm v. Klerner*, 99 Va. 10, 37 S. E. 292.

Telegrams.—Thus a contract for the sale of real estate may be made by means of telegraphic communications, and if it can be collected from the telegrams referring to one another and directly related to one another, so that it may be fairly said to constitute one paper relating to the contract, and if the telegrams are signed by the parties or their agents, and it appears by them that the minds of the parties met, and that the terms of the contract, by referring to the telegrams, can be made to clearly appear, it is a sufficient compliance with the statute which requires contracts for the sale of real estate to be "in writing and signed by the party to be charged thereby, or his agent." *Cobb v. Glenn Boom & Lumber Co.* (W. Va.), 49 S. E. 1005. See the title **SPECIFIC PERFORMANCE**.

Parol Evidence Inadmissible.—Where the memorandum of the bargain be-

tween the parties is contained in separate pieces of paper, and these papers contain the whole bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the signed paper make such reference to the other written paper, or papers, as to enable the court to construe the whole of them together as constituting all the terms of the bargain. But if it be necessary to produce parol evidence in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the contents of the signed paper to show a reference to or connection with the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain so as to satisfy the statute. But it is not necessary that the signed paper should refer to the unsigned paper as such. It is sufficient to show that a particular unsigned paper, and nothing else, can be referred to, and parol evidence is admissible for that purpose. *Darling v. Cumming*, 92 Va. 521, 23 S. E. 880.

Must Refer to Each Other Distinctly.—Where it is attempted to show a sufficient memorandum of a contract for the sale of real estate, by connecting a signed with an unsigned paper, the authorities require that the signed paper must refer to the unsigned paper in clear and distinct terms, but it is not necessary to refer to it *eo nomine*. Parol evidence is admissible to identify it if the reference to it is sufficiently clear to exclude the idea that any other paper can be referred to. A reference in a will to an "understanding" is not a sufficiently clear reference to an unsigned paper—there being no evidence in the will to connect it with the paper. *Darling v. Cumming*, 92 Va. 521, 23 S. E. 880.

Mutual Wills Held Insufficient Where No Reference to Agreement.—A verbal agreement was made between two sisters that they would make mutual wills

and each should be made the beneficiary of the other, so that the survivor would get the whole estate. A suit to enforce this agreement was defended on the ground of the statute of frauds, and the question was raised as to the wills being sufficient memoranda to satisfy the requisitions of the statute. As each will only purported to be a mere will, and neither alluded to any contract or any other writing, they were held insufficient. The established rule being that the memorandum of a contract for sale of real estate must show, either on its face or by reference to some other writing, the contract between the parties, so that it can be understood without recourse to parol proof. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

D. DELIVERY NOT NECESSARY.

Upon a contract for the exchange of land, a deed executed by one of the parties, conveying his land to the other, though not delivered, is a sufficient memorandum in writing to bind the grantor, under the statute of frauds. *Parrill v. McKinley*, 9 Gratt. 1.

E. ON WHOM BINDING.

When the memorandum of the contract is signed by but one party, he alone is liable, the other is not. *Capehart v. Hale*, 6 W. Va. 547. See *Monongah Coal, etc., Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201.

VI. Procedure.

A. DECLARATION.

Unnecessary to Allege Promise in Writing.—It was held in *Skinker v. Armstrong*, 86 Va. 1011, 11 S. E. 977, to be unnecessary to aver in a declaration that a promise to pay the debt of another, which was sued on, was in writing, as it is a question of fact, to be determined by plea and proof.

Special Counts—Averment of Consideration.—The promise of one person to pay the debt of another, though in writing, must be founded on a consideration to make it binding; and if there

is an attempt made to declare upon it specially, the count, or counts, must set forth the consideration. *Winkler v. Chesapeake, etc., R. Co.*, 12 W. Va. 699.

Averment of Payment of Debt.—A special count in a declaration brought on the promise of one to pay the debt of another, which shows a consideration for the promise, and does not allege that the other has paid the debt, is fatally defective. *Winkler v. Chesapeake, etc., R. Co.*, 12 W. Va. 699.

B. PLEA AND ANSWER.

Benefit of Statute Claimed—Effect—

Waiver.—At law a defendant may insist upon the benefit of the statute of frauds by the general issue, or in equity, by simply denying in his answer that any such agreement was ever made as that charged in the bill. This general denial will put the plaintiff to the proof of the agreement, and, if it be within the statute of frauds, he must produce a writing at the trial or hearing, unless the defendant waives his right to require it by allowing the agreement to be proved by parol testimony. *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978; *Argenbright v. Campbell*, 3 Hen. & M. 144, 164.

When Specifically Pleaded.—It is not necessary, in order to set up the statute of frauds as a defense, that it should be specifically pleaded, unless the existence of agreement sued on is admitted by the answer; or the bill, in addition to the general allegation that it was made, alleges such acts done in part performance, or such other equitable circumstances, as would justify the court in enforcing it. In which case the defendant must directly traverse the allegation of equitable circumstances at the time he pleads, or by answer insists upon, the statute as preventing the plaintiff's recovery on the mere verbal agreement. *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978.

Agreement Admitted—Must Plead Statute.—When an answer admits an

agreement for the sale of land as alleged in the bill, though it be oral, the defendant must plead the statute of frauds and perjuries, or the answer must claim its benefit; otherwise he is held to have admitted the agreement, and renounced the statute's benefit. *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Fleming v. Holt*, 12 W. Va. 143.

Effect of Denial—Proof of Plaintiff.

—If an answer denies generally the making of an agreement for the sale of land, as alleged in the bill, the plaintiff must prove an agreement valid under the statute of frauds; but if the answer admits an agreement substantially the same as that alleged in the bill, and differing from it in points not essential, the answer is treated as admitting the agreement, and unless the defense under the statute is made by plea or answer, the statute will not avail the defendant. *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

Statute Must Be Pled.—It was said in *Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, that a party who relies on the statute of frauds must generally rely upon it in his pleadings. But, it was held, in *Rowton v. Rowton*, 1 Hen. & M. 92, that the statute of frauds will avail a defendant, although not formally pleaded.

Amendment of Answer.—After issue joined, and the cause set for hearing, the defendant may be permitted, for good cause shown, to amend his answer, and to plead the statute of frauds. Their failure to file the plea in this case was due to a mistake of counsel. *Jackson v. Cutright*, 5 Munf. 308.

Need Neither Confess Nor Deny the Contract.—"With respect to all promises, agreements and contracts within the purview of the statute, if not reduced to writing, and signed pursuant to the statute, and if nothing be done in performance of them, whereby the actual state of the parties, or one of them, is materially affected, they

ought to be considered as imperfect and incomplete, so as to be incapable of supporting a suit either at law or in equity; consequently, wherever a defendant to a bill for the specific performance of a parol agreement, pleads and relies upon the benefit of the statute, he is not compellable to answer as to the agreement, and confess or deny it, but may protect himself from such answer by his plea; and where offered and insisted on, it ought to be allowed; for by compelling a defendant to answer after he has claimed the protection of the statute by his plea, the inducement to perjury, which it is the object of the statute to prevent, will be increased in tenfold proportion." Per Tucker, J., in *Argenbright v. Campbell*, 3 Hen. & M. 144.

C. EVIDENCE.

In General.—Mere oral declarations to destroy title are inadmissible, because parol disclaimers can not affect a vested title in the face of the statute of frauds. *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536; *Suttle v. Richmond*, etc., R. Co., 76 Va. 284.

Specific Execution of Verbal Contract—Clear Proof Essential.—Notwithstanding the statute of frauds, equity will at all times lend its aid to defeat a fraud, yet to justify the court in relaxing the operation of the statute, and in compelling the specific execution of a verbal contract for the sale of land, clear and convincing proof is essential, otherwise the desire to prevent fraud might result in great wrong and injustice to him who has the lawful right, and thus the prime object of the statute be defeated. *Boyd v. Clegghorn*, 94 Va. 780, 27 S. E. 574; *Darling v. Cumming*, 92 Va. 521, 23 S. E. 880; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739; *Pierce v. Catron*, 23 Gratt. 588; *Wright v. Pucket*, 22 Gratt. 370, and note; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742.

Memorandum of Agent—Proof of Au'hority.—Where a writing, which is

a promise to pay the debt of another, purporting to be signed by an agent, is offered in evidence and objected to, it is error to admit it, until the agency, and the agent's authority to sign it, is proved. *Winkler v. Chesapeake, etc., R. Co.*, 12 W. Va. 699.

Memorandum with No Mention of Consideration Proper Evidence.—In his declaration on the promise of the defendant to pay the debt of another, the plaintiff alleges a particular consideration, but the written promise of the defendant, adduced in evidence, contains no mention of the consideration. This was held to be no material variance; the written promise was proper evidence, and the consideration may be proved aliunde. *Colgin v. Henley*, 6 Leigh 86.

Entry on Merchant's Books.—Where on a verbal promise to pay the debt of another, if the merchant charge the goods to that other, to whom they were delivered, such entry in his books is strong evidence against him that he is dealing with the one to whom the goods were delivered, and not with the promisor, but on the other hand if the entry be against the promisor, such entry is not evidence for the merchant, so as to make what would otherwise have been a collateral promise, an

original promise. *Cutler v. Hinton*, 6 Rand. 509.

Conversations.—Conversations between persons can not be admitted as evidence of a parol contract for land without an utter disregard of the policy and letter of the statute of frauds. *Perry v. Ruby*, 81 Va. 317, citing *Blow v. Maynard*, 2 Leigh 29.

Parol Lease for More than Year Admissible.—Where upon the trial of a case of unlawful detainer, the defendant sets up title in himself, plaintiff may prove that defendant entered upon premises under a parol lease from himself, though the lease proved was to continue for more than a year. *Adams v. Martin*, 8 Gratt. 107.

D. APPEAL.

When Same Testimony Used as in Lower Court.—When parties in the lower court allow a contract to be proven by oral testimony, which by reason of the statute could only be proved by writing, and no exceptions or objections being taken, and the court decides the case upon such evidence, this will be regarded as a waiver of the statute of frauds, and the case will be determined on appeal upon the same testimony. *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978.

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CROSS REFERENCES.

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As to fraud in disposing of property as grounds for arrest or attachment, see the titles ARREST, vol. 1, p. 719; ATTACHMENT AND GARNISHMENT, vol. 2, p. 70; LARCENY. As to transfers by partners in fraud of social or individual creditors, see the title PARTNERSHIP. As to transfers in fraud of marital rights, see the title HUSBAND AND WIFE. As to preferences by insolvents which are void under the statutes, see the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232. As to conveyances by insolvent corporations, see the title CORPORATIONS, vol. 3, p. 510. As to proceedings by judgment creditors to subject property to their judgments by an action, see the title CREDITORS' SUITS, vol. 3, p. 780. As to proceedings by judgment creditors to subject property to their judgments supplementary to execution, see the title EXECUTIONS, vol. 5, p. 416. As to mortgages of personal property invalid as to creditors on grounds other than fraud, see the title CHATTEL MORTGAGES, vol. 2, p. 798. As to the necessity of recording marriage settlements and validity as to creditors and purchasers when not recorded, see the title MARRIAGE CONTRACTS AND SETTLEMENTS; RECORDING ACTS. As to the nature, requirements and effect of acts pertaining to the registry of particular instruments, see the title RECORDING ACTS, and other appropriate titles. As to the effect upon rights of creditors and purchasers of a failure to record deeds of trust, see the titles MORTGAGES AND DEEDS OF TRUST;

RECORDING ACTS. As to what constitutes a good or valuable consideration sufficient to support a contract, and questions generally affecting the adequacy or want of consideration, see generally, the titles **CONTRACTS**, vol. 3, pp. 307, 308; **RESCISSION, CANCELLATION AND REFORMATION; SPECIFIC PERFORMANCE.** As to the effect of fraud upon the validity and operation of contracts, see generally, the title **FRAUD AND DECEIT**, ante, p. 448; as to remedies for same, see the titles **DAMAGES**, vol. 4, p. 162; **INJUNCTIONS; RESCISSION, CANCELLATION AND REFORMATION.** As to the effect of undue influence upon contracts, see the title **UNDUE INFLUENCE**; as to remedies therefor, see the titles **INJUNCTIONS; RESCISSION, CANCELLATION AND REFORMATION.**

I. Conflict of Laws.

See generally, the title **CONFLICT OF LAWS**, vol. 3, p. 100.

Property in Other State or Country.

—The legal situs of personal property follows the domicile of the owner, and the law of the actual situs protects the claims of creditors domiciled there only against transfers by operation of law. *Yost v. Graham*, 50 W. Va. 199, 40 S. E. 361.

II. Interpretation and Constitutionality of Statutes.

See generally, the titles **CONSTITUTIONAL LAW**, vol. 3, p. 140; **INTERPRETATION AND CONSTRUCTION; STATUTES.**

A. GENERALLY.

In interpreting a statute, it should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous or insignificant, and in construing a proviso or exception contained in the statute the same rule should be applied. *Argand Refining Co. v. Quinn*, 39 W. Va. 535, 20 S. E. 576.

B. STATUTES ON FRAUD GENERALLY.

See generally, the title **FRAUD AND DECEIT**, ante, p. 448.

C. VA. CODE, 1873, CH. 114, § 1—CLAIMS PROTECTED.

The Va. Code, 1873, ch. 114, § 1, protects against fraudulent transfers, all claims, debts and demands, including claims to damages for breach of con-

tract to marry, for which judgment may, after the execution of the conveyance, be obtained. *Burton v. Mill*, 78 Va. 468.

D. MEANING OF "VOID" AS USED IN STATUTE, VA. CODE, 1887, § 2458.

The statute relating to fraudulent conveyances, Va. Code, 1887, § 2458, provides that gifts, conveyances, etc., made with intent to "delay, hinder, or defraud creditors, purchasers, or other persons," etc., shall be void as to such creditors, etc. From the provision following in this same section, the true effect intended by the statute would seem to be that such "conveyance," etc., is rendered "voidable" (not void), as the statute expressly protects a purchaser for valuable consideration, who had no notice of fraud affecting the title of his immediate grantor.

E. W. VA. CODE, 1899, CH. 74, § 1—LIBERALLY EXPOUNDED.

See the title **FRAUD AND DECEIT**, ante, p. 448.

The statute against fraudulent conveyances, ch. 74, § 1, W. Va. Code, 1899, like all other statutes against fraud, is to be liberally expounded for the suppression of fraud. *Harden v. Wagner*, 22 W. Va. 356.

F. STATUTE OF FRAUDS.

See the title **FRAUDS, STATUTE OF**, ante, p. 516.

The statute of frauds is merely declarative of the common law and vacates no conveyance, unless it shall appear to have been executed with in-

tent to delay, hinder, or defraud creditors or subsequent purchasers. This statute does not militate against any transaction, bona fide, and where there is no imagination of fraud; and so is the common law. *Land v. Jeffries*, 5 Rand. 600.

G. 13 ELIZABETH, CH. 5.

See post, "Transfers Which Are Voluntary or upon Consideration Not Deemed Valuable in Law," V.

Rights of Prior and Subsequent Creditors.—The policy of the statute of 13 Eliz., ch. 5 (substantially adopted in Va. Code, ch. 109, to prevent frauds and perjuries), was investigated by Judge Baldwin, and the true principle was declared by him to be, that a fraudulent intent of a grantee against one or more creditors is fraudulent against all; and that no distinction exists between prior and subsequent creditors, other than that which arises from the necessity of showing a fraudulent intent against some creditors, which can not be done in behalf of creditors in existence at the time of the conveyance, but by proving either a prior indebtedness or a prospective fraud against them only. *Hutchison v. Kelly*, 1 Rob. 123.

Purposes and Objects.—It is the duty of the debtor to retain at least a sufficiency of his property to pay all of his debts, and perform all his contracts; if he does not, justice requires that the property should be followed into the hands of the donee by the creditor. He who combines with a debtor to defraud his creditor, by buying his property, even at a full price, and receiving a conveyance of it, does a wrong to the creditor for which he should answer by having the property subjected to the creditor's demand. He who gives or sells property, and remains in the possession and enjoyment of it, as before the conveyance, has the credit of being the owner of such property, and it should be subject to his debts contracted while he so appears

to be owner. A man who falsely represents another as being the owner of a thousand dollars' worth of land, knowing it to be false, and thereby induces a stranger to credit the person so represented, should, if necessary to prevent the creditor's losing, pay him one thousand dollars. To enforce these principles, to prevent creditors from suffering by their violation, was the object of the statute of 13 Elizabeth, ch. 5. *Hutchison v. Kelly*, 1 Rob. 123, 128; *Hunters v. Waite*, 3 Gratt. 26.

Declarative of Common Law.—These statutes are declarative only of the common law, which, as now understood, would, without the statutes, have effected all that can be effected with them. *Hutchison v. Kelly*, 1 Rob. 123; *Hunters v. Waite*, 3 Gratt. 26.

Coextensive as to Relief.—As to the relief afforded creditors these statutes are coextensive, each makes void conveyances made with intent to defraud creditors. *Hutchison v. Kelly*, 1 Rob. 123; *Hunters v. Waite*, 3 Gratt. 26.

III. Powers Exercisable by a Debtor over His Property.

In General.—A debtor is bound by duty to devote the whole of his property to the satisfaction of his creditors' demands. *Skipwith v. Cunningham*, 8 Leigh 271; *Kevan v. Branch*, 1 Gratt. 274; *Phippen v. Durham*, 8 Gratt. 457; *Gordon v. Cannon*, 18 Gratt. 387; *Clarke v. Figgins*, 27 W. Va. 663.

Right of Insolvent to Release or Surrender.—An insolvent debtor can not release or surrender without consideration; rights available to his creditors any more than he can give away his property. *Hauser v. King*, 76 Va. 731.

Sale of Merchandise and Assignment of Notes Received.—A mercantile firm, although indebted to insolvency, may sell its stock of merchandise to a disinterested party, and receive his notes in payment therefor, payable to its order, and assign one or more of said notes in payment of a debt owed by it

to a bona fide creditor; and such transfer will not be void, under § 2 of ch. 74 of the West Virginia Code, as amended by ch. 4 of the acts of 1895. *Merchant v. Whitescarver*, 47 W. Va. 361, 34 S. E. 813. Such purchaser may also, as a part of the purchase money, make a note payable directly to a bank that holds the note of said firm for a bona fide pre-existing debt, and substitute such note for the note of the firm held by the bank. *Merchant v. Whitescarver*, 47 W. Va. 361, 34 S. E. 813.

Disposition of Property Where Debtor Has Nominal or Equitable Interest.—A debtor may convey for his creditors' benefit property held by him nominally in trust for others, but equitably his own, and withhold property nominally his own, but equitably belonging to others. *Brown v. Putney*, 90 Va. 447, 18 S. E. 883.

IV. Transfers or Alienations Made or Obtained with Intent to Defraud.

A. GENERAL CONSIDERATION.

Fraud in Law and in Fact Distinguished.—A conveyance is said to be fraudulent in law, when it has been executed under such circumstances, that the law itself conclusively infers the fraudulent intent, from the intrinsic nature of the circumstances, without an inquiry into the actual intent of the parties to the transaction. A conveyance is said to be fraudulent in fact, where the circumstances are not such as that the law conclusively infers a fraudulent intent from them, but where the parties have actually intended to delay, hinder or defraud the creditors or purchasers. But, both descriptions of cases are equally void under the statute of frauds; for in the first the fraudulent intent is inferred by law, and in the second it is actually proved. *Land v. Jeffries*, 5 Rand. 600.

B. STATUTORY PROVISIONS.

Va. Statute—§ 2458.—Every gift,

conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers, or other persons, their representatives, or assigns, be void. (Code, 1849, p. 507, ch. 118, § 1.) Va. Code, Anno. (1903), § 2458.

W. Va. Statute—§ 3099.—Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given, with intent to delay, hinder, or defraud creditors, purchasers, or other persons, of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers, or other persons, their representatives or assigns, be void. W. Va. Code, Anno. (1906), § 3099.

As to the effect of the vendor's fraudulent intent upon the title of vendee, see post, "Operation and Effect," VI.

C. FORM AND MODE OF CONVEYANCE.

1. In General.

The particular form or mode of conveyance is an immaterial matter, as the statute embraces all transfers and dispositions of property where the intent is to hinder, delay or defraud creditors in enforcing their just claims. Va. Code (1887), § 2459; W. Va. Code (1899), ch. 74, § 1; *Stigler v. Stigler*, 77 Va. 163; *Spence v. Repass*, 94 Va. 716, 27 S. E. 583; *Spence v. Bagwell*, 6 Gratt. 444; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242; *Shattuck v. Knight*, 25 W. Va. 590; *Hope v. Valley City Salt Co.*, 25 W. Va. 789; *Coleman v. Cocke*, 6 Rand. 618; *McMasters v. Edgar*, 22 W. Va. 673; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; Mar-

tin v. Warner, 34 W. Va. 182, 12 S. E. 477; Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. 410.

2. Payment of Consideration for Conveyance to Third Person.

Where a debtor takes money that is liable for his debts, and purchases property for the use of another the transaction is in fraud of his creditors' rights, and they may subject it to their lawful claims. *Coleman v. Cocke*, 6 Rand. 618; *McMasters v. Edgar*, 22 W. Va. 673; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Martin v. Warner*, 34 W. Va. 182, 12 S. E. 477.

3. Payment of Insurance Premiums.

If a debtor fraudulently expends his means in making payment of premiums upon life insurance policies, his creditors may recover of the beneficiary a sum equal to the premiums so paid, with interest. *Stigler v. Stigler*, 77 Va. 163.

4. Gifts.

See generally, the title GIFTS.

The statute contemplates a transfer of property by gift with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to. Va. Code (1887), § 2458; W. Va. Code (1899), § 3099.

Fraudulent Gift of Slaves—Act of 1858.—See generally, the title FRAUDS, STATUTE OF, ante, p 516.

By the acts of 1858, to prevent fraudulent gifts of slaves, though the parol gift of slaves may be given in evidence to show the character of the possession held by the donee, yet the gift itself is void. Thus if a father-in-law put slaves into the possession of his son-in-law on loan, no length of possession will give the lendeo title against the lender, until such possession has become adverse by demand and refusal of the possession. *Cross v. Cross*, 9 Leigh 245.

A verbal gift of slaves to a feme sole, to whose husband, upon her subsequent marriage, they were delivered,

and by him kept until his death, four years after the marriage, is within the statutes for preventing fraudulent gifts of slaves. *Taylor v. Wallace*, 4 Call 92.

5. Loans.

See generally, the title LOANS. And see post, "Loan or Sale with Retention of Title," IV, L, 5.

6. Sales or Conveyances.

a. Absolute Transfers of Title.

(1) In General.

By special provision of the statute every conveyance of real or personal property is embraced when given with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to. Va. Code (1887), § 2458; W. Va. Code (1899), § 3099.

Purchase by Parol.—A purchase of land by parol contract which has been so far executed as to vest in the purchaser the right to compel his vendor to execute the parol contract in a court of equity, gives to such purchaser an equitable right in the land purchased, which a court of equity will fully protect as against a subsequent judgment creditor of the vendor, who seeks to avoid the conveyance on the ground that it is in fraud of creditors. *Farmers' Transp. Co. v. Swaney*, 48 W. Va. 272, 37 S. E. 592.

(2) Possession Retained.

See post, "Retention by Possession or Apparent Title by Grantor," IV, I.

(3) Transfers upon Trust.

See generally, the title MORTGAGES AND DEEDS OF TRUST.

(a) Generally.

If a conveyance be made by A to B, and at the same time and as a part of the same transaction B executes a written paper, wherein he declares, that he purchased the land in trust for C, this constitutes an executed and express trust, and as such it is valid, though C gave no consideration whatever for being thus made the cestui que trust. If B afterwards conveys

this land to D, who has notice of this trust, a court of equity will set aside such conveyance as fraudulent. *Titchnell v. Jackson*, 26 W. Va. 460.

(b) To Secure Creditors.

A deed of trust, though executed to indemnify a bona fide surety, may be fraudulent on its face. *Spence v. Bagwell*, 6 Gratt. 444.

But a deed of trust executed in good faith to secure a bona fide debt on a stock of goods and extending to cover after-acquired property, duly recorded, is not fraudulent per se or prima facie fraudulent, as to subsequent creditors with notice, in equity. *Horner Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564.

(c) Assignments.

aa. Generally.

See the title ASSIGNMENTS, vol. 1, p. 745.

bb. Assignments for the Benefit of Creditors.

See generally, the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799.

(d) Existence of Secret Trust.

See post, "Reservations and Secret Trusts," IV, F, 18.

b. Conditional Transfers.

(1) In General.

See post, "Reservations, Conditions and Secret Trusts," IV, L.

(2) Mortgages and Pledges.

See generally, the title MORTGAGES AND DEEDS OF TRUST.

(3) Title Reserved.

See post, "Reservations, Conditions and Secret Trusts," IV, L.

7. Suits Commenced, Decree, Judgment, or Execution Suffered or Obtained.

In General.—It is expressly provided that every suit commenced, or decree, judgment, or execution suffered or obtained with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall, as

to such creditors, purchasers, or other persons, their representatives, or assigns, be void. Va. Code (1887), § 2458; W. Va. Code (1899), § 3099.

Confession of Judgment.—In *Crawford v. Carper*, 4 W. Va. 56, a debtor, who was insolvent, confessed judgment in favor of one of his creditors, giving the creditor first lien upon his land. The debt thus attempted to be secured, was barred by the statute of limitations. The land upon which the lien rested was not sufficient to pay all of the debts owed. Upon these facts the court declared the judgment void, as coming within the purview of the prohibition, against fraud in obtaining judgments, contained in Va. Code, 1860, ch. 118, § 1; Va. Code, 1887, § 2458.

In *Elliot v. Trahern*, 35 W. Va. 634, 14 S. E. 223, a judgment was confessed by a son to his father upon notes previously executed to him. The court held that the judgment was not fraudulent as to debts existing against the estate of the intestate, although the son was at the time the judgment was confessed one of the sureties of the administrators of the estate on their official bond; and several months after the judgment was confessed it was ascertained that the administrators had committed a considerable devastavit.

8. Incumbrance by Lien.

The statute expressly includes every charge upon any estate, real or personal, made with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to. Va. Code (1887), § 2458; W. Va. Code (1899), § 3099.

Where a grantor for another's benefit, puts a lien on his real estate for the amount of a fictitious note that would cover its value, and then refers his creditors to the supposed beneficiary, as a probable purchaser of their debts, and some sell at fifty cents on the dollar, there being a secret agreement between the grantor and

supposed beneficiary that the discounts should be shared equally between them, the deed creating the lien is fraudulent in fact and void as to the grantor's creditors. *Rucker v. Moss*, 84 Va. 634, 5 S. E. 527.

9. Homestead Deeds.

See post, "Where Homestead Deed Attacked," VIII, F, 3.

a. Former Rule.

In *Russell v. Randolph*, 26 Gratt. 705, it was held competent under the provisions of § 2, ch. 179, Va. Code, 1860 (corresponding section, Va. Code Anno., 1904, § 2460), for a judgment creditor, without having sued out an execution at law, to impeach by bill in equity, a deed of homestead, upon the ground of fraud, actual or constructive. To same effect, see *Kahn v. Kern* (1889), unreported, decided by Chancellor Fitzhugh, in the chancery court of the city of Richmond. The supreme court refused to grant an appeal in this case. See also, *Short v. McGruder*, 22 Fed. Cas. 46, in which Judge Hughes entertained a bill in equity attacking as fraudulent a homestead deed, setting aside property under the provisions of the homestead law of Virginia.

b. Present Rule.

But in a more recent case, *Simon v. Ellerson*, decided by the supreme court of Virginia in 1895, and reported in 2 Va. Dec. 203, Cardwell, J., held, that the filing of a homestead deed is not a conveyance or assignment which can be attacked under the provisions of § 2460 of the Virginia Code, as amended.

10. Marriage Settlements.

See post, "Settlements," V, C.

11. Improvements on Another's Property.

See generally, the title IMPROVEMENTS.

Where a debtor in fraud of the rights of his creditors expends money in improving the property of a third person with the consent and knowledge of the latter, the sums so expended can be

followed by the creditors to the premises where they are put, and the realty can be charged in favor of such creditors to the extent of the value of such improvements. *Spence v. Repass*, 94 Va. 716, 27 S. E. 583; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410.

And for a stronger reason, the creditor can charge the property if invested in improvements with bad intent. *Vandevort v. Fouse*, 52 W. Va. 214, 43 S. E. 112; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780.

"If a father put valuable improvements upon land of his daughter, their value may be charged upon the land by his then existing creditor, whether he had, or has not, fraudulent intent as to them in making the improvements." *Vandevort v. Fouse*, 52 W. Va. 214, 43 S. E. 112.

But where the allegations and proofs are insufficient to justify it, it is error for the circuit court to subject a divorced wife's property to the payment of the debts of her husband's creditors by reason of improvements alleged to have been placed thereon with intent to delay, hinder, and defraud such creditors. *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. 59.

Improvements put upon the property of another by an insolvent debtor may be followed by his creditors, and the realty on which they are placed may be charged with their value. *National Val. Bank v. Hancock*, 100 Va. 101, 40 S. E. 611.

In *Hall v. Hyer*, 48 W. Va. 353, 37 S. E. 594, a solvent husband put improvements on his wife's separate property to the amount of \$1,100; afterwards, she as surety, joined in a deed of trust on the property to secure his individual indebtedness to an amount in excess of \$1,100. It was held, that former creditors of the husband could not attack property because of the gift of the improvements by the husband to the wife, so long as

such trust debt remained unpaid by the husband, and the wife was liable for the same, as such trust debt unpaid was equivalent to revocation of the debt.

D. SUBJECT MATTER OF CONVEYANCE.

1. Exempt Property.

See ante, "Homestead Deeds," IV, C, 9.

The homestead of a debtor is not subject to the demands of his creditors. Consequently, it is held, that a conveyance of the homestead property, whether made with or without consideration, and regardless of the intent of the parties, can not be set aside as fraudulent as to creditors. *Williams v. Lord*, 75 Va. 390.

2. Encumbered Property.

Equity of Redemption.—It seems that the surrender or conveyance of a valueless equity of redemption is not prejudicial to the rights of other creditors. *Johnson v. Riley*, 41 W. Va. 140, 23 S. E. 698; *Cox v. Horner*, 43 W. Va. 786, 28 S. E. 780.

3. Property in Which Alienee Has an Equitable Title.

See ante, "Husband and Wife," IV, H, 3.

Where a man purchases property with funds derived from the separate estate of his wife, although he may take the title in his own name, the wife is the equitable owner, and a subsequent conveyance of the land by the husband to the wife is not in fraud of the rights of creditors of the husband. *Spence v. Repass*, 94 Va. 716, 27 S. E. 583; *Hamilton v. Steele*, 22 W. Va. 348.

4. Wages or Earnings of Infants.

See ante, "Parent and Child," IV, H, 2, b. And see generally, the title PARENT AND CHILD.

A father may emancipate his child, and if the child thereafter gives his mother the benefit of his labor on her separate estate, it is held, that the profits derived from such labor can not be held liable to the debts of the

father. *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570.

E. THE INTENT TO HINDER, DELAY OR DEFRAUD.

As to matters of evidence affecting the alienation, see post, "Evidence," IV, H, 3, b, (7); "Evidence," IV, H, 6; "Evidence," VIII, I.

1. Distinctions.

The words, "hinder," "delay" and "defraud" are not synonymous. A conveyance may be made with intent to hinder or delay, without any intent to absolutely defraud. Either intent is sufficient. The statute is in the disjunctive, and attempts to attach a separate and specific meaning to each of the words which it employs. *Quarles v. Kerr*, 14 Gratt. 48; *Edgell v. Smith*, 50 W. Va. 349, 356, 40 S. E. 402.

2. Rule Stated.

To come within the scope of the statute the transfer or act must be done or made with intent to hinder, delay or defraud. *Wheby v. Moir*, 102 Va. 875, 47 S. E. 1005; *Batchelder v. White*, 80 Va. 103; *Johnson v. Wagner*, 76 Va. 587; *Fischer v. Lee*, 98 Va. 159, 163, 35 S. E. 441; *Ferguson v. Daugherty*, 94 Va. 308, 26 S. E. 822; *Anderson v. Mossy Creek Woolen Mills Co.*, 100 Va. 420, 41 S. E. 854; *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686; *Spence v. Bagwell*, 6 Gratt. 444; *Briscoe v. Clarke*, 1 Rand. 213; *Bullock v. Gordon*, 4 Munf. 450; *Roanoke Nat. Bank v. Farmers' Nat. Bank*, 84 Va. 603, 5 S. E. 682; *Witz v. Osburn*, 83 Va. 227, 230, 2 S. E. 33; *Moore v. Ullman*, 80 Va. 307; *Bowling v. Harrison*, 2 Pat. & H. 532; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303; *Farley v. Bateman*, 40 W. Va. 540, 22 S. E. 72; *Keneweg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773; *Lewis v. Bragg*, 47 W. Va. 707, 35 S. E. 943; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892; *Bowyer v. Martin*, 27 W. Va. 442; *Silverman v. Greaser*, 27

W. Va. 550; *Parker v. Valentine*, 27 W. Va. 677; *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363; *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302; *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. 59, 60; *Claflin v. Foley*, 22 W. Va. 434; *Harden v. Wagner*, 22 W. Va. 356; *Martin v. Rexroad*, 15 W. Va. 512; *Rose v. Brown*, 11 W. Va. 122, 134; *Hunter v. Hunter*, 10 W. Va. 321; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Enslow v. Shger*, 51 W. Va. 405, 41 S. E. 173; *Pusey v. Gardner*, 21 W. Va. 469; *Livesay v. Beard*, 22 W. Va. 585; *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203; *Connoway v. McCann*, 30 W. Va. 200, 3 S. E. 590; *Duncan v. Custard*, 24 W. Va. 730; *Mayhew v. Clark*, 33 W. Va. 887, 10 S. E. 785; *State v. Burkeholder*, 30 W. Va. 592, 5 S. E. 439; *Lockhard v. Beckley*, 10 W. Va. 87. See also, *Staton v. Pittman*, 11 Gratt. 99; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Burns v. Morrison*, 36 W. Va. 423, 15 S. E. 62.

3. Nature and Scope of Intent.

a. Intent Need Not Be Entirely to Defeat Claim.

In order to render a deed fraudulent, it is not necessary that the debtor should intend entirely to defeat the creditor in the collection of his claim. Creditors are entitled not only to be paid, but to be paid as their claims accrue, and a debtor has no more right to postpone payment simply for his own advantage, than to defeat it altogether. A purpose to delay and hinder a creditor is therefore fraudulent, although the debtor may honestly intend that all his debts shall ultimately be paid. The words, "hinder," "delay" and "defraud" are not synonymous. A conveyance may be made with intent to hinder or delay, without any intent to absolutely defraud. Either intent is sufficient. The statute is in the disjunctive, and attempts to attach a separate and specific meaning to each of the words which it employs. A conveyance made by an embarrassed

debtor with a view, which was known to the purchaser, to secure the property from attachment, is void though honestly made, the debtor intending that all creditors should be paid in full. The debtor's property is, in theory of law, subject to immediate process issued at the instance of his creditors, and the debtor will not be permitted to hinder or delay them by any device which leaves it, or the avails of it, subject to his control and disposition; and it makes no difference that the debtor intends to apply the avails of it to the payment of his debts. *Quarles v. Kerr*, 14 Gratt. 48; *Edgell v. Smith*, 50 W. Va. 349, 356, 40 S. E. 402.

To make a conveyance fraudulent as to creditors it is not necessary that the intent be to entirely defraud them out of their debts. If the intent is to either hinder or delay them, or defraud them, by a conveyance which places an obstacle in the way of the prosecution of their legal remedies, it is void under the statute against fraudulent conveyances. *Edgell v. Smith*, 50 W. Va. 349, 350, 40 S. E. 402.

A conveyance by a debtor to secure his property from immediate subjection to debts of creditors is a fraudulent act on his part, and as to him void as against them, though honestly made, the debtor intending that his creditors shall be ultimately paid. *Edgell v. Smith*, 50 W. Va. 349, 350, 40 S. E. 402.

b. Intent Must Exist at Inception.

If a conveyance is not fraudulent in its inception, it can not become so by subsequent matters; because the statute requires that the act should be done with the criminal intent; however, if it be afterwards employed for a fraudulent purpose, a court of equity will interpose to prevent such use of it. *Harden v. Wagner*, 22 W. Va. 356.

c. Effect of Subsequent Fraud Where Valid in Inception.

"The fifth assignment of error, that

the court erred in overruling the separate demurrers of Isaac Prager & Son, Henry Keller and Keller, trustee, and the appellant to the original and amended and supplemental bills. It is claimed that as the deed of assignment conveyed all the property of the assignors, wherever situated for the general benefit of all creditors without priority or preference and that it was in form and effect the only kind of deed of assignment which a debtor, under the assignment of law of West Virginia, could make either under chapter 72 or chapter 74 of the Code, and does not appear fraudulent on its face, that the same can not be attacked for acts of fraud committed previous or subsequent to the execution of said deed. Section 1, ch. 74, Code, provides that 'Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, * * * with intent to delay, hinder, or defraud creditors, purchasers or other persons, of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers or other persons, their representatives or assigns, be void.' In *Loos v. Wilkinson*, 110 N. Y. 195, at page 210, the court say: 'Frauds upon the assignment either by the assignor or assignee do not necessarily avoid the assignment but that may be considered in determining whether there was any fraud in the assignment and frequently furnish very convincing and sometimes very conclusive evidence upon that point.' And in *Aaronson v. Deutsch*, 24 Fed. Rep. 465, it is held: 'The rule that a deed valid in its inception will not be rendered invalid by any subsequent fraudulent or illegal act of the parties has no application when the fraudulent or illegal act is the consummation of an illegal agreement made contemporaneously with the deed. In such case the illegal act is part of the original design, and the deed is void ab initio.'" *First Nat. Bank v. Prager*, 50 W. Va. 660, 679, 41 S. E. 383.

d. Determination by Inspection of Deed.

When a court is called upon to decide whether a deed is fraudulent upon its face, it must decide the question from the inspection of the deed alone. And unless, upon an inspection of the deed claimed to be fraudulent on its face, the court sees that it contains some provision which clearly shows that the intent of the grantor, in executing the deed, was to hinder, delay, or defraud his creditors, the court can not hold the deed fraudulent on its face. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203.

e. Assumed Ownership of Property by Consent of Real Owner.

In *Bowling v. Harrison*, 2 Pat. & H. 532, a resident of Virginia, owned certain slaves in Florida, and wished to bring them to Virginia but fearing lest his creditors should seize them under execution, on their arrival, he persuaded another to assume to be the owner of them and conveyed them, by deed, to a trustee for the benefit of his (true owner's) wife and children. This was done, and the increase were brought to Virginia, and were kept in the possession of the true owner for several years, and were then carried by the true owner, with their family, beyond the limits of the state. Certain judgment creditors of the true owner then sought to hold the pretended owner liable in equity for the value of the negroes. The pretended owner had neither the title to the negroes, nor possession or control of them, but merely lent himself to the scheme of the true owner, as above stated. The court held the deed void; and further, that the mere representation in the deed as to the ownership of the property, did not make the pretended owner liable in equity, for the value of the property, as constructive trustee for the creditors, though he would have been so liable if he had acquired the possession or control of the property. And if any cred-

itor had suffered actual damage by the fraudulent misrepresentation, his remedy was at law.

f. Intent to Avoid Payment of Fines.

If a party engaged in the unlawful retailing of ardent spirits conveys away his land with the intent to prevent the state from subjecting it to the payment of any future fines for such unlawful retailing, such deed is fraudulent, although the sales in which fines were subsequently recovered had not then been made. *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439.

g. Intent to Defeat Recovery of Damages in Tort.

It is a settled doctrine that a deed made with intent to defeat a recovery of damages in an action of tort, and before trial and judgment, is fraudulent and void to the same extent as a conveyance to hinder and delay existing creditors, and the intent need not be established by express proof. *Johnson v. Wagner*, 76 Va. 587.

h. Sale of Land by Execution Debtor.

A sale of a tract of land, by a debtor charged in execution, is not necessarily fraudulent and void as to the creditors at whose suit he is in custody, but may be supported, if made to a bona fide creditor, for a reasonable consideration, and without any secret agreement, or understanding between the parties, that the land is to be holden for the use and benefits of such debtor. *Bullock v. Gordon*, 4 Munf. 450.

i. Conveyance by Wife Immediately before Marriage.

And a conveyance made by a woman immediately before her marriage is *prima facie* good, and can be impeached only by proof of fraud. *Pusey v. Gardner*, 21 W. Va. 469.

As to transfers or charges in fraud of marital rights, see the title **HUSBAND AND WIFE**.

Future Advances.—Where a mortgage of personal property is executed with the intention that it shall cover future responsibilities which are not

named in the instrument, it is void pro tanto as against creditors. *Alexandria Sav. Inst. v. Thomas*, 29 Gratt. 483.

j. Conveyance to Secure Debt.

A deed of trust which is executed to secure a bona fide debt on a stock of goods and on after-acquired property, and which is duly recorded, is not fraudulent as to subsequent creditors with notice in equity. *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869.

Combined with Object to Hinder, Delay and Defraud.—If a creditor takes from his debtor a conveyance to secure a debt, and mix with this object that of delaying, hindering, or defrauding other creditors, the conveyance will be void. *Goshorn v. Snodgrass*, 17 W. Va. 717; *Wright v. Hancock*, 3 Munf. 521.

k. As Affected by a Valuable Consideration.

See post, "Consideration," IV, G.

A deed may be fraudulent, if executed with a fraudulent intent, although founded upon a valuable and adequate consideration. *Briscoe v. Clarke*, 1 Rand. 213; *Wright v. Hancock*, 3 Munf. 521; *Livesay v. Beard*, 22 W. Va. 585, 594; *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 W. Va. 321; *Rose v. Brown*, 11 W. Va. 122, 134; *Martin v. Rexroad*, 15 W. Va. 512; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Harden v. Wagner*, 22 W. Va. 356; *Clafin v. Foley*, 22 W. Va. 434.

l. Preferences.

See generally, the titles **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 1, p. 799; **BANKRUPTCY AND INSOLVENCY**, vol. 2, p. 232.

Where an insolvent debtor, with intent to prefer certain of his creditors, sells his property to a third party, who is cognizant of the purpose of the sale and participates therein, and the proceeds of sale are paid to certain creditors, leaving others unpaid, and the creditors so preferred are parties to the

transaction and enter into it for the purpose of obtaining the preference, such sale is not fraudulent in fact, unless there be evidence sufficient to establish the fraudulent intent, mere intent to prefer being alone insufficient to establish it. In such case, however, the preference so given is in violation of § 2, of chapter 74 of the Code, and the preferred creditor must bring in the money so received to be distributed rateably in payment pro rata of the debts due to him and the creditors, at whose instance the transaction is set aside. *Powers, etc., Drug Co. v. Faulconer*, 52 W. Va. 581, 44 S. E. 204.

Where an insolvent party conveys his real estate to his father, from whom he purchased it for a fair price, a portion of the purchase money being applied to the extinguishment of a vendor's lien retained by his father for the purchase money, and to the payment of an attachment lien on the property and other bona fide indebtedness, such conveyance can not be set aside as fraudulent by a creditor of the insolvent, who has no lien upon the land, in the absence of any evidence showing a fraudulent intent on the part of such grantor, of which the grantee had notice. *Smith v. Smith*, 48 W. Va. 51, 35 S. E. 876.

m. Burden of Proof.

See post, "Evidence," IV, H, 3, b, (7); "Evidence," IV, H, 6; "Evidence Must Be Clear—Onus," IV, L, 16; "Evidence," V, C, 2, d; "Evidence," VIII, I.

A gift after five years from the date thereof, occupies much the same position as a sale to a purchaser for value, and throws on the plaintiff the burden of proving fraudulent intent on the part of the grantor. *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. 59, 60.

4. Participation of Alienee in Fraud.

Necessity.—It is not enough that the purpose of the grantor be fraudulent. Knowledge of such purpose must be clearly brought home to the alienee.

Batchelder v. White, 80 Va. 103; *Anderson v. Mossy Creek Woolen Mills Co.*, 100 Va. 420, 41 S. E. 854; *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686; *Ferguson v. Daughtrey*, 94 Va. 308, 26 S. E. 822; *Fischer v. Lee*, 98 Va. 159, 163, 35 S. E. 441; *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. 59, 60; *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363; *Silverman v. Greaser*, 27 W. Va. 550; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Bowyer v. Martin*, 27 W. Va. 442; *Merchants' Bank v. Belt*, 2 Va. Dec. 604; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560; *Blubaugh v. Loomis*, 48 W. Va. 666, 37 S. E. 794.

Where there is a fraudulent intent on the part of the grantor in a deed founded upon a valuable consideration, and such intent is not known to the grantee, the latter is not chargeable with want of good faith, since no rule is better established than that both parties must concur in the fraudulent intent to render the deed absolutely void. *Rixey v. Deitrick*, 85 Va. 42, 45, 6 S. E. 615; *Skipwith v. Cunningham*, 8 Leigh 271; *Norris v. Jones*, 93 Va. 176, 183, 24 S. E. 911; *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507; *Bishoff v. Hartley*, 9 W. Va. 100; *Herring v. Wickham*, 29 Gratt. 628; *Merchants' Bank v. Belt*, 2 Va. Dec. 604; *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938; *Henderson v. Hunton*, 26 Gratt. 926. See also, *Shurtz v. Johnson*, 28 Gratt. 657.

But a transfer of his property by a debtor is void as to his creditors, even though the grantee pay the full value, and though it be applied on bona fide debts of the grantor, if the intent of the grantor in making the transfer was to hinder, delay, or defraud other creditors, and the grantee had notice of the grantor's fraudulent intent. *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761.

Burden of Proof.—See post, "Evidence," IV, H, 3, b, (7); "Evidence," IV, H, 6; "Evidence Must Be Clear—Onus," IV, L, 16; "Evidence," V, C, 2, d; "Evidence," VIII, I.

A gift after five years from the date thereof occupies much the same position as a sale to a purchaser for value, and throws the burden on the plaintiff to prove the knowledge of or participation in the fraud by the grantee. *McCue v. McCue*, 41 W. Va. 151, 23 S. E. 689; *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. 59, 60.

Weight and Sufficiency.—See also, post, "Evidence," IV, H, 3, b, (7); "Evidence," IV, H, 6; "Evidence Must Be Clear—Onus," IV, L, 16; "Evidence," V, C, 2, d; "Evidence," VIII, I.

The fraud must be clearly proved. *First Nat. Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. 250.

It is not necessary to prove that the grantee had positive knowledge of such fraudulent intent. It is sufficient to prove that the grantee had knowledge of facts and circumstances which would have excited the suspicion of a man of ordinary care and prudence, and put him upon inquiry as to the bona fides of the transaction, which inquiry would necessarily have led to a discovery of the fraud of his grantor. *American Net & Twine Co. v. Mayo*, 97 Va. 182, 33 S. E. 523.

If the circumstances involved in the making a fraudulent transfer of property are sufficient to put a man of ordinary prudence and experience in business transactions on inquiry, he must be held, though a purchaser for value, to have notice of the fraudulent intent of his vendor to delay, hinder, and defraud his creditors. *Keneweg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773.

In order to charge a grantee with knowledge of the fraud of his grantor, it is sufficient to show that the grantee had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally cause him to pause and inquire before consummating the transaction, and that

such inquiry would have necessarily led to the discovery of the facts from which the law imputes fraud to the grantor. *Anderson v. Mossy Creek Woolen Mills Co.*, 100 Va. 420, 425, 41 S. E. 854.

In order to charge a grantee with knowledge of his grantor's fraud, it is not necessary to prove actual knowledge. It is sufficient to prove knowledge of facts and circumstances naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and inquire before consummating the transaction. If such inquiry would have necessarily led to a discovery of the fact, with notice of which he is sought to be charged, he will be chargeable with such notice whether he made the inquiry or not. But while notice may be inferred from circumstances as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser, and be so strong and clear as to fix upon him the imputation of bad faith. Mere inadequacy of price is not sufficient to set aside a deed unless it be so gross as to shock the conscience and furnish decisive evidence of fraud. In the case in judgment, the evidence fails to establish notice to the grantees of the fraud of their grantor, if indeed there was such fraud. *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686.

"There was enough at least in the manner and mode of those sales to have raised an honest dealer's suspicion, and put him on inquiry which was sufficient. They operated to delay, hinder, and defraud creditors." *Keneweg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303; *Farley v. Bateman*, 40 W. Va. 540, 22 S. E. 72.

"There is no direct proof in the record of any fraudulent intent on the part of the appellants, nor of any

knowledge by them of any fraudulent purpose on the part of the grantor. It is not necessary, however, that the grantees should appear to have had actual knowledge of the grantor's unlawful purpose. It is sufficient if they had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and inquire before consummating the transaction. If such inquiry would have necessarily led to a discovery of the fact, with notice of which he is sought to be charged, he will be considered to be effected with such notice, whether he made inquiry or not. But while the fact of notice may be inferred from circumstances as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides*." *Flook v. Armentrout*, 100 Va. 638, 643, 42 S. E. 686; *Fischer v. Lee*, 98 Va. 159, 35 S. E. 441; *Newberry v. Bank*, 98 Va. 471, 36 S. E. 575.

In *Douglass, etc., Co. v. Laird*, 37 W. Va. 687, 17 S. E. 188, a deed of trust was held to be fraudulent, but not on its face, and the trustee held to have notice of the grantor's fraudulent intent.

5. Fraud on Grantor's Part Alone.

In *Roanoke Nat. Bank v. Farmers' Nat. Bank*, 84 Va. 603, 5 S. E. 682, a grantor conveyed land to a certain grantee, as it appears, without his consent or knowledge, and had the deed recorded. A creditor at large under Va. Code, 1873, ch. 175, § 3, brought a suit to annul it as fraudulent. The grantor made no appearance. After the decree was entered and during the same term, the grantee filed his answer, denying that he had ever claimed any title, under the deed. The court held the deed fraudulent as to grantor's creditors, and therefore void.

6. Voluntary Conveyances Executed with Intent to Defraud.

See post, "Transfers Which Are Voluntary or upon Consideration Not Deemed Valuable in Law," V.

A voluntary conveyance will be declared fraudulent as to subsequent creditors, if, from the circumstances and other evidence, the court is convinced the deed was made with intent to defraud such creditors; and the conveyance being voluntary, it is immaterial whether the grantee had notice of the fraud. *Mayhew v. Clark*, 33 W. Va. 387, 10 S. E. 785; *Duncan v. Custard*, 24 W. Va. 730; *Connaway v. McCann*, 30 W. Va. 200, 3 S. E. 590.

While it is true, as held in *Lockhard v. Beckley*, 10 W. Va. 87, 88 (1877), under the second section of chapter seventy-four of the Code of West Virginia, that a voluntary conveyance, as to subsequent creditors, is not void merely on the ground that it was voluntary, and the party indebted at the time it was made; yet upon the question whether it is fraudulent in fact, it is proper to consider the circumstances of its being voluntary, and the party indebted at the time; and if additional circumstances connected with these two be sufficient to show fraud in fact, it is void as to subsequent creditors.

7. Confidential Relations as Evidence of Knowledge of Intent.

See post, "Confidential Relations," IV, H.

If the grantor and grantee are relations or are intimate, it seems that this is a fact from which it may be inferred that the latter knows the former's financial condition. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960.

F. ELEMENTS AND BADGES OF FRAUD.

1. In General.

In the absence of direct and positive testimony, there are many facts and circumstances which the law admits to be the marks or signs of frauds; and

from which, therefore, the fraudulent intent may be inferred. Some of these circumstances afford only *prima facie* evidence of it; but others afford conclusive evidence and establish it decisively. *Land v. Jeffries*, 5 Rand. 600. See also, *Bank of Piedmont v. Bowman*, 39 W. Va. 622, 20 S. E. 593; *Allen v. Freeland*, 3 Rand. 170.

While fraud must be proved, the transaction itself may furnish proof of the fraud so satisfactory and conclusive as to outweigh the answers of the defendants denying the fraud, or even the evidence of witnesses. *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517.

Wherever there appears to be connected with the transaction circumstances indicating excessive effort to give the appearance of fairness or regularity, which are not usual attendants of such business, the courts will regard such circumstances as badges of fraud. *Hart v. Sandy*, 39 W. Va. 644, 20 S. E. 665.

Marriage Settlement.—See post, "Settlements," V, C.

Fraud can not be presumed in an action to set aside a marriage settlement, but must be proved by clear and satisfactory evidence to have been concurred in by both parties. And this is so, irrespective of the amount of the husband's indebtedness, and even though his whole estate is included in the settlement. *Noble v. Davies*, 1 Va. Dec. 633.

2. Possession, Use, and Apparent Ownership Unchanged.

See post, "Retention of Possession or Apparent Title by Grantor," IV, I.

a. General Rule.

One of the usual badges of fraud is that of the grantor remaining in possession as before the conveyance. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Arm-*

strong v. Lachman, 84 Va. 726, 6 S. E. 129; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750. See also, *Land v. Jeffries*, 5 Rand. 600.

b. Realty.

Retention by the grantor of the possession of real estate conveyed by him with intent to defraud his creditors is a badge of fraud, and casts upon the parties the burden of showing that the grantor is holding in good faith under the grantee as his tenant or consistently with the deed. *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268.

Where a grantor who is largely in debt conveys all his land to his son, upon a consideration merely nominal, and secured to himself and wife, thus rendering himself hopelessly insolvent, and the possession, use and apparent ownership remains unchanged in the grantor, it seems that the transaction is marked with badges of fraud. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16, 33; *Hunter v. Hunter*, 10 W. Va. 321; *Lockhard v. Beckley*, 10 W. Va. 87; *White v. Perry*, 14 W. Va. 66; *Martin v. Rexroad*, 15 W. Va. 512; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Knight v. Capito*, 23 W. Va. 639; *Hunters v. Waite*, 3 Gratt. 26.

Concurrent Possession of Grantor and Grantee.—Concurrent possession of both the grantor and grantee in an absolute deed after the conveyance is a badge of fraud. *Livesay v. Beard*, 22 W. Va. 585.

Grantor Holding as Lessee.—In a suit to set aside a conveyance as in fraud of the grantor's creditors, though possession by the grantor after the conveyance is *prima facie* evidence of ownership by him, yet when the fact of his remaining in possession is satisfactorily explained, as where it is shown that he holds as a lessee, in good faith, under his grantee, and not under any secret trust for his own benefit, such remaining in possession does not invalidate the conveyance to

the purchaser for value without notice. *Blackshire v. Pettit*, 35 W. Va. 547, 14 S. E. 132, 133.

c. Chattel Property.

The retention of the possession of the personal property by the vendor, after an absolute sale, is *prima facie* fraudulent. *Davis v. Turner*, 4 Gratt. 422.

3. Transfers Where Insolvency Threatened.

The badges of fraud, in a particular case, were, that the deed was executed on the eve of the debtor's departure from the state, and shortly after the receipt of intelligence materially affecting his credit; that the value of the property conveyed by it, was more than double the amount of the debt intended to be secured; that a bill of lading, for part of the property, was antedated by the grantee, for the purpose of overreaching another creditor, who had previously obtained a bill of lading for the same; that the grantee, on applying for an injunction, to prevent a sale at the instance of a third creditor, refused to accede to just and reasonable terms offered him by the court; and, finally, that he permitted the grantor to take, use, and sell the property, contrary to the tenor of the deed, or connived at his doing so. *Wright v. Hancock*, 3 Munf. 521.

4. Transfers Pendente Lite.

A conveyance made by a party of his entire property during the pendency of a suit brought to recover judgment against him on a debt is a badge of fraud. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750.

The expectation or pendency of a suit is a badge of fraud, because a

transfer tends to deprive the creditor of the means of enforcing his judgment when he obtains it. If an attorney who holds a claim for collection is induced to delay the institution of a suit at the request of the debtor, who thereupon takes advantage of the delay to make a conveyance, this is a badge of fraud the same as if the suit were actually pending. The pendency of a suit, however, is merely a badge of fraud. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 964.

The mere fact, however, that a deed was made during the pendency of the actions, and under the circumstances just mentioned, does not affect the validity of the deed, in the absence of fraud, and we do not discover in the record any evidence to sustain the charge of fraud, which to avail in such a case, must always be proved with clearness and certainty. *Matthews v. Crockett*, 82 Va. 394; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131. It has been repeatedly decided that the execution of a deed, pending a suit against the grantor by a creditor, and a short time before the term at which it was probable judgment would be rendered against him, does not of itself vitiate the deed, and that a debtor in failing circumstances may make a valid assignment for the benefit of his creditors, and may make preferences as between them. To make such preferences is neither illegal nor immoral when not prohibited by statute. *Brooks v. Marbury*, 11 Wheat. 78; *Skipwith v. Cunningham*, 8 Leigh 271; *Sipe v. Earman*, 26 Gratt. 563; *Gordon v. Cannon*, 18 Gratt. 387; *Williams v. Lord*, 75 Va. 390. Besides, even if there had been fraud on the part of the grantor, such fraud could not affect the rights of the trustee and the creditors secured by the deed without notice of the fraud. *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615.

And the following state of facts are not badges of fraud: That a debtor,

pending actions against him, threatens to protect himself if they are pressed, and makes assignment postponing the claims of the suing creditors; that the bonds of the preferred creditors are antedated without their knowledge; that until the bonds of the preferred creditors mature, namely, eleven months after date of assignment, grantor retains possession and takes the profits, and sale to be made by trustee on request of any creditor; that grantor secures the debt of the suing creditor on condition of a release of one-half thereof, and conveys all his property, except an equity of redemption in property, the incumbrances on which exceed its value, and a small amount of exempted personalty; or that the preferred creditors failed to list for taxation the bonds evidencing their claims. *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329.

A conveyance of all his property by a father, who is greatly in debt and apprehensive of a heavy liability by the decision of a suit against him for damages for breach of warranty of title to land sold by him, to his son, for an improbable cash payment, and deferred payments without interest, extending through a period of fifteen years, upon an agreement on the son's part to provide maintenance for his father and mother during their lives, presents a case, which, without full examination, is indicative of fraudulent intent, especially where the son, who might afford the necessary explanation, if there was any, is not examined as a witness in the suit to set aside the conveyance for fraud. *Click v. Green*, 77 Va. 827.

5. Retaining Uncancelled Evidence of Indebtedness.

When a conveyance is made in consideration of a pre-existing indebtedness, it is a badge of fraud for the grantee to retain the evidence of such indebtedness, in his possession uncancelled, after the conveyance has been completed. *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816.

6. Conduct.

Fraud may be deduced from deceptive assertions, and from incidents and circumstances evincing a fraudulent intent. *Sturm v. Chalfant*, 38 W. Va. 248, 18 S. E. 451.

In a suit, if the burden of proof as to the existence and validity of certain debts are within the power of the grantee and the persons, to whom or by whom any of such debts were paid, as well as the subscribing witnesses to such deed, are within the power of the grantee, and instead of examining them he becomes a witness for himself in regard to such consideration, such failure to call and examine such witnesses unless satisfactorily explained will be regarded as a badge of fraud upon said conveyance. *Knight v. Capito*, 23 W. Va. 639.

7. Relationship.

Relationship is not a badge of fraud. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 963. See post, "Confidential Relations," IV, H.

Fraud, however, is generally accompanied with a secret trust, and hence the debtor must usually select a person in whom he can repose a secret confidence. The sentiments of affection commonly generate this confidence, and often prompt relatives to provide for each other at the expense of just creditors. Consequently relatives are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has confidential relations. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 963.

Relationship and the nature of indebtedness coupled with other things such as inadequacy of consideration, a conveyance of the whole of the debtor's property, or the greater part thereof, or that the debtor made it as a secret trust for his own use, may justify the setting aside of the deed as fraudulent, but standing alone they do not furnish a sufficient excuse. *Stuart*

v. Neely, 50 W. Va. 508, 512, 40 S. E. 441.

8. Inability or Failure to Account for Consideration.

The inability or failure of the grantor to satisfactorily account for the money he claims to have received in consequence of the conveyance, when put upon oath as to the matter, is a circumstance from which fraud on his part in the transaction may be presumed. *Ballard v. Chewning*, 49 W. Va. 508, 517, 39 S. E. 170.

9. Grant Producing Insolvency.

Where the grantor who is largely in debt, conveys to his son all the land that he owns, upon a consideration that is merely nominal, and which is secured to himself and wife, thus rendering himself hopelessly insolvent, such transaction is a badge of fraud. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16, 33; *Hunter v. Hunter*, 10 W. Va. 321; *Lockhard v. Beckley*, 10 W. Va. 87; *White v. Perry*, 14 W. Va. 66; *Martin v. Rexroad*, 15 W. Va. 512; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Knight v. Capito*, 23 W. Va. 639; *Hunters v. Waite*, 3 Gratt. 26.

As to the necessity of grantee's knowledge, see ante. "The Intent to Hinder, Delay and Defraud." IV, E.

10. Including Perishable Property in Deed.

The including in the deed perishable property which must be consumed or become worthless before the time fixed for the sale, though it may not of itself be sufficient to set aside the deed as fraudulent, yet it is a fact indicative of a fraudulent intent. *Quarles v. Kerr*, 14 Gratt. 48.

11. Gross Inadequacy of Consideration.

See post, "Consideration," IV, G.

Gross inadequacy of price is one of the usual badges of fraud. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129;

Reilly v. Barr, 34 W. Va. 95, 11 S. E. 750; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Livesay v. Beard*, 22 W. Va. 585, 594; *Bresee v. Bradfield*, 99 Va. 331, 38 S. E. 196.

12. Failure to Take Security.

One of the usual badges of fraud is that no security was taken for the purchase money. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Livesay v. Beard*, 22 W. Va. 585, 594.

13. Extended Credit.

Unusual length of credit for bonds which have been taken at long periods for land conveyed is a badge of fraud. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Livesay v. Beard*, 22 W. Va. 585, 594.

14. Concealment of Transaction.

The concealment of the transactions which relate to the conveyance is deemed a badge of fraud. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Livesay v. Beard*, 22 W. Va. 585, 594.

15. Delay in Acknowledging and Recording Deed.

Keeping the deed unacknowledged and unrecorded for a considerable time is deemed a badge of fraud. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young*

v. Willis, 82 Va. 291; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129, *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Livesay v. Beard*, 22 W. Va. 585, 594.

16. In Payment of Antecedent Indebtedness.

A conveyance in payment of an antecedent indebtedness of a father to his son when they reside together is a badge of fraud. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Livesay v. Beard*, 22 W. Va. 585, 594.

Conveyance by Insolvent.—A conveyance in consideration of an antecedent debt, from an insolvent to his creditor, without fraudulent intent in the creditor though the creditor knows of his debtor's insolvency, does not alone stamp the conveyance as one fraudulent in fact and utterly void; but it stands for the benefit of all creditors, including the one thus preferred. *Herold v. Barlow* (W. Va.), 36 S. E. 8.

17. Indebtedness.

That the grantor is largely indebted at the time of the conveyance to his son, which is upon a nominal consideration, is a badge of fraud. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16, 33; *Hunter v. Hunter*, 10 W. Va. 321; *Lockhard v. Beckley*, 10 W. Va. 87; *White v. Perry*, 14 W. Va. 66; *Martin v. Rexroad*, 15 W. Va. 512; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Knight v. Capito*, 23 W. Va. 639; *Hunters v. Waite*, 3 Gratt. 26.

The mere payment by a husband, though indebted, but clearly solvent, for lots intended as a permanent home, and conveyed to the wife by his vendor at his request, or payment by him for building a house thereon, will not alone establish actual fraudulent intent, so as

to subject the lots to aftermade debts; but these are circumstances to be considered with others upon the question of such intent. *Enslow v. Sliger*, 51 W. Va. 405, 41 S. E. 173.

A mere trifling indebtedness will not be grounds for avoiding a conveyance for fraud. *Irvine v. Greever*, 32 Gratt. 411.

Nature of Indebtedness.—The nature of the indebtedness and the relationship of the parties, coupled with other things, such as inadequacy of consideration, a conveyance of the whole of the debtor's property, or the greater part thereof, or that the debtor made it as a secret trust for his own use, may justify the setting aside of a deed as fraudulent, but standing alone it would seem not to furnish a sufficient excuse. *Stuart v. Neely*, 50 W. Va. 508, 512, 40 S. E. 441.

18. Reservations and Secret Trusts.

See post, "Reservations, Conditions and Secret Trusts," IV, L.

19. Conveyance of Whole or Greater Part of Property.

The conveyance of the whole of the debtor's property, or the greater part thereof, coupled with the relationship of the parties and the nature of the indebtedness, may justify the setting aside of a deed as fraudulent, but standing alone it would seem not to furnish a sufficient excuse. *Stuart v. Neely*, 50 W. Va. 508, 512, 40 S. E. 441.

20. Withholding from Record as a Circumstance Evidencing Fraud in Fact.

As to the effect upon the rights of creditors and purchasers of a failure to comply with the requirements of recording acts, see post, "Failure to Record," IV, K, and cross references there made.

A voluntary transfer of property to be valid against subsequent creditors must be recorded, or possession must remain solely and bona fide with the donee. *Davis v. Payne*, 4 Rand. 332;

Bank of Alexandria v. Patton, 1 Rob. 499; *Hunters v. Waite*, 3 Gratt. 26; *Penn v. Whitehead*, 17 Gratt. 503; *Huston v. Cantril*, 11 Leigh 136, 137; *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

21. Badges of Fraud Raise Prima Facie Presumption.

See post, "Evidence," VIII, I.

Any of the facts which are deemed badges of fraud may make a case of prima facie fraud, calling on the parties for explanation. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Livesay v. Beard*, 22 W. Va. 585, 594.

G. CONSIDERATION.

1. In General.

Land Conveyed in Consideration of Stock.—In *Baker v. Naglee*, 82 Va. 786, 1 S. E. 191, a grantor conveyed land, in exchange for stock, to an incorporated company, which conveyed it to secure bonds issued by it. The grantor's creditor subsequently filed a bill, alleging that the grantor and the company were one and the same, and that the conveyance was a contrivance to hinder, delay and defraud his creditors; and prayed that the conveyance be annulled and the issue and sale of the bonds be enjoined. The court held the conveyance valid, the stock a valuable consideration, and that there was no proof of fraud in the transaction.

Consideration Composed of a Promise to Pay Off Grantor's Debts and Abandon a Suit for Divorce.—In *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799, a worthless husband, indebted to insolvency, in pursuance of a agreement that his wife would abandon her purpose to sue for a divorce, and that she

and her sons would pay certain specified debts of the husband, which he asserted and they believed were all he owed, amounting to over \$800, conveyed to a third person, who on the same day conveyed to the wife, real estate worth from \$600 to \$800. The wife and sons at the time assumed to pay, and afterwards, in good faith and without notice of any fraud, did pay off said debts. Upon these facts the court declared that, the conveyance was valid as against the creditors of the husband whose debts existed prior to and at the time of the conveyance, but of which the wife had no notice.

Assignment of Bond in Consideration of Maintenance.—In *Hisle v. Rudasill*, 89 Va. 519, 16 S. E. 673, two maiden ladies, the one an invalid and the other fifty-five years old, without means except certain bonds of uncertain value, assigned these bonds to a certain assignee, in consideration that this assignee would support them during their lives. The assignee did not know certain prior creditors of theirs, these creditors taking no steps to enforce their claims until more than twenty years after the assignment was made. Thenceforth they both resided with the assignee; the invalid continuing with him twenty-three years, until her death, the other still continuing. There was no evidence that the transaction was voluntary or fraudulent. Neither assignor sought to annul it. The court held upon these facts that it was a contract of hazard and the bill of the prior creditor to set it aside was without merit.

Title Bond Given in Husband's Name, but Consideration Paid Out of Wife's Separate Estate.—In *Hamilton v. Steele*, 22 W. Va. 348, the court declares, that if a title bond for land is executed by a vendor of the land to a husband, and the consideration is paid by the husband as the agent of his wife, directly from the proceeds of the sale of certain separate estate belonging to the wife, the husband hav-

ing no estate or means of his own, and the circumstances show that the purchase is made for the wife, and the deed is subsequently made by the vendor directly to the wife, such deed is not fraudulent as against the creditors of the husband, and the land can not be subjected to the payment of the debts of the husband's creditors.

2. Valuable Consideration.

As to the necessity of a valuable consideration to support a contract, and what constitutes a valuable consideration, see the title **CONTRACTS**, vol. 3, p. 307.

Where a conveyance is upon a valuable consideration, it will, as a general rule, be valid as against all persons. *Nulton v. Isaacs*, 30 Gratt. 726.

Where, upon the evidence in the cause, a deed was made without reference to any indebtedness, if any such existed, but upon a consideration not deemed valuable in law, it was held, void as to creditors at the date of the deed. *King v. Malone*, 31 Gratt. 158.

Meritorious Consideration.—See generally, the title **CONTRACTS**, vol. 3, p. 307.

Though the conveyance is not founded on a valuable but only on a meritorious consideration in favor of a wife and children, a court of equity may give effect to it against subsequent creditors. *Sayers v. Wall*, 26 Gratt. 354.

Relinquishment of Marital Rights.—See post, "Husband and Wife," IV, H, 3.

"Although it is not competent to a husband, after his marriage, to defeat or obstruct his creditors, by selling or exchanging his property, and taking a conveyance of the money or other property received therefor, to the use, or for the benefit of his wife and family (such conveyance being deemed voluntary, and fraudulent as to creditors); yet the case may be otherwise in relation to so much of such money or other property as goes to compen-

sate the just interests of the wife. If, therefore, the wife relinquish her right of dower in other land, in consideration of such conveyance, the value of such dower ought to be saved to her, in opposition to the claims of her husband's creditors." *Quarles v. Lacy*, 4 Munf. 251; *Johnston v. Gill*, 27 Gratt. 587.

Valuable but Intent Is Fraudulent.—See ante, "Participation of Alienee in Fraud," IV, E, 4.

Although a deed be made for a valuable and adequate consideration, yet if the intent of the grantor be dishonest or unlawful, the deed will be deemed fraudulent, if the grantee had notice of such intent. *Harden v. Wagner*, 22 W. Va. 356, 357; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Briscoe v. Clarke*, 1 Rand. 213; *Livesay v. Beard*, 22 W. Va. 585; *Bowyer v. Martin*, 27 W. Va. 442; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *First Nat. Bank v. Prager*, 50 W. Va. 660, 680, 41 S. E. 363; *Silverman v. Greaser*, 27 W. Va. 550. See also, *Lewis v. Bragg*, 47 W. Va. 707, 35 S. E. 943.

Voluntary Subsequently Followed by Valuable Consideration.—In *Huston v. Cantril*, 11 Leigh 136, it was held, that a voluntary conveyance, made by a man greatly indebted, to his daughter, is rendered good and available against creditors of the grantor upon the subsequent marriage of the daughter, who thereupon was to be regarded a purchaser by relation for a valuable consideration. See also, *Herring v. Wickham*, 29 Gratt. 628, 637; *Bentley v. Harris*, 2 Gratt. 357.

3. Want of Consideration.

In *Harrison v. Carroll*, 11 Leigh 476 (1841), a husband and wife made a parol agreement, that the husband should settle personal property to the separate use of the wife, on condition that the wife would relinquish her contingent right of dower in lands of the husband, which he proposed to convey for the benefit of creditors. The settlement

upon the wife was accordingly executed. Subsequent to the execution of this deed of settlement, a creditor of the husband obtained judgments against him, and sued out a fieri facias thereon, and delivered it to the sheriff. Some time after this, the wife, in pursuance of her agreement, joined her husband in a deed conveying the lands. Upon these facts, the court held that the property settled on the wife was liable to the execution of the judgment creditor, and that it was not proper for a court of equity to restrain the creditor from proceeding to make his debt out of same. This on the ground that the agreement which was the ostensible consideration, in no wise bound the wife, and in respect of every legal obligation on her, or remedy on the part of the husband or his creditors, the agreement was a mere nullity. And in the case of a mere parol unexecuted contract, between husband and wife, where nothing passed from the wife, no obligation was incurred, and no remedy existed to compel her to convey anything.

4. Inadequacy of Consideration.

a. In Conjunction with Other Circumstances.

Inadequacy of consideration, coupled with relationship and the nature of the indebtedness, may justify the setting aside of a deed as fraudulent, but standing alone it does not necessarily furnish a sufficient excuse. *Stuart v. Neely*, 50 W. Va. 508, 512, 40 S. E. 441.

Inadequacy of Consideration Combined with Subsequent Fraud.—And, as further held in *Livesay v. Beard*, 22 W. Va. 585, if an insolvent debtor for an inadequate consideration conveys a valuable portion of his real estate to his children, and others, and on the same day makes a conveyance of other property to secure preferred creditors, which deed is fraudulent on its face, and four days thereafter makes a similar deed conveying all the residue of his property, which last deed is also

fraudulent on its face, these facts taken together are strong evidence of a fraudulent intent in the execution of the first deed.

b. Gross Inadequacy.

See ante, "Gross Inadequacy of Consideration," IV, F, 11.

c. Mere Inadequacy.

Where there is no actual fraud and no fiduciary relation between a purchaser of a reversionary interest and his vendor, mere inadequacy of consideration is not sufficient to avoid a sale, unless it is so great as to shock the moral sense. *Mayo v. Carrington*, 19 Gratt. 74.

"Mere proof of inadequacy of price by itself has been considered insufficient to implicate the vendee in the fraudulent intent, and inadequacy of price, unless extremely gross, does not per se prove fraud. It must appear that the price was so manifestly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud." *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804; *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560; *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775; *Blubaugh v. Loomis*, 48 W. Va. 666, 37 S. E. 794.

It is a well-settled rule of law that mere inadequacy of price is no ground for setting aside a conveyance, unless so gross as to shock the conscience and furnish decisive evidence of fraud. *Bresee v. Bradfield*, 99 Va. 331, 38 S. E. 196. In this case it is said, citing 2 Pom. Ep. Jur., § 928: "If there is nothing but mere inadequacy of price, the case must be extreme, in order to call for the interposition of equity. When the accompanying incidents are inequitable, and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of

the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative." *Flook v. Armentrout*, 100 Va. 638, 644, 42 S. E. 686.

In *Moore v. Triplett*, 2 Va. Dec. 238 (1895), the court held, that the fact that the consideration paid on property worth \$26,000 was \$2,872 less than that amount, does not show such an inadequacy of consideration as to justify a cancellation of the conveyance, as in fraud of the grantor's creditors. See also, *Sutherlin v. March*, 75 Va. 223.

Sale for Fair Price—Larger Price Obtained if Sold on Credit.—"A bona fide sale for a fair price to an innocent purchaser should not be set aside, at the instance of the creditor of the grantor, on the grounds of alleged fraud, for the sole reason that, in the opinion of sundry witnesses, the property might have brought a larger price if sold on credit." *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671. See also, *Smith v. Smith*, 48 W. Va. 51, 54, 35 S. E. 876.

d. Nominal Consideration.

Where a grantor is largely in debt, and conveys all his land to a grantee, who is his son, upon a consideration that is merely nominal, and is secured to himself and wife; and the possession, use, and apparent ownership of the land remains unchanged in the grantor, who by the conveyance is rendered hopelessly insolvent, it seems that such transaction is marked with badges of fraud. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16, 33; *Hunter v. Hunter*, 10 W. Va. 321; *Lockhard v. Beckley*, 10 W. Va. 87; *White v. Perry*, 14 W. Va. 66; *Martin v. Rexroad*, 15 W. Va. 512; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Knight v. Capito*, 23 W. Va. 639; *Hunters v. Waite*, 3 Gratt. 26.

Conveyance from Debtor to Creditor.—And if an insolvent grantor justly indebted to one of his creditors in a comparatively small amount, convey

to him all his property, or the greater portion thereof, in satisfaction of his debt, for a nominal consideration, falsely recited in the deed, and claimed by the grantee to have been in hand paid, equal in value to that of the property conveyed but largely in excess of the debt actually due such creditor, and he accepts the same, such deed, as to the other creditors of the grantor, will be held to be fraudulent and void; as the necessary effect of such deed is to hinder, delay and defraud such other creditors; and the grantor and grantee in such deed will be held to have intended the necessary result of their wrongful act. *Knight v. Capito*, 23 W. Va. 639.

5. Consideration Voluntary in Part.

See post, "Transfers Which Are Voluntary or upon Consideration Not Deemed Valuable in Law," V.

The consideration may be in part voluntary, and yet the legal consideration may be more than ample to cover the value of the property. *Stuart v. Neely*, 50 W. Va. 508, 512, 40 S. E. 441.

6. Consideration Fraudulent in Part.

A deed of trust executed in part to secure fraudulent debts, but in part to secure a bona fide debt, the bona fide creditor having no notice of the dishonest purpose on the part of the grantor, is a valid security for the bona fide debt. *Billups v. Sears*, 5 Gratt. 31.

7. Transfers Where Confidential Relation Exists.

See post, "Confidential Relations," IV, H.

H. CONFIDENTIAL RELATIONS.

1. General Consideration.

It seems to be well settled that any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances and serves to elucidate, explain or give color to the transaction. *Johnson v. Lucas*, 103 Va. 36, 40, 48 S. E. 497; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E.

960, 963; *Johnston v. Gill*, 27 Gratt. 587.

Relationship between parties, by blood or affinity, calls upon the court for careful and close scrutiny of the transaction and the conduct of, and evidence offered by, the grantee. *Colston v. Miller*, 55 W. Va. 490, 491, 47 S. E. 268.

But mere relationship of itself is not a badge of fraud. There is no law which forbids persons standing in near relations of consanguinity, affinity, or business, from dealing with each other, or which requires them to conduct their business with each other differently from the manner in which they conduct it with other persons. But as fraud is generally accompanied by a secret trust, the debtor usually selects some person in whom he can repose secret confidence. And as this trust and confidence is more likely to exist between relatives, or those who occupy confidential relations, their transactions with each other, when fraud is charged, will be more closely scrutinized. *Johnson v. Lucas*, 103 Va. 36, 40, 48 S. E. 497.

A transaction with a near relative is open to more suspicion than with a stranger, because it is more likely to be intended, not as a real transaction, but as a feigned and collusive arrangement by which it is secretly understood that the donee shall hold the property against the claims of creditors and still let the debtor receive the benefit from it. *Watkins v. Wortman*, 19 W. Va. 78; *Knight v. Capito*, 23 W. Va. 639; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 267; *Ballard v. Chewning*, 49 W. Va. 508, 517, 39 S. E. 170.

Conveyance Renders Debtor Unable to Satisfy Creditors.—When a conveyance in favor of a relative leaves a man without means to satisfy his creditors, it is the basis of a strong suspicion of

fraud. *Moore v. Gainer*, 53 W. Va. 403, 44 S. E. 458; *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364; *Bartlett v. Cleavenger*, 35 W. Va. 719, 720, 14 S. E. 273; *Herzog v. Weiler*, 24 W. Va. 199; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 791.

As Showing Knowledge of Fraudulent Intent.—As to the fact of relationship or intimacy evidencing knowledge of fraudulent intent, see ante, "Confidential Relations as Evidence of Knowledge of Intent," IV, E, 7.

2. Existence of Relationship by Consanguinity or Affinity.

a. In General.

Transactions between a father and child, brother and sister, and many others, between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction be impeached as fraudulent, may be shown to be fraudulent by less proof than would be required when different relations exist; and the party claiming the benefit of such transaction, will be held to a fuller and stricter proof of its justice; and the fairness of the transactions, after it is shown to be prima facie fraudulent, will require greater proof to be established than would be required if the transaction were between strangers. *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780.

Where a conveyance is made to a near relative, the fact is calculated to awaken suspicion, and the transaction will be closely scrutinized, though the fact is not of itself sufficient to raise a presumption of fraud. So mere proof of inadequacy of price is insufficient to implicate the grantee in the fraudulent intent as inadequacy of price, unless extremely gross, does not per se prove fraud. It must appear that the price was so manifestly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud. *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804.

Board and Lodging and Services Rendered.—See generally, the title IMPLIED CONTRACTS.

Board and lodging and the keep of a horse do not, as between near relatives, constitute a consideration from which the law will imply a promise of payment, and no action can be maintained therefor in the absence of an express contract or engagement to pay for them. Nor can an express promise to pay, made after the supplies have been furnished or the services rendered, be enforced against the promisor to the prejudice of his creditors. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

Purchase under Deed of Assignment, by Mother and Aunt of Assignor—Subsequent Sale to Wives of Assignors—Business Managed by Husbands.—In *Catlett v. Alsop*, 99 Va. 680, 40 S. E. 34, 7 Va. Law Reg. 625, a purchaser at a sale by the trustee under a deed of assignment made by a firm, was the mother of one of the partners and aunt of the other. She purchased the stock of goods for \$1,500, to be credited on her debt of \$3,000, preferred in and secured by the assignment. She continued business in the name of the firm as her agent. Subsequently she sold the stock to the wives of the partners on their agreement to pay her the balance due from the firm. This agreement was reduced to writing a year later. On payment of such balance, she relinquished to the wives all claim to the stock of goods, and they continued the business under the management of their husbands, but in their own names. The wives had no experience in business, nor separate estates, when they contracted to purchase the goods. The Va. Code of 1887, § 2287, allows a married woman to carry on business on her own account and § 2285 provides that her own separate estate shall not be subject to the use or control of her husband, or for his debts or liabilities. The court held, that no fraud was shown sufficient to

subject the profits of the business and property purchased therewith to the claims of the creditors.

b. Parent and Child.

See generally, the titles FRAUD AND DECEIT, ante, p. 448; PARENT AND CHILD; UNDUE INFLUENCE.

(1) In General.

The mere fact that a party conveys his property to a son or a brother is not per se a badge of fraud, but when such conveyance is attacked as fraudulent, such relationship, connected with other circumstances may strengthen the presumption of fraud. *Farmers' Transportation Co. v. Swaney*, 48 W. Va. 272, 37 S. E. 592.

The evidence to sustain an alleged parol gift by a father to his daughter on her marriage, should be clear and cogent. *Collins v. Lofftus*, 10 Leigh 5.

While transactions between father and son are subject to critical scrutiny, yet, if the circumstances show them to be fair, open, and free from fraudulent intent, the relationship of the parties will not vitiate or render them void. *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671. See also, *Smith v. Smith*, 48 W. Va. 51, 55, 35 S. E. 876.

(2) Conveyance from Child to Parent.

A conveyance from a child to its parent, whether with or without a valuable consideration, is presumed to be valid in the absence of any circumstances of proof tending to show fraud, misrepresentation or undue influence, on reasonable ground, from which the court may presume that the act was not entirely free and voluntary on the part of the child. *Pusey v. Gardner*, 21 W. Va. 469.

Where an insolvent party conveys his real estate to his father, from whom he purchased it, for a fair price, a portion of the purchase money being applied to the extinguishment of a vendor's lien retained by his father for the purchase money, and to the payment

of an attachment lien on the property and other bona fide indebtedness, such conveyance can not be set aside as fraudulent by a creditor of said insolvent, who has no lien upon the land, in the absence of any evidence showing a fraudulent intent on the part of such grantor, of which the grantee had notice. *Smith v. Smith*, 48 W. Va. 51, 35 S. E. 876.

(3) Parent to Child.

(a) Validity in General.

The fact that a party conveys his property to a son is not per se a badge of fraud, but, when such conveyance is assuaulted as fraudulent, such relationship, connected with other circumstances, may strengthen the presumption of fraud. *Farmers' Transportation Co. v. Swaney*, 48 W. Va. 272, 37 S. E. 592. If founded on a valuable consideration, the conveyance will be upheld. *Nulton v. Isaacs*, 30 Gratt. 726.

"And in this case we must reflect that this transaction, the building the house, paying out money, expending labor, is not between strangers, but between father and daughter, which makes the transaction more open to suspicion, places the burden on the defendant, and calls for fuller proof than a case between strangers." *Vandevort v. Fouse*, 52 W. Va. 214, 43 S. E. 112; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 791.

(b) Consideration Board and Lodging—Services Rendered.

See generally, the title IMPLIED CONTRACTS.

aa. In General.

The authorities held, that a parent, who is indebted to others, can convey property to a child to whom he is indebted for services rendered without being adjudged guilty of an intent to delay, hinder and defraud other creditors; but all such transactions are subject to careful investigation and will not be upheld unless entirely free from fraud. *Stuart v. Neely*, 50 W. Va. 508,

510, 40 S. E. 441; *Knight v. Capito*, 23 W. Va. 639.

bb. Law Will Not Imply Promise.

But it is further held, that board and lodging and the keep of a horse do not, as between husband and wife, parent and child, and other near relatives, constitute a consideration from which the law will imply a promise of payment, and no action can be maintained therefor in the absence of an express contract or engagement to pay for them. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

cc. Subsequent Express Promise.

An express promise to pay, made after the supplies have been furnished or the services rendered, will not be enforced against the promisor to the prejudice of his creditors. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

(c) Meritorious Consideration.

See generally, the title CONTRACTS, vol. 3, pp. 307, 376.

Defendant, representing himself as the owner of certain land, bought goods on credit. The record showed the title to be in his name. Later he had recorded a conveyance of the land to his daughter, the consideration being expressed to be one dollar, love and affection. The conveyance was of date prior to the purchase. A check was presented by him, which he insisted was the real consideration. It bore marks of unexplained alterations and erasures, and draftsmen testified that the check was not mentioned or produced when the conveyance was drawn. The grantor continued to occupy the house on the land after the execution of the deed, and paid taxes on it in his own name. When it was executed, he took it and locked it up, where it remained until recorded. Shortly after the conveyance was recorded, he assigned his effects for the benefit of his creditors, the proceeds whereof barely paid the rent for his store. Held, that the conveyances

were fraudulent and void as to creditors. *Slater v. Moore*, 86 Va. 26, 9 S. E. 419.

(d) Future Maintenance and Support.

See generally, the title CON-TRACTS, vol. 3, pp. 307, 369.

An agreement for future support, while it is a valuable consideration, is not sufficient to sustain a conveyance, when to do so will operate to the prejudice of the grantor's existing creditors. *Hanna v. Charleston Nat. Bank*, 55 W. Va. 185, 190, 46 S. E. 920. See also, *Henderson v. Hunton*, 26 Gratt. 926; *Keener v. Keener*, 34 W. Va. 421, 12 S. E. 729.

"In the present case on the face of the deed itself, the future support is made a part of the consideration thereof and it is rendered thereby prima facie void as a matter of law. This can only be overcome by the grantee showing that the grantor reserved a sufficient amount of property to pay all his existing debts, the best evidence of which as heretofore said, is that all existing debts have been satisfied. The void character of the deed can not be cured by showing that the grantee had afterwards assumed and paid debts to the full value of the property conveyed." *Hanna v. Charleston Nat. Bank*, 55 W. Va. 185, 190, 46 S. E. 920.

Conveyance Executed Pendente Lite.

—See ante, "Transfers Pendente Lite," IV, F, 4.

(e) Wages or Earnings of Minor Child Forming Consideration.

The earnings of a minor child who has not been emancipated, while laboring for another without the consent and approbation of the father, belong to the father; and, if received either directly or indirectly by the father, they do not constitute a valuable consideration for a deed by the father to the child. *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821.

But a bounty paid by the United States government, or by a state, city,

or county to a minor, a citizen of the United States, during a war, upon his enlisting in the military service of the United States, during a war, as well as his pay, belong to the minor, and not to his father; and, if such bounty and soldier's pay are received by the father from the son, they constitute a debt due to the son from the father, unless intended as a gift to the father by the son, and the father may satisfy such debt by a conveyance of land to the son, and such a conveyance should be regarded as made for a valuable consideration, and on a voluntary conveyance. *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821.

c. Brother, Sister or the Like.

Conveyance to Brother or Sister.—

The fact that a party conveys his property to a brother is not per se a badge of fraud, but, when such conveyance is assaulted as fraudulent, such relationship, connected with other circumstances, may strengthen the presumption of fraud. *Farmers' Transportation Co. v. Swaney*, 48 W. Va. 272, 37 S. E. 592.

A, who was the owner of a tract of land in X county, conveyed the same to his brother, B, for the avowed purpose of hindering and delaying one of his creditors, and the deed was properly recorded. More than twenty-one years thereafter, B, then residing and doing business in Y county, becoming involved in debt, conveyed two tracts of land he owned in said last-named county to his brother, A, for the purpose of hindering, delaying, and defrauding his creditors; and about the same time, after two judgments had been docketed against him in X county, he recovered the land situated in X county to his brother, A. Held, that it must be presumed that the last conveyance was made with the same object. *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302.

Transfer to Brother-in-Law.—"In the case of *Herzog v. Weiler*, 24 W.

Va. 199, it appeared that an insolvent husband transferred to his wife's brother for an alleged valuable consideration all of his personal property. Soon afterwards the brother transferred the said property to another brother, and the latter transferred it to his sister, the wife of said insolvent husband, as a gift in consideration of fraternal affection. In a controversy between the wife and the husband's creditors to have said property subjected to the payment of debts contracted by the husband before the transfer by him, the court held, that 'the burden of proving the transfer by the husband to the brother was bona fide and for a valuable consideration rests upon the wife.' The circumstances immediately surrounding this transaction—the pendency of the suit, the relationship of the grantee, the transfer of the entire property, real and personal, including the home of the grantor, when a judgment is about to be taken against him—are indications of a fraudulent intent. The near relationship or business relations of the grantee with the grantor are such as to cast the burden of proving the payment of consideration and the bona fides of the transaction upon [X] and his nephew [Y], and yet neither of them came forward as a witness to sustain the transaction or show that a valuable consideration was paid." *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 964.

Board and Lodging or Services Rendered as a Consideration.—See ante, "In General," IV, H, 2, b, (3), (b), aa.

d. Uncle and Nephew.

Among the relations to which the doctrine as to confidential relations applies, that of uncle and nephew is embraced. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960.

Where a conveyance of property by an uncle to his nephew is assailed as fraudulent as to creditors, the parties are held to a fuller and stricter proof

of the consideration and of the fairness of the transaction than if the conveyance was between strangers. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960.

e. Creditor Relative.

"As to the relationship of the parties, it may be stated that, while the law allows no discrimination in favor of creditors by reason of their being related to the debtor, it certainly does not put them at a disadvantage. The debtor may do no more for them than a stranger, but there is no rule of law that he may not do as much." *Harden v. Wagner*, 22 W. Va. 356, 370; *Smith v. Smith*, 48 W. Va. 51, 54, 35 S. E. 876.

3. Husband and Wife.

a. Operation and Effect in General.

The authorities make it clear that there are two distinct classes of cases in relation to the purchase of property by married women and settlements upon them by their husbands: The one class where the contest is between creditors of an insolvent husband and the wife, touching an alleged purchaser by the wife from the husband, or else from others, with means derived from him; and the other where the husband is not indebted at the time of the purchase or settlement. In the former case, it is settled law that the transaction is presumed to be fraudulent, and the burden rests upon the wife to repel the presumption and to show by clear and satisfactory evidence that the consideration was paid by her out of her separate estate and not by the husband; or, in case of a settlement, that the settler retained ample assets to satisfy creditors. The former class is exemplified by the cases of *Rankin v. Goodwin*, 103 Va. 81, 48 S. E. 521; *Kline v. Kline*, 103 Va. 263, 48 S. E. 882, and that line of decisions. On the other hand, where the husband is not indebted at the time of the transaction, no such presumption arises, and the burden of proof is upon the

subsequent creditor to show that a prospective fraud was contemplated and directed against him; and this principle applies also to voluntary settlements by the husband upon the wife. *Hutchison v. Kelly*, 1 Rob. 123, 131, 39 Am. Dec. 250; *Bank v. Patton*, 1 Rob. 499, 528; *Johnston v. Gill*, 27 Gratt. 587; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659; *Building, etc., Ass'n v. Reed*, 96 Va. 345, 31 S. E. 514.

Pecuniary transactions between husband and wife are to be closely scrutinized in order to ascertain if they are fair and honest. *Kline v. Kline*, 103 Va. 263, 48 S. E. 882.

In order that they may be sustained they must be fair and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors. *Baker v. Watts*, 101 Va. 702, 707, 44 S. E. 929; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Spence v. Repass*, 94 Va. 716, 27 S. E. 583.

"A conveyance of property from husband to wife, directly or indirectly with fraudulent intent towards prior or subsequent creditors will be held void as to them." *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 89; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

Transactions between a husband and wife, between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction be impeached as fraudulent, may be shown to be fraudulent by less proof than would be required when different relations exist; and the party claiming the benefit of such transaction will be held to a fuller and stricter proof of its justice; and the fairness of the transaction, after it is shown to be prima facie fraudulent, will require greater proof to be established than would be required if the transaction were between strangers. *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780.

If a husband conveys a tract of land to his wife, and the conveyance is attacked as fraudulent by his creditors, the deed should be set aside if the evidence is conflicting, as the presumption is against the good faith of the transaction. *Noyes v. Carter*, 2 Va. Dec. 218.

If it appears that the wife actively participated in the attempt to sustain a conveyance from her husband to her, by claiming that certain additional and unfounded indebtedness was a part of the consideration for the property, the conveyance will be treated as fraudulent in fact, and void in toto as to the creditors of the husband, and will not be permitted to stand as security to the wife for the valid portion of the consideration paid by her, as against such creditors. *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816.

If a married woman directly or indirectly convey her separate real property to her husband upon a consideration not deemed valuable in law, this is void as to her creditors whose debts shall have been contracted at the time it was made, if such creditors had the right, while the land was hers, to subject it or its rents and profits to the payment of their debts; as against existing creditors such voluntary conveyance is conclusively presumed to be fraudulent in law. *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

The participation of a wife in the fraud by her husband will not impair her rights. *Penn v. Whitehead*, 17 Gratt. 503, 512; *Quarles v. Lacy*, 4 Munf. 251; *Taylor v. Moore*, 2 Rand. 563; *Blanton v. Taylor*, Gilmer 209.

Where Husband Insolvent.—Transfers of property, either directly or indirectly, by an insolvent husband to his wife during coverture are justly regarded with suspicion, and unless it clearly appears, that the consideration was paid from the separate estate of the wife or by some one for her out of means not derived either directly or remotely from the husband, such trans-

fers will be held fraudulent and void as to the creditors of the husband. *Core v. Cunningham*, 27 W. Va. 206. See also, *Davis v. Davis*, 25 Gratt. 587.

Inadequacy of Consideration.—A conveyance of real estate, made directly or indirectly, by a husband to his wife, in consideration of a valid debt due from the husband to the wife, is fraudulent and void, as to the existing creditors of the husband, when it is shown that said consideration is much less than the value placed upon the property by both the husband and the wife, and they attempt to make out a consideration equal to or in excess of the value of the property by adding to said valid debt other indebtedness of the husband to the wife which had no existence in fact. *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816.

b. Particular Transfers and Transactions.

(1) Conveyance under Circumstances That the Law Would Require.

See generally, the title **CONTRACTS**, vol. 3, p. 307.

Although a husband, as the agent of his wife, contracts for the purchase of a tract of land, and the deed therefor, through mistake of the vendor, is made directly to the husband, and he pays no part of the purchase money, but conveys it to a third party, who does pay the entire purchase money for the same, for his wife, if the purchase money be either furnished to the third party by the wife, or be afterwards returned to the third party out of profits arising from the cultivation of her separate real estate, the husband being insolvent, and having no means of his own, although he assisted in managing the separate real estate from which the money paid as aforesaid was derived, and his minor sons by their labor assisted in making the money from the products of the land, the deed, under the circumstances, is not fraudulent against the creditors of the husband, and the land can not be subjected to

the payment of the debts of such creditors. *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. 688.

Although a contract for the sale of a tract of land be made with a husband, yet if it is understood between the parties at the time the contract is made that the purchase money is to be paid by the wife out of her separate estate, and the deed is made by the vendor to the husband, and a vendor's lien retained to secure the purchase money, yet if the vendor knowingly receives the purchase money from the wife, in accordance with the original understanding, and such land is conveyed by the husband to the wife, in consideration of her payment of the purchase money, said vendor can not attack such conveyance as fraudulent to a debt due from the husband as purchase money for a mule, of which the wife had no notice; neither can the assignee of such debt so attack such conveyance. *Prim v. McIntosh*, 43 W. Va. 790, 28 S. E. 742.

(2) Permitting Separate Estate to Pass into Hands of Husband.

See generally, the titles **HUSBAND AND WIFE**; **SEPARATE ESTATE OF MARRIED WOMEN**.

If a wife permits funds which constitute her separate estate to pass into the hands of her husband, and there is nothing to show that the transaction was a loan to him, or that they intended to occupy the relation of debtor and creditor, in a contest between the creditors of an insolvent husband and the wife over the funds, the creditors will prevail. *Building, etc., Ass'n v. Reed*, 96 Va. 345, 31 S. E. 514.

Money or property delivered by a wife to her husband is presumed, in a contest between her and the creditors of her insolvent husband, to have been a gift, and the burden is upon her to show the contrary. *Horner v. Huffman*, 52 W. Va. 40, 43 S. E. 132; *McGinnis v. Curry*, 13 W. Va. 29; *Kanawha Val. Bank v. Atkinson*, 32 W. Va. 203,

9 S. E. 175; *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871.

When the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves, that the transaction was by them considered or intended as a loan to the husband by the wife and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift. *Horner v. Huffman*, 52 W. Va. 40, 43 S. E. 132; *McGinnis v. Curry*, 13 W. Va. 29; *Kanawha Val. Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175; *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871.

Rebuttal.—To rebut the presumption of a gift from a wife to her husband, where with her knowledge and consent he has at different times received, and she has delivered to him, the proceeds of the sale of her realty, no receipt or written obligation being given to repay, and the same is mingled with his funds, the proof must be clear, full and above suspicion. *Kanawha Val. Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175. See *Fitzhugh v. Anderson*, 2 Hen. & M. 289.

Thus in *Kanawha Val. Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175, a husband, with the knowledge and consent of his wife, at different times, received, or she delivered to him, the proceeds of the sale of her realty; he gave her no note or other written obligation to repay it; and he mingled it with his means; used it in his business for years; kept no written account of such moneys (nor did she); then became insolvent, and some eight or ten years after his receipt of the money, purchased real estate in the name of his wife, and it was alleged by him and her that it was paid for with the money so received; and several years afterwards he and she united in a deed of trust to secure a very considerable debt on said real estate, such debt be-

ing a loan to the husband, and before such purchase a judgment was rendered against him for a debt. The lot was held liable to the judgment. And it was further declared that, if, when such purchase was made, any claim which she may have had on him for such proceeds of her real estate was barred by limitation, that such circumstances tended strongly to repel the wife's claim to exempt the land against creditors. See also, *Fones v. Rice*, 9 Gratt. 568; *Miller v. Cox*, 38 W. Va. 747, 18 S. E. 900.

(3) Improvements on Consort's Property.

See generally, the title IMPROVEMENTS.

The husband of an insane wife can not bind her separate estate to the payment of improvements put thereon, unless such improvements are in fraud of his creditors. *Hanley v. National Loan & Investment Co.*, 44 W. Va. 450, 29 S. E. 1002.

A husband can not in this manner charge the corpus of his wife's separate real estate, although, if he borrow money and invest it in improvements of his wife's separate real estate in fraud of his creditors, he being insolvent, such defrauded creditors may at least subject the rents, issues, and profits of such property owing to the enhanced value thereof by reason of such improvements, to the payment of their claims. *Hanley v. National Loan & Investment Co.*, 44 W. Va. 450, 29 S. E. 1002; *Kanawha Val. Bank v. Wilson*, 25 W. Va. 242.

Improvements put upon the separate estate of a married woman by her insolvent husband, in fraud of his creditors, may be followed in her hands by such creditors, and the separate estate charged with the value of such improvements. *Building, etc., Ass'n v. Reed*, 96 Va. 345, 31 S. E. 514.

A solvent husband puts improvements on his wife's separate property to the amount of one thousand and one hundred dollars. Then she, as his

surety, joins in a deed of trust on such property to secure his individual indebtedness to an amount in excess of one thousand, one hundred dollars. Former creditors of the husband can not attack such property because of the gift of the improvements by the husband to the wife, so long as such trust debts remain unpaid by the husband, and the wife is liable for the same, as such trust debt unpaid is equivalent to a revocation of the gift. *Hall v. Hyer*, 48 W. Va. 353, 37 S. E. 594.

Where there was a subsisting lien by deed of trust upon a piece of real estate, the property of the wife, and subsequently the husband with his own means made valuable improvements thereon in fraud of the rights of his creditor, who filed a bill and succeeded in charging the value of the improvements so made thereon, on account of his debt, it was held, that he had a lien on the improvements to the amount of the value thereof, subject to the deed of trust, and it was error to require the deed of trust debt to be paid out of the amount decreed to plaintiff against the improvements. *Myllius v. Smith*, 53 W. Va. 173, 44 S. E. 542.

(4) Surrender of Bond as a Consideration.

Where a wife has surrendered to her husband his bond, in consideration of a conveyance of real estate to her by him, the creditor of the husband can not object to the sufficiency of the consideration merely because she had not listed the bond for taxation, although she might not have been able to maintain an action on the bond until the tax and penalties had been paid. *Spence v. Repass*, 94 Va. 716, 27 S. E. 583.

(5) Conveyance by Trustee to Wife of Debtor.

Where property is conveyed for the benefit of creditors to a trustee, and the trustee sells it to the wife of the

debtors, and it is afterwards taken on a *fi. fa.*, against the husband, the question whether the transaction is fraudulent depends on the wife's good faith and want of notice, and not on the good faith of the trustee. *Hughes v. Kelly*, 2 Va. Dec. 588.

(6) Settlements.

As to settlements, antenuptial and postnuptial, see post, "Settlements," IV, H, 3, b, (6), where the subject is fully treated.

(7) Evidence.

(a) Presumption and Burden of Proof.

aa. Transactions between Husband and Wife.

(aa) Presumption against Bona Fides of Transaction, and Burden on Claimant.

Transactions between husband and wife must be fair and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors. In a contest between creditors of the husband and the wife, settlements upon the wife by the husband are presumed to be voluntary, and in transactions generally, where interests of the husband are transferred to the wife, especially where money transactions are involved, the presumption as to the bona fides of the transaction is in favor of the creditors and against the wife, and the burden is upon the wife to show by clear and satisfactory evidence that the transaction was made in good faith, and that the consideration was adequate and valuable, and where there is an alleged purchase by her, she must show that the consideration was paid out of her separate estate. *Crowder v. Garber*, 97 Va. 965, 34 S. E. 470; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Grant v. Sutton*, 90 Va. 771, 19 S. E. 784; *Kline v. Kline*, 103 Va. 263, 48 S. E. 882; *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660; *Spence v. Repass*, 94 Va. 716, 27 S. E. 583; *Lee v. Willis*, 101 Va. 188, 190, 43 S. E. 354; *Baker v. Watts*, 101 Va. 702, 44 S. E.

929; *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279, 6 Va. Law Reg. 613; *Kinnier v. Woodson*, 94 Va. 711, 27 S. E. 457; *Rankin v. Goodwin*, 103 Va. 81, 48 S. E. 521; *Yates v. Law*, 86 Va. 117, 9 S. E. 508; *Perry v. Ruby*, 81 Va. 317; *Robbins v. Armstrong*, 84 Va. 810, 6 S. E. 130; *Massey v. Yancey*, 90 Va. 626, 19 S. E. 184; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615; *Hatcher v. Crews*, 78 Va. 460; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804; *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 964; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 262; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Himan v. Thorn*, 32 W. Va. 507, 9 S. E. 930; *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671; *Knight v. Capito*, 23 W. Va. 639; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828; *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451; *Murdoch v. Baker*, 46 W. Va. 78, 32 S. E. 1009.

Conveyance to Husband and Wife.

—Where a lot is conveyed to a husband and wife, and, in a suit to subject the land, the bill charges that she paid no money for the property, in the absence of proof the presumption is that her husband furnished the means of payment. *Murdoch v. Baker*, 46 W. Va. 78, 32 S. E. 1009.

(bb) Shifting of Burden.

"If the bill charges them to be voluntary, and the answer denies the charge, such denial is not evidence for respondent, and does not shift the burden of proof, but a valuable consideration moving from the wife must be proved." *Perry v. Ruby*, 81 Va. 317; *Robbins v. Armstrong*, 84 Va. 810, 6 S. E. 130.

"Where bill alleges them to be voluntary, answer denying the allegation does not shift the burden. The defense must be proved." *Hatcher v. Crews*, 78 Va. 460; *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529.

(cc) Rebuttal of Presumption.

The presumption against the bona fides of the transaction must be overcome by clear, competent and satisfactory evidence. *Rankin v. Goodwin*, 103 Va. 81, 83, 48 S. E. 521; *Yates v. Law*, 86 Va. 117, 9 S. E. 508; *Grant v. Sutton*, 90 Va. 771, 19 S. E. 784; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Crowder v. Garber*, 97 Va. 565, 34 S. E. 470; *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279, 6 Va. Law Reg. 613; *Lee v. Willis*, 101 Va. 188, 43 S. E. 354; *Baker v. Watts*, 101 Va. 702, 44 S. E. 929; *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

"In a controversy between a wife and her husband's creditors, the burden is on the wife to show, by clear and satisfactory evidence, the bona fides of the transaction. The presumption is against her, and in favor of the creditors, the burden is upon her to show that the original transaction was a loan on her part, and that there was a contemporaneous agreement on his part to repay it. The mere possession of his bond or note is not alone sufficient to prove a loan as of its date." *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

"The case of *Kinnier v. Woodson*, 94 Va. 711, 27 S. E. 457, is relied on by appellant as a precedent in this case. But it will be observed that the cases are essentially different. In that case the wife was shown to possess sufficient means to purchase the property sought to be subjected by the husband's creditors; while it appeared that he was impecunious and insolvent. In the present case the conditions are practically reversed, and the evidence warrants the conclusion that the transaction was a shallow device concocted for the purpose of shielding the property of the husband from the payment of his debts." *Rankin v. Goodwin*, 103 Va. 81, 83, 48 S. E. 521.

"The mere holding by the wife of the husband's bond is not sufficient evidence that the relation of debtor and

creditor was established between them at the time the bond bears date. In this case the evidence falls short of these requirements." *Kline v. Kline*, 103 Va. 263, 48 S. E. 882.

"In the case in judgment the consideration for the settlement made by the husband on the wife is sought to be established by ex parte settlements of the husband as guardian of a ward, a part of whose estate the wife inherited, and the record, in its present condition, does not disclose facts sufficient to overcome the presumption against the wife, but renders it proper that the cause should be remanded for further evidence." *Lee v. Willis*, 101 Va. 188, 43 S. E. 354.

bb. Transaction between Wife and Stranger.

(aa) Presumption in Favor of Creditor, and Burden on Wife.

In a contest against the creditors of her husband, where the wife claims to have purchased real estate, or to have made improvements upon it after purchase, the rule is that the presumption as to the bona fides of the transaction is in favor of the creditors, and against the wife, and the burden is cast upon the wife to prove the bona fides of the transaction by showing that the property and improvements were paid for with her money derived from some source other than her husband. *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828; *Knight v. Capito*, 23 W. Va. 639; *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671; *Himan v. Thron*, 32 W. Va. 507, 9 S. E. 930; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 267; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804; *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170; *Crowder v. Garber*, 97 Va. 565, 34 S. E. 470; *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

In *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451, it was urged that this rule ought to be abolished, because the statute now authorizes a married woman to carry on business in her own name and to acquire and hold property free from her husband's control and from liability for his debts.

It was argued that this rule had been abolished in Virginia by the decision in *Catlett v. Alsop*, 99 Va. 680, 40 S. E. 34, 7 Va. Law Reg. 625, or that the principles there declared, if followed out, would produce such result. The court said: "That case seems to liberalize the rules of law to some extent in such contests, but it does not hold that this particular rule, which has been so long the well-settled law in all jurisdictions, is to be overturned. It holds that an insolvent husband may be employed by his wife in the management and conduct of her business, and that his earnings in her employment may be devoted to the support of his family as far as may be necessary for that purpose and his creditors are only entitled to subject to the payments of their debts the excess. This court, long ago, enunciated and applied substantially the same proposition in *Boguess v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 936. That is a matter entirely foreign to any question arising in this case. In establishing the presumption of fraud as to transactions between husband and wife, working prejudice to the rights of the creditors of the former, the courts do not assign, as reason, therefor, the common-law disabilities of the wife. They base it upon the close relationship of the parties, and the facilities which that relationship affords for the perpetration of fraud. That relationship is in no manner altered by the married woman's statute. If that statute has any effect in this connection, it is to increase, rather than to diminish, the facility for the perpetration of such fraud. There is greater latitude under it for the wife to set up claims to property and to

hold property than there was at common law. It is urged, however, that this rule has the effect of trenching upon the rights of married women under this statute, and of partially thwarting the purpose of the legislature in passing the statute. Married women had property rights before the passage of this law, which were as sacred as their new rights. Had the courts deemed this rule prejudicial and injurious to their rights in the sense of depriving them of anything which belong to them, it never would have had any existence in the jurisprudence of this country. The same principle is applied by the courts everywhere to persons standing in a close confidential relation, such as father and son, brother and brother, brother and sister, and all others closely related by blood or affinity. Why? Because of the relationship, and the relationship of husband and wife, being closer than that of any others, the principle is more rigidly applied as between them. * * * But for it, the statute against fraudulent conveyance could not be made effective." *Miller v. Gillispie*, 54 W. Va. 450, 463, 46 S. E. 451.

(bb) Rebuttal of Presumption.

A wife acquiring land must, in a suit by creditors to charge it with her husband's debts, not merely prove that she paid for it, but must clearly prove that she paid for it with her separate estate, else the presumption is that the means paying for it came from her husband. *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 89.

In *Crowder v. Garber*, 97 Va. 565, 34 S. E. 470, it was held, that the requisite evidence to sustain the deed from the husband to the wife had not been furnished. She claimed in her answer to have furnished the money with which to purchase the property conveyed to her husband, and afterwards conveyed by him to her, but failed to show by satisfactory evidence that she had in fact furnished the money with which

her husband purchased the property, upon a contemporaneous promise from him to repay it to her, or that she had the means out of which to furnish the money. It was, therefore, held, that the conveyance to the wife was not a bona fide transaction, and was void as to the creditors of the husband. See also, *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

(b) Competency and Admissibility.

See generally, as to the competency and admissibility of evidence, the title EVIDENCE, vol. 5, p. 295. See also, ante, "Rebuttal of Presumption," IV, H, 3, b, (7), (a), aa, (cc); "Rebuttal of Presumption," IV, H, 3, b, (7), (a), bb, (bb).

(c) Weight and Sufficiency.

See generally, as to the weight and sufficiency of evidence, the title EVIDENCE, vol. 5, p. 295. See also, ante, "Rebuttal of Presumption," IV, H, 3, b, (7), (a), aa, (cc); "Rebuttal of Presumption," IV, H, 3, b, (7) (a), bb, (bb).

(d) Witnesses.

See generally, the titles HUSBAND AND WIFE; WITNESSES.

In a suit to annul such settlements as voluntary, husband and wife are incompetent to testify, no matter by which party introduced. *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805.

4. Partners.

See generally, the titles FRAUD AND DECEIT, ante, p. 448; PARTNERSHIP; UNDUE INFLUENCE.

A transfer of partnership property situated in this state by a member of an insolvent firm to a private creditor, with full knowledge, to satisfy an individual obligation, is fraudulent and void as to the social creditors. *Kurner v. O'Neil*, 39 W. Va. 515, 20 S. E. 589.

Where one member of a mercantile firm purchases the interest of the other member, and in consideration thereof assumes to pay all the partnership debts, the firm and both members be-

ing at the time insolvent, or on the eve of insolvency, and shortly thereafter the purchasing partner, without paying any of the firm debts, conveys the whole of the assets of the late firm to a trustee, in such a manner as to devote the whole thereof to the payment of his individual debts, such sale, being without any valuable consideration, is ineffectual to convert the social assets into individual property; and, as to the equitable rights of the firm creditors, such trust deed is fraudulent and void. *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. 400.

5. Employer and Employee.

See generally, the titles MASTER AND SERVANT; UNDUE INFLUENCE.

6. Evidence.

See ante, "Evidence," IV, H, 3, b, (7); post, "Evidence Must Be Clear—Onus," IV, L, 16; "Evidence," V, C, 2, d; "Evidence," VIII, I.

The rule seems to be that when a conveyance or deed of trust between close relations is assailed by creditors as fraudulent, such relationship is a badge of fraud, and calls upon those claiming under it for full proof of the essentials to sustain such conveyance and throws upon them the burden of proof. *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960.

If a conveyance provides for near relatives at the expense of creditors, the relatives must assume the burden of proof, and make things clear. *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 894; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Herzog v. Weiler*, 24 W. Va. 199.

"We must not carry the rule that fraud is never presumed, but must be fully proved, too far. We must not require evidence of fraud beyond reason-

able doubt. If we do this, fraudulent conveyances and covinous transactions will walk triumphant over the just right of others; a premium will be given to fraud. The distinguished and lamented Judge Green, in *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, said, in enunciating the true principle: "I suppose that the real trouble in reaching correct decisions in these cases is that the rules of law which have been laid down have been misapprehended, though this court endeavored to make them clear. Yet some seem still to think and act as though to establish fraud in cases like the one before us required evidence almost as strong as the evidence required to convict in a criminal prosecution; and when fraud is established by direct proof or necessary inference, they seem to think that the slightest evidence ought to be regarded as sufficient to explain and rebut the facts which establish the fraud." *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892.

Conveyance Results in Inability to Pay Debts.—When a conveyance in favor of a relation leaves a man without means to satisfy his creditors, it is a basis of a strong suspicion of fraud; it is *prima facie* fraudulent, and calls upon the grantee to furnish strong proof of the bona fides of the transaction. *Moore v. Gainer*, 53 W. Va. 403, 44 S. E. 458; *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 893; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Herzog v. Weiler*, 24 W. Va. 199; *Bartlett v. Cleavenger*, 35 W. Va. 719, 720, 14 S. E. 273.

Strict Proof of Bona Fides.—"Where a conveyance has been made to a relative and such conveyance is impeached by the creditors of the vendor as having been made with intent to hinder, delay and defraud them in the collection of their debts the vendee relative will be held to stricter proof of the bona fides of the transaction than a stranger would be." *Hutchinson v.*

Boltz, 35 W. Va. 754, 14 S. E. 267; *Timms v. Timms*, 54 W. Va. 414, 46 S. E. 141; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750.

I. RETENTION OF POSSESSION OR APPARENT TITLE BY GRANTOR.

See ante, "Possession, Use and Apparent Ownership Unchanged," IV, F, 2.

1. Early Rule—Leaning towards Conclusive Presumption of Fraud.

The doctrine declared by the early Virginia cases as to the effect of the retention of possession or apparent title by the grantor was neither certain nor uniform. The leaning seems to have been towards the rule that the retention of possession or apparent title by the grantor was fraudulent per se. *Clayborn v. Hill*, 1 Wash. 177; *Fitzhugh v. Anderson*, 2 Hen. & M. 289; *Alexander v. Deneale*, 2 Munf. 341; *Hardaway v. Manson*, 2 Munf. 230; *Robertson v. Ewell*, 3 Munf. 1; *Thomas v. Soper*, 5 Munf. 28; *Williamson v. Farley*, Gilmer 15; *Glasscock v. Batton*, 6 Rand. 78; *Claytor v. Anthony*, 6 Rand. 285; *Sydnor v. Gee*, 4 Leigh 535; *Lewis v. Adams*, 6 Leigh 320; *Gay v. Moseley*, 2 Munf. 543; *Shields v. Anderson*, 3 Leigh 729; *Mason v. Bond*, 9 Leigh 181. See also, *Shirley v. Long*, 6 Rand. 735, 763; *Hunter v. Jones*, 6 Rand. 541.

But compare *Kroeson v. SeEVERS*, 5 Leigh 434, in which it is held, that where an owner of personal property has bailed it out to a third party, and then gives an absolute bill of sale to a vendee, and the vendee at the expiration of the time for which it is bailed out, applies to the bailee to deliver the property to him, and the bailee tells him that he may have possession, but he does not take actual possession, but leaves the property in the hands of the bailee, the bill of sale is good against the creditors of the vendor.

In *Mason v. Bond*, 9 Leigh 181, the court declared that while it is a gen-

eral rule, that an absolute sale of chattels not accompanied and followed with transfer of possession to the vendee, is per se fraudulent and void as against creditors of the vendor; and though there are exceptions to the rule, yet it is no ground of exception, that the possession at the time of the sale was in a third person, if, notwithstanding such possession, the vendor had a right, and it was in his power, to take the possession and deliver it to the vendee.

In *Lewis v. Adams*, 6 Leigh 320, a vendor for full value paid him, sold certain slaves to a vendee in December 1821, and the property was delivered to the vendee; on the same day, the vendee hired the same slaves to the vendor till January, 1823, and took his bond for the hire; in November, 1822, the vendee, by deed duly recorded, conveyed the slaves to a trustee for the use of his daughter, who was the vendor's wife, and her children. Upon these facts the court declared that the exercise of full ownership by the vendee, by the execution of such deed of trust, was equivalent to an actual resumption of the possession at the date of the deed, consequently, whether the sale from the vendor to vendee was originally accompanied and followed by possession or not, it was valid as against any creditors of the vendor whose rights attached after the date of the deed of trust.

A bill of sale of chattels, which is absolute in form, executed by a debtor—but which is in fact a mortgage to secure a debt, is fraudulent and void, as it tends to deceive and injure others. *Shields v. Anderson*, 3 Leigh 729; *Clark v. Hardiman*, 2 Leigh 347.

If personal property is mortgaged, and is afterwards sold absolutely to the mortgagee but the bill of sale is not recorded, it is fraudulent as against a subsequent purchaser. And a court of equity will (under the particular circumstances) entertain a bill to recover the property as against the fraudulent

vendee who has clandestinely gotten possession of the property. Such fraudulent vendee, can not prevent a recovery, by showing that the plaintiff did not take possession at the instant of the purchase; because such an omission as this can not make a fraudulent sale good. *Glasscock v. Batton*, 6 Rand. 78.

If there is an absolute bill of sale of slaves, by an executor, and he is permitted to retain the possession thereof, it is fraudulent and void, as to legatees, as well as creditors and purchasers. *Robertson v. Ewell*, 3 Munf. 1.

In *Roberts v. Kelly*, 2 Pat. & H. 396, it was held, that an agreement, between a debtor and his surety in a forthcoming bond, to the effect that the surety should purchase slaves of the debtor, at a sale under an execution on a judgment on the bond, for the amount of the debt, which was greatly less than the value of the slaves, and, holding the legal title, permit the slaves to remain in the possession of the debtor, with liberty to redeem them, upon paying the amount advanced with interest within five years, when there is no intention to defraud creditors, is valid and would be enforced in a court of equity, by permitting the debtor to redeem on paying the amount advanced with interest.

2. Later Doctrine—Prima Facie Presumption of Fraud.

The doctrine declared in the earlier cases was thoroughly reviewed in the case of *Davis v. Turner*, 4 Gratt. 422, and the doctrine of fraud per se repudiated, and, the doctrine declared that the retention of possession or apparent title by the vendor is merely prima facie evidence of fraud. When the presumption of fraud is raised, it becomes conclusive in the absence of satisfactory explanation. But such presumption is rebuttable by showing that there was no fraud in fact. See, in accord; *Forkner v. Stuart*, 6 Gratt. 197; *King v. Levy*, 2 Va. Dec. 151 (1895); *Curd v. Miller*,

7 Gratt. 185; *Dance v. Seaman*, 11 Gratt. 778; *Sipe v. Earman*, 26 Gratt. 563, 565; *Bindley v. Martin*, 28 W. Va. 773; *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329; *Young v. Willis*, 82 Va. 291. See also, *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364; *Norris v. Lake*, 89 Va. 513, 16 S. E. 663; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Hughes v. Epling*, 93 Va. 424, 25 S. E. 105; *Benjamin v. Madden*, 94 Va. 66, 26 S. E. 392; *Land v. Jeffries*, 5 Rand. 211. And see, as recognizing this rule to be the doctrine in Virginia, *Baltimore, etc., R. Co. v. Glenn*, 28 Md. 287, 2 Am. Dec. 688; *Baltimore, etc., R. Co. v. Hoge*, 34 Pa. St. 214.

In *Davis v. Turner*, 4 Gratt. 422, 446, it is said: "*Clayborn v. Hill*, 1 Wash. 177, was the case of a sweeping sale by an embarrassed debtor of his slaves and other personal property to his son, to whom the same had been previously mortgaged for a debt of a dubious character, and the bill of sale recorded, after the creditor's levy of his execution upon the property in the possession of the son, by whom, notwithstanding the alleged sale, it had been held, used and enjoyed as his own. It was a suit in equity in which the whole question of law and fact was to be decided by the court, and the sale was held to be fraudulent. The question whether the mere fact of the grantor's retaining possession rendered the transaction fraudulent was neither discussed nor decided; and there were no proofs in the case to repeal the prima facie presumption of fraud, but on the contrary strong circumstances to confirm it."

In *Forkner v. Stuart*, 6 Gratt. 197, it was held, on a sale of slaves, if the possession of the slaves does not accompany the sale, but remains with the vendor, such retention of possession by the vendor is prima facie evidence of fraud, but is not conclusive; and it is liable to be repelled by satisfactory

legal evidence of the fairness and good faith of the transaction.

In *Benjamin v. Madden*, 94 Va. 66, 26 S. E. 392, it was held, that the retention of the possession of personal property by the vendor after an absolute sale is prima facie fraudulent against creditors of the vendor, though not as against a subsequent purchaser for value, without notice of the prior sale, but this presumption may be rebutted by proof. In the case at bar there was a bona fide sale for value of a stock of goods, and delivery of possession, and it was held that the facts that the vendor did not transfer his license to the vendee before levy on the stock; that the name of the vendor upon the window shades, which had constituted his only sign remained as before; and that the vendor and his former clerk remained in the store and sold goods, do not, in view of other evidence in the cause, establish a case of fraud upon creditors of the vendor. Nor, under the admitted fact, does § 287 of the Virginia Code apply.

In the absence of a fraudulent intent, it is not fraudulent per se as to creditors, in one, who has assumed an indebtedness of a firm, in consideration of a sale of specified merchandise, to allow such merchandise to remain in said firm's possession to be disposed of in the usual course of trade. *King v. Levy*, 2 Va. Dec. 151.

3. Additional Circumstances.

Failure to Account.—Where, after a conveyance of real estate by a debtor in failing circumstances, he remains in possession of the land without contract and without accounting for the use of the land, these facts are evidence of fraudulent intent in such conveyance. *Livesay v. Beard*, 22 W. Va. 585, 594.

Failure to Offer Repelling Circumstances.—The vendor of a slave continuing in possession until an execution was levied on the slave more than a year after the sale, and the presump-

tion arising from the inconsistency of the possession with the title claimed by the vendee not being repelled by any circumstances appearing in the case, but the circumstances on the contrary confirming the presumption of fraud, the sale was declared void as to the execution creditor. *Tavenner v. Robinson*, 2 Rob. 280.

Authority to Sell—Disposition of Excess Sum.—A and his wife conveyed to B, the brother of the wife of A, a house and lot in the city of X, being all the estate owned by A, in consideration of \$1,900, assumed to be paid on the indebtedness of A by B, the grantee; six hundred and sixty-five dollars of which was the balance due on a trust debt on the property conveyed and the residue of the consideration was made up of negotiable paper of A mostly endorsed by B, a part endorsed by the brother of B, and most of it long past due and under protest. No lien was retained on the property conveyed to secure the payment of the notes so assumed by B, and B made no inquiry as to any other indebtedness of A, and left A in possession of the property free of rent, with authority to sell the same, and the excess over \$1,900, for which it might be sold by A was to go to the wife of A, the sister of B. Held, such conveyance was made in fraud of the creditors of A and was void as to creditors. *Timms v. Timms*, 54 W. Va. 414, 46 S. E. 141.

"Another very suspicious circumstance connected with the transaction is the fact that the vendor was permitted to continue to occupy the premises in sole possession and without payment of rent and was authorized by Uhl to sell the same, and his wife who was the sister of the vendee was to have all the proceeds of such sale above the amount promised to be paid by the vendee, the \$1,900. Timms tried to sell the property, representing it as his own, and made a contract of sale, in writing, signed by himself to one

Leslie M. Sorrell." *Timms v. Timms*, 54 W. Va. 414, 419, 46 S. E. 141.

It is not an evidence of fraud, for a mortgagor, of personal property to continue in possession, if the mortgage appears to have been made upon a bona fide consideration, and is duly recorded. But if the mortgagor afterwards by deed releases the equity of redemption to the mortgagee (which deed is not duly recorded), and still retains the possession, such evidence is sufficient to render the deed void as against creditors. *Clayborn v. Hill*, 1 Wash. 177.

4. Public Sale.

In *Wilson v. Butler*, 3 Munf. 559, a suit on a bond was brought against the debtor in a county in which he did not reside; he confessed judgment on the return of the writ, and furnished the sheriff having the execution, with a list of slaves, and other property of his, to be advertised for sale at his house; the property (without being seen by the sheriff until the day of the sale) was advertised, and sold to the creditor, for a fair price, though no other person bid; the creditor (whose claim was proved to be just and bona fide), being a brother of the debtor's wife, permitted the property to remain in the debtor's possession, and within five years afterwards, conveyed the same, in trust, for the use of the wife and children of the debtor, by a deed recorded in a different county from that in which the property was. The court held that none of these circumstances were considered unfair; and the deed was adjudged to be good against other creditors.

If there is a sale of personal property under an execution, by a sheriff, and it is bona fide, though irregular, the sale is valid, even though the purchaser leaves the property with the debtor in the execution; moreover, the property is not liable to the creditors of the debtor in execution. *Carr v. Glasscock*, 3 Gratt. 343.

Where a purchaser of property leaves

it in the possession of the original owner, but the possession thereof is taken by the administrator of the purchaser before creditors have acquired a specific lien thereon, by judgment and execution, it is not liable to the creditors of the original owner. *Carr v. Glasscock*, 3 Gratt. 343.

5. Possession Retained by Donor.

In *Charlton v. Gardner*, 11 Leigh 281, the father in consideration of natural love and affection, made a deed, which was duly recorded, conveying slaves and other property to three infant children, upon the condition understood and reserved, that the slaves were to remain in the donor's possession, during his life, and if his wife should survive him, that she should have the use of one-third of the slaves and their increase, during her life. At the time of executing the deed, the father was indebted by two bonds, on which judgments were afterwards obtained, and the executions returned satisfied. Subsequent to the deed, the father became appearance bail, and a judgment was obtained against him as such, and the execution thereon was levied upon the slaves so conveyed, which were still in his possession and they were sold by the sheriff. After the father's death an action of detinue was brought against the purchaser by the widow and children jointly, and another action was brought by the children alone; in each of which cases there was a special verdict, finding the facts as above mentioned. Upon these facts, the court held, that the action in which the widow was joined could not be maintained, but that the action by the children alone was well brought; and further, the facts found did not constitute fraud per se; and so far as the fraud was a matter of fact, the jury not having found fraud, the court could not as a matter of law infer it.

J. PREFERENCE OF CREDITORS BY INSOLVENT.

See generally, the titles ASSIGN-

MENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

1. In the Absence of Statutory Regulation.

Since a debtor has the right to pay one creditor in preference to another, so he may, without the imputation of fraud, secure one creditor to prevent another from gaining an advantage. *Williams v. Lord*, 75 Va. 390; *Johnson v. Lucas*, 103 Va. 36, 38, 48 S. E. 497; *Lucas v. Claflin*, 76 Va. 269.

In the absence of statute, state or federal, forbidding it, an insolvent debtor may, without the imputation of fraud, prefer one creditor to another, although the preferred creditor may know that the preference will have the effect of defeating the collection of other debts. This is not hindering or delaying creditors within the meaning of the statute against fraudulent conveyances, as they have no right to a priority. *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497.

At common law, the giving of a preference by an insolvent debtor was not prohibited. A debtor, though insolvent, could convey his property in trust, and prefer his creditor, although the conveyance transferred the entire estate. *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484.

"Nothing can be more firmly settled than at common law, apart from the statutes of bankruptcy, a debtor, even in failing circumstances, until his property is specifically bound to the satisfaction of his debts, has an absolute right to dispose of it at his pleasure. He may give undue preference to a part of his creditors, or even to one, and such preference * * * can not be treated as a fraud." *Alexandria Savings Inst. v. Thomas*, 29 Gratt. 483, 490.

At common law, a man, though insolvent, until a lien became fixed in some way on his property, might, with-

out fraud, convey or transfer it in trust, and prefer one creditor over another, even though it left no estate to pay other creditors. *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 798; *Harden v. Wagner*, 22 W. Va. 356; *Skipwith v. Cunningham*, 8 Leigh 271. But see Code of West Virginia, § 2, ch. 74, which has changed the common law in this respect in so far as it relates to insolvent debtors.

It is firmly settled that a debtor in failing circumstances may make a valid assignment of his whole estate, subject, however, to existing liens thereon, for the benefit of his creditors, in such order of priority as he may choose to prescribe in the assignment; and though his estate be insufficient for the payment of all his debts, he may lawfully subject it, in the first place, to the payment in full of such of his debts as he may choose to prefer, and then to the payment pro rata of the claims of such of his creditors as may, in a reasonably limited period, accept the terms of the assignment and release him from all further and other liability on account of said claims. And such an assignment may be valid, even though it does not direct any surplus which may remain after satisfying the claim of the accepting and releasing creditors to be applied to the payment of his other debts, or any of them; or even though it directs any such surplus to be paid to the debtor himself. *Gordon v. Cannon*, 18 Gratt. 387.

"As is said by Mr. Justice Bradley, in *Grant v. Nat. Bank*, 97 U. S. 80: 'It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule.

A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further. He may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some ground of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided. Hence the act very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man." *Johnston v. Witt Shoe Co.*, 103 Va. 611, 622, 50 S. E. 153.

2. Under Statutes.

As to the validity and effect of preferences by insolvents under statutes relating to assignments by insolvent debtors, see the titles *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 1, p. 799; *BANKRUPTCY AND INSOLVENCY*, vol. 2, p. 232.

"What Floyd Neely did on this occasion he did openly and above board and wrote the purpose thereof on the face of his deed. He also knew that in doing so he was merely giving his daughter a preference which at the instance of any of his creditors in time could be adjudged unlawful and the property could be sold and the proceeds be divided pro rata among all his unsecured creditors. So he was only attempting to prefer his daughter subject to the concurrence of his other creditors, they having four months after the deed was admitted to record to have it avoided as a preference and held for the benefit of all creditors willing to attack it. *Wilson v. Carrico*, 50 W. Va. 336, 40 S. E. 439. Hence his deed could not operate to delay, hinder and defraud his creditors without their assent except as to pro rata dividend which his grantee might receive out of the proceeds of the property, which compared with the other debts and arising from a special sale, would be trivial in amount. The deed was promptly recorded and the appellants seemingly assenting thereto as a just preference, did not attack it. But after the four months had expired, they assailed it as fraudulent. Since the enactment of the statute avoiding unlawful preferences by insolvent debtors at the instance of creditors not preferred, the courts are no longer justified to the same strictness in adjudging such deeds made with intent to delay, hinder and defraud, for the reason that they no longer so operate unless the creditors not preferred silently acquiesce therein. Formerly the courts would go a great way to seize badges of fraud and set aside conveyances highly meritorious

for the reason that the debtor had shown an undue preference and partiality in total disregard of his other creditors. Now under the law at their own instance the unpreferred can be placed on an equality with the preferred, and therefore they have less reason to complain unless by lack of the diligence the law requires or assent, they lose their equality. Such loss must be attributed to their own laches or acquiescence, and not to the deed of the debtor." *Stuart v. Neely*, 50 W. Va. 508, 510, 40 S. E. 441.

A transfer or charge by an insolvent debtor, free from actual fraudulent intent as to creditors, preferring a particular debt is not, as to debts contracted after its recordation, a preference contrary to § 2, ch. 74, W. Va. Code, 1899. *Feely v. Bryan*, 55 W. Va. 586, 47 S. E. 307.

3. Confession of Judgment.

The fact that an insolvent debtor confesses judgment in favor of his father-in-law, who immediately institutes a suit in chancery to enforce his judgment, and causes his debtor's land to be sold for the judgment, and purchases the land at less than the amount of the judgment is of little or no value in making out a case of fraud against the parties. *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497.

4. Preferring Social Creditors.

See generally, the title PARTNERSHIP.

When a deed of assignment for the benefit of creditors is unaffected by the bankrupt law, a partner has a right to convey partnership property to secure firm creditors, and in doing so to make preferences among them. *Millhiser v. McKinley*, 98 Va. 207, 35 S. E. 446.

5. Actual Fraud.

If there is actual fraud in the transaction, however, it is voidable if the creditor, in any way, participated in the fraud. *Johnston v. Witt Shoe Co.*, 103 Va. 611, 50 S. E. 153.

K. FAILURE TO RECORD.

For comprehensive treatment of the several acts requiring designated transactions and instruments to be recorded as a condition precedent to their validity and operation in respect to certain persons, and the effect of failure to record, reference is made to the title RECORDING ACTS, and other appropriate titles covering transactions and instruments embraced. See also, the titles DEEDS, vol. 4, p. 364; FRAUDS, STATUTE OF, ante, p. 516; LOANS; MORTGAGES AND DEEDS OF TRUST; SALES; SLAVES.

1. Deeds.

If, before the time limited by law for recording a deed has expired, a bill be filed to impugn it as fraudulent, the court can not afterwards declare it void, as against the complainant, on the grounds of its not having been duly recorded. *Gibson v. Randolph*, 2 Munf. 310.

In a given case the facts were that, a certain sewing machine company, by its agent, made a contract with a person by the name of Dunbar, to sell sewing machines for the company; the father of Dunbar, the defendant, gave guaranty, that the son would faithfully pay all sums which he might owe under said contract, and the father and his two sons, the defendant and another, represented that the father was solvent and owned ninety-four acres of land. Three years before this date, the father had made and delivered a deed for this land to these two sons, but the deed had never been recorded. After the contract with the machine company was made, the two sons and the father agreed that the deed should be made for the land to the brother of the defendant, which was done, and placed on record the day before the defendant entered upon his duties under the contract. The defendant became indebted, soon after, to the company in a large sum of money, and then became in-

solvent. Upon a bill filed to subject the ninety-four acres of land to the payment of the debt, it was held, that under the circumstances, the scheme was one to defraud the plaintiff, and the ninety-four acres of land should be subjected to the payment of the debts. *Davis Sewing Machine Co. v. Dunbar*, 29 W. Va. 617, 2 S. E. 91.

A voluntary conveyance of personal property, by a party not indebted at the time, is good against subsequent creditors, if the deed be duly recorded or the possession remain solely bona fide with the donee. Otherwise it is void by the statute of frauds. *Davis v. Payne*, 4 Rand. 332.

2. Contracts for Sale of Land.

Where a contract in writing which is executed for the sale of land, before judgments are obtained against the vendor, and the deed is executed in pursuance of such contract, but is not recorded until after the judgments are duly docketed, and the contract is never recorded, the contract and deed are void as to the creditors; and the land so contracted to be sold, and so conveyed is subject to the satisfaction of the judgments. *Anderson v. Nagle*, 12 W. Va. 98.

3. Marriage Settlements.

In *Thomas v. Gaines*, 1 Gratt. 347 (1845), the court declared that a deed of marriage settlement made before the marriage conveying the property of the wife, and in which the intended husband joined, is fraudulent and void against subsequent purchasers from the husband, without notice, unless duly recorded. By this decision the case of *Pierce v. Turner*, 5 Cranch 162, and the opinions of Judges Carr, Coalter and Brooke, in *Land v. Jeffries*, 5 Rand. 211, were overruled. The facts in *Land v. Jeffries* were as follows: A woman who was about to be married made a personal conveyance of her property to a third person with the privity and approbation of her intended husband; the marriage took place a few minutes

after the conveyance and the husband took possession of the property after the marriage; the property thus conveyed was held not to be subject to the husband's creditors, as his possession after marriage was not that of his wife (she not being *sui juris*), and her short possession between the time of the conveyance and that of the marriage, not being sufficient, or of the nature to render the deed fraudulent. See post, "Marriage Settlements," IV, K, 3.

4. Loans and Reservations of a Use of Property.

See generally, the titles FRAUDS, STATUTE OF, ante, p. 516; LOANS; RECORDING ACTS; SLAVES.

a. Validity as to Creditors.

Under the act to prevent frauds and perjuries, a loan of goods and chattels made by parol, to a person with whom, or those claiming under him, possession remains five years, without demand made and pursued by due process of law on the part of the lender, is taken to be fraudulent as to creditors and purchasers of the persons so remaining in possession. Va. Code (1887), § 2461; W. Va. Code (1899), § 3101; *Taylor v. Beale*, 4 Gratt. 93; *Gay v. Moseley*, 2 Munf. 543, 544; *Lacy v. Wilson*, 4 Munf. 313; *Beasley v. Owen*, 3 Hen. & M. 449; *Garth v. Barksdale*, 5 Munf. 101; *London v. Turner*, 11 Leigh 403; *Durham v. Dunkly*, 6 Rand. 135; *Lightfoot v. Strother*, 9 Leigh 451.

As between the lender of a slave and the creditors of the loanee, under the statute declaring that where possession shall have remained with the loanee or those claiming under him, for five years, without demand made and pursued by due process of law on the part of the lender, the loan shall be taken to be fraudulent as to the creditors of the loanee, unless it were declared by will or by deed in writing proved and recorded. *Pate v. Baker*, 8 Leigh 80.

If no writing declaring a loan be recorded, or no demand be made by

the lender, and pursued by course of law, for more than five years after possession commenced, the loan is void as to the loanee's creditors, whose rights can not be affected by the lender's subsequent resumption of possession. But the creditors meant are those whose debts were contracted before the resumption of possession, or conveyance of the chattels, by the lender—they having given credit to the loanee on the apparent ownership of property. *Scott v. Jones*, 76 Va. 233.

b. Validity between Parties.

See generally, the titles **FRAUDS**, **STATUTE OF**, ante, p. 516; **LOANS**.

A loan of slaves, though not declared by deed in writing duly recorded, and therefore void as to creditors, the loanee having continued in possession for five years without such demand, as would bar their right, is nevertheless effectual between the parties and their representatives. If, therefore, the loanee died in possession of such slaves, they are not to be considered assets belonging to his estate, nor can be recovered as such; being liable to his creditors so far as their claims remain unsatisfied by their assets in the hands of his executor or administrator, but no farther. *Boyd v. Stainback*, 5 Munf. 305; *Scott v. Jones*, 76 Va. 233.

c. Creditors Embraced within Provision.

The creditors meant are those whose debts were contracted before the resumption of possession, or conveyance of the chattels by the lender—they having given credit to the loanee on the apparent ownership of the property. *Scott v. Jones*, 76 Va. 233.

d. Avoiding Operation of Statute.

Presumption of Possession—Recordation.—According to the settled construction of the clause in the statute of frauds, Va. Code, 1887, § 2461, concerning loans, a resumption of possession by the lender, or the recorded deed or will granting away the property to another within five years, avoids the oper-

ation of the statute and puts an end to the loan. *Collins v. Lofftus*, 10 Leigh 5; *Scott v. Jones*, 76 Va. 233.

Where possession has remained with the loanee or with those claiming under him for five years, and is then resumed by the creditor, the possession must continue with the lender the full period of five years from the time it was actually resumed, before the title will be revested in the lender as against a creditor of the loanee. *Pate v. Baker*, 8 Leigh 80.

Sale.—If the property be sold before possession shall have remained five years with the loanee or those claiming under him, the loan is not, under the statute, taken to be fraudulent as to the purchaser. *Lightfoot v. Strother*, 9 Leigh 451.

Demand by Loanor, and Redelivery.

—A demand of slaves by the lender, who thereupon receives, and immediately redelivers them to the loanee to be held on the same terms, as before such demand, receipt, and redelivery being in private, is not sufficient to bar the rights of creditors, under the act to prevent fraud and perjuries. *Boyd v. Stainback*, 5 Munf. 305 (1817); Va. Code 1887, § 2461.

Deed, after Five Years, Declaring Loan—Unrecorded.—After a loan to a person with whom, or with those claiming under him, possession has remained five years and a deed is made by the lender, declaring the original loan and continuing it; but this deed is never admitted to record, it can not affect the creditor of a person in possession, and the deed is not to be received as evidence against such creditor. *Pate v. Baker*, 8 Leigh 80.

Remaining in Possession on Hire.—It is to be observed, however, that § 2461, Va. Code 1887, does not apply to the case of property remaining in possession of a debtor for more than five years, on hire. Therefore, slaves remaining in possession of one person on hire for more than five years, are

not subject to be taken in execution for his debt. *McKenzie v. Macon*, 5 Gratt. 379.

L. RESERVATIONS, CONDITIONS AND SECRET TRUSTS.

1. In General.

The principles underlying the decisions, holding deeds to be fraudulent per se, are well and clearly stated in Hogg's Equity Prin., § 189, as follows: "They (the deeds) contain such provisions and stipulations as to property that is perishable or readily consumable, as a stock of goods, as to enable the grantor to remain in possession and control of the property encumbered with the trust, and to indefinitely postpone the execution of the same, and the subjection of the property therein embraced to the payment of his debts. In fact, it is that the provisions of the conveyance are in contravention of the avowed purposes of the grantor in executing the same." *Ballard v. Chewning*, 49 W. Va. 508, 513, 39 S. E. 170.

2. Intent Must Appear from Face of Instrument.

A court may pronounce a deed fraudulent per se. The intent to hinder, delay or defraud creditors must appear on the face of the instrument. This must appear from an inspection of the deed or other writing, without reference to extrinsic evidence. *Ballard v. Chewning*, 49 W. Va. 508, 513, 39 S. E. 170. See also, *Burton v. Mill*, 78 Va. 468.

"While this deed is silent as to the date at which the debt will become due and by its terms no sale is to be made until after default in payment and then only upon request of the trust creditor, it does not affirmatively appear from its face that such sale might or could be unreasonably delayed or entirely prevented. Nobody, save the debtor and creditor, knows when sale can be made under the deed, but when disclosed the time may be found to be

reasonable and just to all parties and not such as to indicate any fraudulent intent, or be inconsistent with the terms of the deed. On the other hand, the date of maturity may turn out to be so far in the future as to clearly indicate collusion between the parties to it to defeat the rights of creditors and not the existence of a bona fide debt and security for the same. However, no case is recalled in which the court has gone to the extent of holding that a deed of trust, to be valid on its face, must be so certain and definite in its terms as to exclude the existence of a secret reservation in favor of the grantor, fraudulent and inconsistent with the terms of the instrument, and not apparent on the face thereof. In *Livesay v. Beard*, 22 W. Va. 585; *Clafin v. Foley*, 22 W. Va. 434; *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203, and other cases in which this court has held deeds fraudulent on their faces, the evidence of the fraud clearly appeared in the instruments. The terms of the deed in this case are not necessarily inconsistent with good faith or the ostensible purpose set forth in it. It is, therefore, not fraudulent per se." *Ballard v. Chewning*, 49 W. Va. 508, 513, 39 S. E. 170.

3. Inconsistent Powers and Stipulations.

Where a deed reserves to the grantor a power inconsistent with the avowed object for which the deed is made, it will be null and void, as against creditors and purchasers. *Lang v. Lee*, 3 Rand. 410; *Burton v. Mill*, 78 Va. 468; *Janney v. Barnes*, 11 Leigh 100; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Kuhn v. Mack*, 4 W. Va. 186.

Where the clause in a deed of trust to secure a debt is inconsistent with the security for the debt, or object of the trust, and adequate to the defeat thereof, being equivalent to a power of revocation, the deed is fraudulent and void as to creditors. *Garden v.*

Bodwing, 9 W. Va. 121; Stoneburner v. Motley, 95 Va. 784, 30 S. E. 364.

Deed Secures Debts Not Due—Trustee Is Not Authorized to Take Possession of Trust Property.—How-

ever, a deed, conveying a stock of goods and merchandise, and notes and accounts of a merchant to a trustee to secure the payment of notes not then due, which provides that said conveyance shall cover "such goods and merchandise as may be added to said stock, from time to time, by the grantor and brought into the store in course of business, or to take the place of such goods as may hereafter be sold," but does not authorize the trustee to take possession or control of said goods until the grantor has made default in the payment of one or more of said notes, and has been refused to do so by the holder or holders of such note or notes, is as against the unsecured creditors of the grantor fraudulent and void on its face, although it provides that the "trustee, by himself or by his agent or attorney, shall at once take possession" of the notes and accounts transferred by such deed, and collect the same for the benefit of the trust creditors. Claffin v. Foley, 22 W. Va. 434.

Nor is such deed validated or its character affected by the fact, that subsequent to its execution and on the same day a second trust deed is made between the same grantor and grantee, conveying the same goods and merchandise, to secure other and different cestuis que trustent, which authorizes the trustee to take possession of said goods and merchandise at once, "and manage and control the same for the benefit and advantage of the parties secured and indemnified by the deed." Claffin v. Foley, 22 W. Va. 434.

4. Reservation of Interest.

In *Dance v. Seaman*, 11 Gratt. 778, 782, it is said: "The reservation of an interest in the property, by postponing the time of sale, or directing a sale

on credit, or providing for the payment of the surplus after satisfying the creditors secured, do not of themselves furnish evidence of fraudulent intent, has been affirmed by the repeated decisions of this court. *Skipwith v. Cunningham*, 8 Leigh 271; *Kevan v. Branch*, 1 Gratt. 274; *Lewis v. Caperton*, 8 Gratt. 148; *Cochran v. Paris*, 11 Gratt. 348; *Janney v. Barnes*, 11 Leigh 100." See also, *Sheppards v. Turpin*, 3 Gratt. 373, 379; *Marks v. Hill*, 15 Gratt. 400, 480, 420; *Henderson v. Hunton*, 26 Gratt. 926; *Young v. Willis*, 82 Va. 291, 296; *Gardner v. Johnston*, 9 W. Va. 403, 407; *Harden v. Wagner*, 22 W. Va. 356, 371; *Claffin v. Foley*, 22 W. Va. 434, 441; *Livesay v. Beard*, 22 W. Va. 585, 590; *Klee v. Reitzenberger*, 23 W. Va. 749, 755; *Shattuck v. Knight*, 25 W. Va. 590, 597, dissenting opinion in *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203.

5. Loan or Sale with Retention of Title.

Loans and Reservations of a Use or Property, to Be Recorded.—Where any loan of goods or chattels is pretended to have been made to any person with whom, or those claiming under him, possession shall have remained five years without demand made and pursued by due process of law on the part of the pretended lender, or where any reservation or limitation is pretended to have been made of a use or property, by way of condition, reversion, remainder or otherwise, in goods or chattels, the possession whereof shall have so remained in another as aforesaid, the absolute property shall be taken to be with the possession, and such loan, reservation, or limitation void as to creditors of and purchasers from the person so remaining in possession, unless such loan, reservation, or limitation be declared by will which, or a copy of which is, by deed, or other writing, duly admitted to record within the said five years in the county or corporation

in which said goods or chattels may be. Va. Code, 1887, ch. 109, § 2461, p. 599; *Taylor v. Beale*, 4 Gratt. 93; *Lightfoot v. Strother*, 9 Leigh 451.

But where any reservation or limitation is pretended to have been made of a use or property, by way of condition, reversion, remainder or otherwise, in goods and chattels, the possession whereof shall have remained in another for five years, the same, as to the creditors and purchasers of the person so remaining in possession, is, under the act to prevent frauds and perjuries, taken to be fraudulent, and the absolute property to be with the possession, unless such reservation or limitation were declared by will or by deed in writing, proved and recorded. *London v. Turner*, 11 Leigh 403.

A deed declaring a loan of a slave from a father to his daughter during her life (being admitted to record on proof by one witness only), is not good against her husband's creditors, or purchasers from him, without notice of such deed; possession of such slave having remained with the husband for five years without interruption. *Lacy v. Wilson*, 4 Munf. 313; *Beasley v. Owen*, 3 Hen. & M. 449. And in *Garth v. Barksdale*, 5 Munf. 101, it is held, that five years' peaceable and uninterrupted possession of slaves, under a loan not evidenced by deed duly recorded, vests a title in the loanee, which inures in favor of his creditors, and can not be divested as to them, by his returning the same to the lender, after the five years have expired. See also, *Gay v. Moseley*, 2 Munf. 543. So, if a debtor remains in possession of slaves for five years, under a parol loan, they are liable to satisfy his creditors, though the possession is resumed by the lender before executions are levied upon them. *Beale v. Digges*, 6 Gratt. 582.

Loan or Sale with Retention of Title.—Where the vendor of goods, by unrecorded bill of sale, delivers possession, but retains title until price is paid,

such sale is void as to creditors of and purchasers for value without notice from such vendee. Va. Code, § 2462. Thus, where the vendor of goods, by unrecorded bill of sale, delivers possession, but retains title to and control over them, and requires the proceeds of sales paid daily to him on the price, and fails to keep up the stock according to his contract, whilst the vendees faithfully perform their part; and at length he sues out an attachment, and seizes upon the goods for an alleged balance, it was held, that the vendor has no claim to priority over other creditors of the vendees, and no claim against them, as he has violated, and they have kept, their contract. *Hash v. Lore*, 88 Va. 716, 14 S. E. 365. See also, *Hyer v. Smith*, 48 W. Va. 550, 37 S. E. 632; *Hufford v. Akers*, 52 W. Va. 21, 43 S. E. 124; *Wagon v. Hutton*, 53 W. Va. 154, 44 S. E. 135.

6. Subsequent Control and Disposition.

In November, 1873, N. conveyed to C. certain real and personal estate, and "all his stock in trade with all accretions to and replenishments of said stock," in trust to secure and indemnify certain endorsers upon negotiable notes due by said N. And if the said notes were not paid on demand, C., upon the written request of either of the parties secured, should sell the said property according to law. But C. was not to be responsible for any of said property until he was ordered to sell the same as aforesaid. N. continued in possession and carried on his store for two years, and until all the goods in the store at the time of the deed were sold, and other goods bought with the proceeds. In November, 1875, under an execution of P. against N., the goods then in store were levied on. Held, the deed is fraudulent per se, and P. is entitled to the proceeds of the sale of said goods under his execution. *Perry v. Shenandoah Nat. Bank*, 27 Gratt. 755.

A conveyed by deed of trust to B

certain goods, to secure to X the payment of a certain sum of money. The deed contained the following clause: That A agrees and obligates himself to keep always on hand a stock of goods equal in quality, description and value to the personal property hereinabove mentioned, until the debt which this deed is drawn to secure is paid in full. Held, that the inference fairly deducible from that clause was that the grantor, not only retained possession of the goods, but had an absolute power of sale thereof; that the clause was inconsistent with the security for the debt, or object of the trust, and adequate to the defeat thereof, being equivalent to a power of revocation; and the deed was therefore fraudulent and void as to creditors. *Garden v. Bodwing*, 9 W. Va. 121.

A debtor can not convey his property to a trustee to secure creditors and reserve an interest in or control over the property inconsistent with the grant, and adequate to its defeat, but a direction to the trustee, "when so required by the creditors, to take charge of said property and sell the same at public auction" is not of itself such reservation of interest or control as to avoid the deed. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

H., a merchant, conveys to L, all his stock of goods, and the storehouse for the current year, in trust to pay certain debts described in the deed. And the deed provides that H. shall keep possession of and sell the stock of goods in the usual line of his trade, and occupy the store, until default in the payment of any of the debts secured, and until the trustee shall be requested by any of the said creditors to close the deed by a sale. The deed is fraudulent per se, and void as to the creditors of H. *Addington v. Etheridge*, 12 Gratt. 436.

7. Release from Liability after Pro Rata Distribution.

In *Skipwith v. Cunningham*, 8 Leigh

271, decided in 1837, it was held, that when a debtor conveys his whole property to trustees upon trust to sell the same, and out of the net proceeds to pay certain preferred creditors, and then disburse the residue in paying pro rata all the just debts due from him to any other creditors, who should within four months release the debtor from further claim, is valid notwithstanding the provision for a release, and those embraced by its terms will have the benefit of the property in preference to a judgment creditor. Tucker, P., in delivering the opinion of the whole court, said: "It is difficult indeed to imagine on what principle the right of composition, by the assent of the creditors, can be contested, if the right of preference be conceded. He who gives up his all, and in doing so has a right to pay one in exclusion of others, can not be justly charged with fraud because he prefers those who humanely surrender all claim to his future labors. To set aside such preference as fraudulent, is to deny the right to prefer, which on all hands is conceded. Accordingly such agreements if executed are acknowledged to be valid and binding. *Heathcote v. Crookshanks*, 2 T. R. 24; *Lynn v. Bruce*, 2 H. Black. 217. But it is none the less true that if they are only part of the debtor's property, the transaction is oppressive upon the creditors and fraudulent. A debtor is bound by duty to devote the whole of his property to the satisfaction of his creditor's demands. 7 Pet. 614. He can have no right while he is full handed to extort from them a release on part of their just demands." "This case was followed in *Kevan v. Branch*, 1 Gratt. 274; *Phippen v. Durham*, 8 Gratt. 457, decided in 1852, and in *Gordon v. Cannon*, 18 Gratt. 387, decided in 1868. We are now asked by counsel for appellant to overthrow this long-established doctrine first decided more than a quarter of a century before the separation and followed in two cases before that time and in an

other few years thereafter." *Clarke v. Figgins*, 27 W. Va. 663, 669.

8. Provisions Which Postpone the Time for Enforcing the Deed.

Though a deed is not fraudulent by reason of a postponement of the time of sale, and the reserving the property to the grantor in the meantime, yet where the time of the sale may be postponed or hastened by the grantor, so as to enable him to defeat any creditor who should attempt to subject the interest in the property reserved to the grantor, to the payment of his debt, the deed is fraudulent. *Quarles v. Kerr*, 14 Gratt. 48.

But a trust deed conveying real and personal property, including a stock of store goods, is not per se fraudulent because it postpones the sale of real estate for six months from the date of the deed, and authorizes the trustee, after taking an inventory of the store goods, to take control of them, and sell the same at private sale, if that can be done in six months, and then sell the residue at public auction; in either case the sales to be in the best possible manner for the interests of the creditors of the grantor. *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41. And a deed which conveys land to secure a bona fide debt, which is not to be enforced for two years, and only then or afterwards upon a notice of the sale for one hundred and twenty days, is valid against creditors. Such a deed is valid though the execution of the deed is postponed for five years from the date of the conveyance; and the rents and profits of the property in the meantime, are reserved to the grantor. *Lewis v. Caperton*, 8 Gratt. 148. So a deed of trust which among other things conveys growing crops of wheat, rye and oats, and which is not to be enforced for two years from its date, is not necessarily fraudulent as to creditors. *Cochran v. Paris*, 11 Gratt. 348. Moreover, a deed which conveys without a schedule, household furniture, the

various kinds of stock on a farm, bacon and lard, to secure a bona fide debt, but not to be enforced for eighteen months after its execution, is valid against creditors, though the deed was made without the knowledge of the creditor, and the grantor was indebted to insolvency at the time of the conveyance. *Lewis v. Caperton*, 8 Gratt. 148.

And a deed executed bona fide to secure a loan of money, not to be enforced for ten years, is a valid deed as against creditors of the grantor. *Lewis v. Caperton*, 8 Gratt. 148.

A deed of trust conveyed a stock of goods to secure the price thereof. There was a parol arrangement by which the purchasers were to hold possession of, sell, and replenish the stock of goods, and after paying necessary expenses, apply the proceeds to the extinguishment of the trust lien. The deed was duly recorded. Held, valid as to the subsequent creditors of the purchasers. *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 793.

9. Provision for Payment of Surplus.

The fact that a deed of trust of all of an insolvent's property, executed to secure part of his creditors, provides for payment of the surplus to the grantor, is not of itself evidence of fraudulent intent. *Harvey v. Anderson*, 2 Va. Dec. 385.

10. Deed Furnishing Security against Losses and Liabilities—Potential Lien.

A deed of trust, though made solely to secure one against any future loss as indorser, can not for that reason be impeached, if made bona fide. *Harvey v. Anderson*, 2 Va. Dec. 385.

In *Alexandria Savings Inst. v. Thomas*, 29 Gratt. 483, by deed which was duly recorded in January, 1856, the grantor and his wife conveyed a house and lot in trust to secure a certain beneficiary against any loss or damage which he might sustain by his acceptance of any drafts or bills which might

thereafter be drawn by the grantor upon the beneficiary, which acceptance the beneficiary had agreed to make for the accommodation of the grantor. The beneficiary, accordingly, from the date of the deed to January, 1861, accepted the drafts of the grantor to a large amount, and the grantor was indebted to him for much more than the house and lot was worth. In 1871, a certain savings bank, being the holder of three of the notes of the grantor in the deed of trust, given on renewals of notes which were due before the date of the deed, filed a bill against the grantor as an absent defendant, to attach the house and lot, insisting that the deed having been given to secure future advancements, was null and void as to the creditors of the grantor. The court held, that though the beneficiary secured in the deed of trust was under no liability for the grantor when the deed was executed, it was, nevertheless, a valid security for all of his acceptances for the grantor given before some other creditor had acquired a lien on the house and lot conveyed in the deed of trust.

A deed which conveys future rents and profits of property conveyed in other deeds, which were reserved to the grantor in the previous deeds, for the purpose of paying a bona fide debt, is valid against creditors of the grantor. *Lewis v. Caperton*, 8 Gratt. 148.

11. Reservations to the Vendor.

It is well settled that conveyances professedly to indemnify creditors, but expressly or impliedly reserving to the grantors powers inconsistent and adequate to defeat such purpose, are void as to creditors and purchasers. *Wray v. Davenport*, 79 Va. 19; *McCormick v. Atkinson*, 78 Va. 8; *Saunders v. Waggoner*, 82 Va. 316; *Sheppards v. Turpin*, 3 Gratt. 373; *Lang v. Lee*, 3 Rand. 410; *Addington v. Etheridge*, 12 Gratt. 436; *Perry v. Shenandoah Val. Nat. Bank*, 27 Gratt. 755. See also, *Hughes v. Epling*, 93 Va. 424, 426, 25 S. E. 105;

Norris v. Lake, 89 Va. 513, 517, 16 S. E. 663; *Harden v. Wagner*, 22 W. Va. 356, 364; *Claflin v. Foley*, 22 W. Va. 434, 441. See also, *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Young v. Willis*, 82 Va. 291; *Kuhn v. Mack*, 4 W. Va. 186; *Marks v. Hill*, 15 Gratt. 400. So where an insolvent debtor conveys his land even for valuable, though inadequate consideration, with a secret reservation, that he shall for the time have use of the land without payment of rent, this fact is evident, that the conveyance was made with fraudulent intent. *Livesay v. Beard*, 22 W. Va. 585.

And a deed of trust on lands and personal property with no definitely fixed period at which a sale could be required, and which puts it in the power of the grantor by collusion, or otherwise, to indefinitely postpone a sale thereunder, and of the live stock conveyed by the deed, and the increase thereof, and all future crops to be raised from the ground in the quiet enjoyment of the grantor, from which to support his family and pay the debts secured thereon, as he may deem most advantageous, is fraudulent on its face and void. Such deed being fraudulent on its face is void in toto and can not stand as security for the debts therein attempted to be secured. *Livesay v. Beard*, 22 W. Va. 585.

A deed of trust on a stock of merchandise which provides that the grantor shall be suffered to remain in the possession and enjoyment thereof until default is made in the payment of the debt secured, and request by the creditor to foreclose, and without accountability to the trustee for the proceeds of sale made by the grantor, is fraudulent per se. *Hughes v. Epling*, 93 Va. 424, 25 S. E. 105.

Where a deed of trust to secure certain debts, conveys certain real estate, and the grantor reserves in it, to himself and his family all exemptions and property allowed by the constitution of Virginia, and all laws passed in pur-

suance thereof, and in addition thereto all exemptions allowed under the bankrupt laws, such reservation is legal and valid, and does not render the deed void on the ground of any fraudulent intent on the part of the grantor. *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

Neither is a trust deed on a stock of goods for the security of creditors which provides that the trustees shall take immediate possession of such goods, and manage them for the benefit of the trust, fraudulent per se, and void as to creditors, because it contains a provision allowing the grantor, without the power of sale, to replenish such stock of goods, and extending the trust to cover the same. *Baer Sons Grocer Co. v. Williams*, 43 W. Va. 323, 27 S. E. 345.

A reservation, in a deed to secure creditors, of the right to manage property therein conveyed for three years before sale, the rents and profits in the meantime to belong to the creditors secured, is not such an unreasonable restraint upon the power of sale as to constitute a fraud in itself. *Noyes v. Carter*, 2 Va. Dec. 218.

In *Kevan v. Branch*, 1 Gratt. 274, the court held, that a deed of trust for the benefit of creditors was not fraudulent, which conveyed among other things, cattle, household and kitchen furniture, and debts, without specification, either in the deed, or by schedule accompanying it; and further provided that the grantor should remain in possession of the property, for six months; and that no creditors should have the benefit of the trust, who did not release the grantor from any further liability, in three months. See also, *Phippen v. Durham*, 8 Gratt. 457.

And in *Baldwin v. Van Wagner*, 33 W. Va. 293, 10 S. E. 716, where a piano was delivered under an agreement in writing purporting to rent the same at \$10 per month, the owner agreeing that when \$300, the value of the piano, was

paid in such monthly payments or otherwise, the title to the piano should vest in the renter, the court held, that such writing showed a sale upon a condition precedent, and, under the provisions of § 3, ch. 74, W. Va. Code, 1887, the reservation of the title, unless a notice thereof is duly recorded, is void as to the creditors of the purchaser.

Where a vendor agrees to sell to the vendee personal property for a price agreed to be paid at any future time, and delivers possession, but expressly retains title until payment, it is a conditional sale, and though by parol or by an unrecorded instrument, it is, nevertheless, valid as against vendee's creditors or subsequent purchasers, with or without notice. This on the ground that such transaction, not being a chattel mortgage, but a conditional sale does not come within the scope of the Virginia Code of 1873, ch. 114, § 5. *McComb v. Donald*, 82 Va. 903, 5 S. E. 559; *Old Dominion Steamship Co. v. Burkhardt*, 31 Gratt. 664. But see Va. Code, 1887, § 2462, which provides that, every sale or contract for the sale of goods or chattels, wherein the title is reserved until the same be paid for in whole or in part, or the transfer of the title is made to depend on any condition, and possession be delivered to the vendee, shall be void as to creditors of, and purchasers for value without notice from said vendee, unless such sale or contract be evidenced by writing executed by the vendor, in which the said reservation or condition is expressed, and until and except from the time the said writing is duly admitted to record in the county or corporation in which said goods or chattels may be, etc.

12. Provisions Conferring Special Powers upon the Trustee, and Providing for His Compensation.

A discretionary power vested in a trustee to run and operate the business for a year, if he deem it wise to do so,

having in view the interest of the creditors secured, does not render void per se a deed of conveyance of a stock of goods. Nor is such deed rendered void by the further provision empowering the trustee to replenish the stock by cash purchases of such articles as will aid in keeping up the business, and disposing of the other stock to better advantage. *Hurst v. Leckie*, 97 Va. 550, 34 S. E. 464. See also, *Williams v. Lord*, 75 Va. 390.

As held in *Marks v. Hill*, 15 Gratt. 400, a provision in a deed of trust to secure creditors, that the trustee may continue the business and replenish the stock, if intended merely as a means of realizing the trust fund, and with a view to winding up the business, is not fraudulent per se, so as to avoid the deed. And in such a case a provision in the deed that one of the grantors shall attend to the business, he being under the control of the trustee, who may at any time on his motion, and shall at the request of creditors, sell the property at auction, is not fraudulent per se, so as to avoid the deed. *Harden v. Wagner*, 22 W. Va. 356. Neither will a provision in a deed of trust authorizing the trustee to sell the property at private sales render the deed fraudulent on its face. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203.

And a trust deed given to secure a note payable one day after date which conveys personal property and choses in action, is not fraudulent merely because it provides that the trustee shall sell the property conveyed on demand by the cestuis que trust or either of them. *Harden v. Wagner*, 22 W. Va. 356. So a provision in a deed of trust on a stock of goods to secure creditors, which authorizes the trustee to dispose of the stock in due course of trade, does not render the deed fraudulent on its face, nor is the deed rendered void by a failure to provide in express terms for a sale by the trustee on request of the creditors secured.

Taylor v. Mahoney, 94 Va. 508, 27 S. E. 107. Similarly a conveyance to a trustee of a stock of goods to secure creditors, which authorizes the trustee to sell in the usual course of trade for a limited period, and to that end to employ clerks and salesmen, is not invalidated by the fact that the trustee employs the grantor as his chief salesman to dispose of the stock of goods. *Hurst v. Leckie*, 97 Va. 550, 34 S. E. 464.

Moreover, a provision in a deed of trust for ten per cent. commissions for the trustee, though more than provided by statute, is not evidence of fraudulent intent, this not being shown to be excessive or unreasonable compensation. *Harvey v. Anderson*, 2 Va. Dec. 385.

13. Special Privileges Given to Certain Creditors.

The inclusion, in a deed of trust to secure certain creditors, of the balance due on a building contract, without regard to rights of subcontractors, has little if any weight on the question whether the deed was made with fraudulent intent. *Harvey v. Anderson*, 2 Va. Dec. 385.

And where a deed of trust is made by an insolvent debtor conveying his household and kitchen furniture to secure a bona fide debt due from him to his mother and payable at six months, with a provision in the deed that the creditor shall retain the possession, use and enjoyment of the property, until there is a default in the payment of the debt at maturity, and the trustee be required by the debtor to sell the same, the conveyance is valid. *Klee v. Reitzenberger*, 23 W. Va. 749.

But where a deed of trust is made about the same time by the same debtor, conveying the store goods and merchandise in his store to secure other creditors, with provisions of a similar character, it is invalid; and what purports to be an absolute sale of the same goods made shortly afterwards by

the debtor to the principal creditor secured in the deed of trust, without the consent of the trustee or the other creditors, in consideration of the debts secured in the deed, but without any actual delivery of the goods so sold, and the seller afterwards conducts the store in the name of the purchaser, will be held to be a part of the same fraudulent transaction, and under the circumstances both the trust deed and the subsequent pretended sale will be held fraudulent and void as to the creditors of the grantor. *Klee v. Reitzenberger*, 23 W. Va. 749.

14. Deeds Executed with Improper Motive—Provisions to Hinder, Delay and Defraud Creditors Not Secured.

And a creditor who takes a conveyance from his debtor, to secure his debt, and at the same time, inserts provisions in the deed, to delay, hinder, or defraud other creditors, comes within the statute of frauds, and the conveyance is void. *Garland v. Rives*, 4 Rand. 282.

So, likewise, if the grantee be privy to a fraudulent intent on the part of the grantor, and takes a deed to secure his own debt, with provisions to delay, hinder, or defraud other creditors, the deed will be void, although his only motive was, to secure his own debt, and the other provisions were forced upon him by the grantor, as the only means of having his own debt secured. Such a grantee will not be considered as a bona fide purchaser. *Garland v. Rives*, 4 Rand. 282.

But a deed of trust executed in part to secure fraudulent debts, and partly to secure a bona fide debt, the bona fide creditor having no notice of the dishonest purpose on the part of the grantor, is a valid security for the bona fide debt. *Billups v. Sears*, 5 Gratt. 31.

The fact that the grantor in a trust deed made to secure, among other things, the surety on a building contract of the grantor, performed the con-

tract, after executing the deed, so that no liability remained on the surety, does not show that the deed was executed with improper motives. *Harvey v. Anderson*, 2 Va. Dec. 385. See also, *Gardner v. Johnston*, 9 W. Va. 403; *Spence v. Bagwell*, 6 Gratt. 444.

15. Secret Trust.

The fact that the debtor conveys his property as a secret trust for his own use, in conjunction with the relationship of the parties and the nature of indebtedness, may justify the setting of the deed aside as fraudulent, where, standing alone, such fact would not furnish a sufficient excuse. *Stuart v. Neely*, 50 W. Va. 508, 512, 40 S. E. 441.

16. Evidence Must Be Clear—Onus.

See post, "Evidence," IV, H, 3, b, (7); "Evidence," IV, H, 6; "Evidence Must Be Clear—Onus," IV, L, 16; "Evidence," V, C, 2, d; "Evidence," VIII, I.

"We must not here forget, because it is very important in the case, that this is a suit to set aside the reservation on the sole ground of fraud in its insertion in that deed, and the legal principle often laid down that a plaintiff who alleges fraud must clearly and distinctly prove it, as the onus probandi is on him." *Edgell v. Smith*, 50 W. Va. 349, 358, 40 S. E. 402; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Pusey v. Gardner*, 21 W. Va. 469.

M. PREFERENCES BY INSOLVENTS.

See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, pp. 799, 811. And see ante, "Transfers Where Insolvency Threatened," IV, F, 3; "Grant Producing Insolvency," IV, F, 9; post, "Insolvency of Grantor," IV, N.

N. INSOLVENCY OF GRANTOR.

See generally, the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; BANKRUPTCY AND INSOLVENCY, vol.

2, p. 254. And see ante, "Transfer Where Insolvency Threatened," IV, F, 3; "Grant Producing Insolvency," IV, F, 9; "Preferences by Insolvents," IV, M.

If an insolvent debtor convey property to a purchaser for value in a position to know that such debtor is making such conveyance to delay, hinder and defraud his creditors, such conveyance will be avoided at the instance of such creditors. *Wilson v. Carrico*, 50 W. Va. 336, 40 S. E. 439.

In *Clinch River Veneer Co. v. Kurth*, 90 Va. 737, 19 S. E. 878, it is held, that a joint stock company can not prefer one creditor to the prejudice of another, unless it be to secure a debt contracted or money lent at the time of the creation of the lien making the preference.

V. Transfers Which Are Voluntary or upon Consideration Not Deemed Valuable in Law.

A. GENERAL CONSIDERATION.

1. Statutory Provisions.

Every gift, conveyance, assignment, transfer, or charge, which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers. (Code, 1849, p. 508, ch. 118, § 2.) Va. Code, Anno. (1903), § 2459.

"Every transfer or charge which is not upon consideration deemed valuable in law, shall be void as to creditors whose debts shall have been con-

tracted at the time it was made; but shall not upon that account merely be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." W. Va. Code, Anno. (1906), § 3100.

2. "Transfer" or "Charge" Defined.

In § 3100, W. Va. Code (1899), it was declared that the word "transfer" shall be taken to include every gift, sale, conveyance and assignment, and the word "charge" shall be taken to include every confessed judgment, deed of trust, mortgage, lien and incumbrance. W. Va. Code, Anno. (1906), § 3100.

3. Determination Question of Fact for Jury.

If a deed which is alleged to be voluntary and fraudulent, forms a part of the plaintiff's claim of title, in an action of ejectment, it is the province of the jury to determine, under a proper instruction from the court, whether the deed is voluntary and fraudulent or not. *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472.

B. WHAT CONSTITUTES.

A deed made by a husband embarrassed at the time, by which he conveys the proceeds of his wife's land which had been sold, and the note for the purchase money made to him, in trust for himself and his wife for their lives and the life of the survivor, and during his life to be under his control and management, is voluntary and fraudulent as to creditors. *Lewis v. Caperton*, 8 Gratt. 148; *Clarke v. King*, 34 W. Va. 631, 12 S. E. 775. See also, *Farmers' Bank v. Gould*, 48 W. Va. 99, 103, 35 S. E. 878.

Where a husband sells his wife's bank stock, not her separate estate, and with the proceeds pays three-fifths of the price of land sold and conveyed

jointly to him and his father, and the latter, paying the residue, conveys, by deed on its face for only a good consideration, his moiety to son's children, the conveyance is wholly voluntary, and his moiety liable to his creditors. *Grayson v. George*, 85 Va. 908, 9 S. E. 13.

C. SETTLEMENTS.

1. Antenuptial Settlements.

a. In Consideration of Marriage.

(1) Common-Law Rule.

In the absence of statutory provisions to the contrary, marriage is a valid consideration to support an antenuptial settlement. See post, "Virginia Doctrine Prior to Statute," IV, H, 3, b, (6), (a), aa, (bb); "West Virginia Doctrine Prior to Statute, Former Rule," V, C, 1, a, (2); "West Virginia Doctrine—Common Law Rule Prevails," V, C, 1, a, (4). See also, the title *CONTRACTS*, vol. 3, pp. 307, 363.

(2) Virginia Doctrine Prior to Statute—Former Rule.

(a) Presumption That Gift in Consideration of Marriage.

Where a father who is possessed of an ample fortune sends certain of his slaves immediately after the marriage of his daughter to her husband, in whose possession they remained, without interruption or claim, until his death which happened two years and four months afterwards, it will be presumed (no proof of fraud appearing), that such slaves, being no more than a reasonable provision for the daughter at the time, were a gift in consideration of the marriage; and the right of the representatives of the husband is good against the creditors of the father. *Moore v. Dawney*, 3 Hen. & M. 127.

In *London v. Turner*, 11 Leigh 403, a father, upon the marriage of his daughter, made her a gift of slaves, and the possession thereof remained in the daughter's husband five years. While the husband was in possession, the father made his will, confirming the gift, and declaring that the same was

"to her in trust for the sole and only purpose of her immediate use and comfort in life, and after her decease the title and fee-simple interest to be vested forever in the children or issue lawfully begotten of her body, free from the claim, control or direction of any other person whatever." Although this will was made and recorded within five years from the time of the gift, yet the slaves were held liable to be taken in execution by the creditors of the husband. This case was distinguished from *Beasley v. Owen*, 3 Hen. & M. 449.

A verbal gift of personal property to a daughter before marriage, in consideration thereof, accompanied by delivery of possession, is (like a promise in writing to make such a gift) valid and effectual against the creditors of the father. However, such verbal gift of property, unaccompanied by possession before the marriage, but in consideration of which the possession is delivered after the marriage, though valid between the parties and privies to it, and against debts of the father afterwards contracted, is voluntary and void against all pre-existing creditors; and this is true though the property be delivered before any lien by execution is acquired by the creditors. *Hayes v. Jones*, 2 Pat. & H. 583.

(b) By Person upon Intended Consort.

aa. Rule Stated.

Prior to May 1, 1888, when the Virginia Code of 1887 went into effect, a settlement by a man upon his intended wife in consideration of marriage, was valid as against his creditors in the absence of fraudulent intent on her part, or knowledge of the fraudulent intent of the intended husband; whatever the design of the grantor might be in making the settlement. *Clay v. Walter*, 79 Va. 92; *Herring v. Wickham*, 29 Gratt. 628; *Moore v. Butler*, 90 Va. 683, 19 S. E. 850; *Bumgardner v. Harris*, 92 Va. 188, 22 S. E. 320;

Triplett v. Romine, 33 Gratt. 651; *Coutts v. Greenhow*, 2 Munf. 363; *Eppes v. Randolph*, 2 Call 125, 135; *Shobe v. Carr*, 3 Munf. 10; *Huston v. Cantril*, 11 Leigh 136; *Bentley v. Harris*, 2 Gratt. 357; *Wells v. Cole*, 6 Gratt. 645; *Fones v. Rice*, 9 Gratt. 568; *Tabb v. Archer*, 3 Hen. & M. 399; *Charles v. Charles*, 8 Gratt. 486; *Moore v. Dawney*, 3 Hen. & M. 127; *Hayes v. Jones*, 2 Pat. & H. 583, 603; *Argenbright v. Campbell*, 3 Hen. & M. 144.

bb. Marriage Must Be Inducement.

"There can be no doubt but marriage, for the benefit of society, is a good consideration, where there is any personal inducement to it, but where there is not, it should not, of itself, be deemed a good consideration against creditors; and more especially in the present case, where the parties lived in open violation of the laws, and to the evil example of the whole community." *Greenhow v. Coutts*, 4 Hen. & M. 485, 486.

(c) Promise by Third Person.

aa. Specific Marriage Contemplated.

Marriage furnishes a valuable consideration for an agreement as much so as money paid or agreed to be paid; and the consideration arises in a contract made, in contemplation of a specific marriage, between the parties to the intended union, or between one or both of them, and a third person who has reason to desire their intermarriage. If such third person promises or agrees, in the event of such intermarriage, to convey or settle, or pay, property or money, to or for the parties to the marriage tie, or either of them, then the occurrence of the marriage is a sufficient consideration for such promise or agreement; the law presuming that the latter was an inducement to the performance of the solemn and irrevocable specific act which it contemplated. In such a contract, the law recognizes mutuality both of promise and consideration. *Welles v. Cole*, 6 Gratt. 645, 652.

Promise to Prospective Son-in-law.

—If A promise B that if he and A's daughter marry, "he will endeavor to do her equal justice with the rest of his daughters, as fast as it is in his power with convenience;" and the marriage be afterwards had with his consent, the promise is sufficiently certain and obligatory. *Chichester v. Vass*, 1 Munf. 98.

A parol promise by a father to his daughter's husband before the marriage was held a sufficient consideration to sustain a written agreement made after the marriage, where such written agreement was otherwise sufficient under the statute of frauds. So, also, if the marriage was had on the father's request. *Argenbright v. Campbell*, 3 Hen. & M. 144.

bb. No Specific Marriage Contemplated.

It was quite otherwise where no specific marriage was in treaty or contemplated, and the promise was in reference to a future possible state or condition of matrimony. As where a father promised a daughter, that if at any after period of life, she should choose to enter into wedlock, he would in that event, and upon its concurrence, give, convey or pay to her specified money or property. In such a case, there was no mutuality either of promise or consideration. The agreement of the father was founded upon no undertaking or promise of the daughter, and upon no valuable consideration, but was merely for a future contingent advancement of the daughter. It was not in the eye of the law in consideration of marriage, but of natural love and affection. *Welles v. Cole*, 6 Gratt. 645, 652.

A bond executed by a father to his daughter to be paid to her on her marriage, was held not to be a covenant or agreement in consideration of marriage, under 1 Revised Virginia Code providing that covenants or agreements made in consideration of mar-

riage shall be admitted to record in the county where the land charged lieth, etc., because no specific marriage was in treaty or contemplated, and the promise was in reference to a future possible state or condition of matrimony. The court said: "No case can be found in which a promise in reference merely to a future condition of wedlock has been treated as one made in consideration of marriage." *Welles v. Cole*, 6 Gratt. 645, 653.

(d) Who within Consideration.

"The consideration of marriage (merely) operated under the settlement, free from fraud, to confer on the husband and wife and issue of the marriage, and on children base born but legitimated by subsequent marriage of the parents and recognition, rights in the property limited to them paramount to those of existing creditors of the settler although embarrassed with debt. This would seem to be going quite far enough, and the manifest injustice done to creditors by the established rules drew from Judge Staples, in *Herring v. Wickham*, supra, the remark, that 'the whole subject needs the attention of the legislative department.' We are now asked to go further and hold, that the consideration extends to persons who are not even collateral relatives but total strangers in blood to the settler, and that such persons are purchasers for value with rights paramount to those of pre-existing creditors. We are not at all disposed to take a single step further in that direction. The mischief and gross injustice which would result from extending the rule, as we are asked to do, is strikingly exemplified by the case in judgment." *Triplett v. Romine*, 33 Gratt. 651, 659.

Children by Former Marriage.—While marriage prior to the statute was a valuable consideration to support an antenuptial settlement, this consideration did not extend to the children of the husband by a former mar-

riage, so as to bar the rights of the existing creditors of the grantor. *Triplett v. Romine*, 33 Gratt. 651.

Where A, a widow, in contemplation of marriage with B, settled her separate property to the use of herself and her intended husband and children by a former marriage, the marriage contemplated having taken place, even before the statute it was held, such marriage was not a sufficient consideration to support the settlement to the use of such children against a creditor of A, whose debt existed at and before the date of the settlement, even though such debt was not a specific lien, if it was then chargeable in equity upon the property settled. *Triplett v. Romine*, 33 Gratt. 651.

Legitimacy of Children.—Prior to the Virginia statute declaring marriage no consideration to support a conveyance as to existing creditors, it was held, that children born out of wedlock but legitimated by a subsequent marriage, were within the consideration. *Coutts v. Greenhow*, 2 Munf. 363; *Herring v. Wickham*, 29 Gratt. 628.

Where the settlement was upon the wife for life, with remainder over to the sister of the grantor and her children, the remainder was without valuable consideration and void as to existing creditors of the grantor. *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229.

(e) Effect Where Parties Lived in State of Fornication.

In *Greenhow v. Coutts*, 4 Hen. & M. 485 (1810), upon a given state of facts, the principle was declared by the superior court of chancery for the Richmond district, that a marriage settlement on a wife with whom the husband had long lived in a state of fornication, and by whom he had several children, will be deemed not to have been on valuable consideration, but voluntary and fraudulent as to creditors. However, upon appeal, the court in *Coutts v. Greenhow*, 2 Munf. 363, re-

versed this decision, declaring that the wife and children were purchasers for value, and the deed was not void as to creditors, no fraudulent intention being proved.

(f) Necessity of Recordation.

See generally, the title RECORDING ACTS.

aa. In General.

A deed of a marriage settlement executed before and recorded after the marriage, but within the time required by law, is conclusive against the creditors of the husband, for debts contracted by him before the marriage. And this, although such deed was recorded upon the acknowledgment of the parties, without any privy examination of the wife. *Scott v. Gibbon*, 5 Munf. 86.

"If plaintiffs in equity charge in their bill that a deed of marriage settlement under which they claim was executed before the marriage, though recorded afterwards; it being, also, expressed in the recital of the deed, that the same is made in contemplation of a marriage 'shortly intended to be solemnized,' etc.; and that allegation be not denied or noticed in the answer; it must be considered as admitted to be true, without farther proof." *Scott v. Gibbon*, 5 Munf. 86.

bb. As to Subsequent Purchasers.

A deed of marriage settlement made before the marriage, conveying the property of the wife, and in which the intended husband joined, is fraudulent and void as to subsequent purchasers from the husband, without notice, unless duly recorded. *Thomas v. Gaines*, 1 Gratt. 347.

cc. As between Immediate Parties.

An agreement made in contemplation of marriage, though void against creditors because unrecorded, was held to be valid as between the parties. *Dabney v. Kennedy*, 7 Gratt. 317.

(3) Statutory Provision—§ 2459—Present Rule.

The Virginia Code of 1887, § 2459,

provides that as against creditors whose debts were contracted at the time the conveyance or settlement was made, marriage shall no longer be a valid consideration.

Construction of Statute.—It will be seen that since this enactment, marriage is no longer a valuable consideration as to existing creditors of the grantor, but it is still a valid consideration to support a conveyance as to subsequent creditors. Therefore, a deed made by a man to his intended wife, followed by marriage, is conclusively presumed to be in consideration of the marriage, and is based on a valuable consideration as to subsequent creditors, but void as to existing creditors. This enactment was intended to defeat frauds perpetrated upon existing creditors by the marriage of an insolvent debtor, accompanied by gifts to his wife, and of course renders nugatory the decisions in *Herring v. Wickham*, 29 Gratt. 628; *Coutts v. Greenhow*, 2 Munf. 363, which furnished instances of gross injustice to existing creditors. *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647.

(4) West Virginia Doctrine—Common-Law Rule Prevails.

But in West Virginia the rule of the common law yet prevails that marriage, in an antenuptial contract or settlement, is a valuable consideration to support the transaction; and such contract can not be impeached by existing creditors, as fraudulent, unless it be shown that both parties thereto participated therein, or had notice of the fraudulent intent. *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303; *Vance v. Richards*, 39 W. Va. 578, 20 S. E. 603. See also, W. Va. Code (1899), §§ 3102, 5438.

(5) Antenuptial Conveyance by Woman in Trust.

As to conveyances in fraud of marital rights, see the titles HUS-

BAND AND WIFE; MARRIAGE CONTRACTS AND SETTLEMENTS.

Where a woman, about to marry a man much involved in debt, settles her own property with his consent, in trust that the husband and wife should enjoy the interest and profits of the said estate jointly during their lives, it gives no claim to his creditors, as it would defeat the avowed object of the settlement. *Scott v. Gibbon*, 5 Munt. 86. See also, *Land v. Jeffries*, 5 Rand. 211, 266. *Roanes v. Archer*, 4 Leigh 550, 568, real and personal estate was settled by deed "to the use and benefit of husband and wife during their joint lives, and if the husband should survive the wife, then to his use during his life, and after his death to their children." It was held, that the joint interest of the husband and wife, during their joint lives was not subject to the husband's debts. In this case, it was held, that the husband's contingent interest, in case he survived his wife, was subject to his debts. To the same effect, see *Nickell v. Handly*, 10 Gratt. 336, 341; *Johnston v. Zane*, 11 Gratt. 552, 570; *Nixon v. Rose*, 12 Gratt. 425, 429; *Armstrong v. Pitts*, 13 Gratt. 235, 243; *French v. Waterman*, 39 Va. 617, 625; *Coatney v. Hopkins*, 14 W. Va. 338, 358; *Lewis v. Adams*, 6 Leigh 320, 335.

(6) Notice of Fraudulent Intent.

The woman's knowledge of the husband's intended fraud had to be clearly and satisfactorily proved. *Clay v. Walter*, 79 Va. 92; *Herring v. Wickham*, 29 Gratt. 628; *Moore v. Butler*, 90 Va. 683, 19 S. E. 850; *Bumgardner v. Harris*, 92 Va. 188, 22 S. E. 229; *Triplett v. Romine*, 33 Gratt. 651; *Coutts v. Greenhow*, 2 Munf. 363; *Eppes v. Randolph*, 2 Call 123; *Shobe v. Carr*, 3 Munf. 10; *Huston v. Cantiril*, 11 Leigh 136; *Benley v. Harr's*, 2 Gratt. 357; *Welles v. Cole*, 6 Gratt. 645; *Fones v. Rice*, 9 Gratt. 568; *Noble v. Davies*, 1 Va. Dec. 633.

And it was held, that the service by creditors of the grantor, of a written notice in accordance with the Virginia Code of 1873, ch. 163, § 1, on the grantor, before the marriage, of his fraudulent design in making the settlement, could not affect her constructively with notice of such design; and her actual knowledge of or participation in that fraudulent design must have been clearly established by proof, in order to render the deed of conveyance fraudulent as against creditors of grantor. *Moore v. Butler*, 90 Va. 683, 19 S. E. 850.

Presumption and Burden of Proof.—Where a man enters into a contract of marriage with a woman, and commits a breach thereof, and she sues him for nonperformance, and during the pendency of the suit, to escape the payment of any judgment against him therein, he, under cover of a second contract of marriage with another woman, and under pretense of consideration therefor, conveys all his property, thus rendering himself hopelessly insolvent, if the facts and circumstances are sufficient to justify the presumption of notice to the grantee, of the fraudulent intent of the grantor the burden of proof is shifted to such grantee, and it devolves upon her to prove want of such notice; and, if she fails to testify with regard thereto, such presumption becomes conclusive. *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

Sufficiency of Evidence.—"The facts and circumstances which tend to show notice or knowledge of fraudulent intent on the part of the grantee, the nature, character, and manner of the execution of the contract itself, and the character of the various items thereby conveyed, including a mere equity of redemption in other plainly fraudulent transfers made by him, and the explicitness with which it is set forth, the knowledge on her part of the charge of seduction, the birth of the child, and the pendency of the suit for breach of promise, it being a matter of common

notoriety in the community in which she lived, were sufficient to put her on her guard and inquiry; and she must therefore be deemed to have accepted him with all his circumstances, and to have taken the risk of his escape from his first marriage contract, and thereby joined with him in his fraud to defeat a recovery on such first contract." *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

b. In Fraud of Marital Rights.

See generally, the title HUSBAND AND WIFE.

In *Prior v. Kinney*, 6 Munf. 510, an agreement was made between two unmarried sisters, that the property of the one who should die first, or be married, should, in either event, belong to the other; in consideration of which agreement, one of them, by a deed of gift executed two days before her marriage, conveyed all her slaves to her sister, who, after the marriage, lived partly with her, and partly with her brother; permitting the husband (who was in embarrassed circumstances), to have the use of the slaves; except two, whom the donee retained in her own employment, and principally to wait upon herself. This deed, though admitted to record on the oath of one of the subscribing witnesses, one swearing to the handwriting of another who was dead, was adjudged not to be fraudulent as to the creditors of the husband, notwithstanding a judgment for the debt had been rendered against him, and was unsatisfied, when it was executed, and when the marriage was solemnized. See also, *Leonard v. Smith*, 34 W. Va. 442, 12 S. E. 479.

2. Postnuptial Settlements.

a. Validity and Effect in General.

(1) At Law and in Equity.

Postnuptial settlements on a wife for value were held valid in equity, though void at common law. *Ficklin v. Rixey*, 89 Va. 832, 17 S. E. 325; *Strayer v. Long*, 86 Va. 557, 10 S. E. 574; *Flynn*

v. Jackson, 93 Va. 341, 25 S. E. 1; *Harvey v. Alexander*, 1 Rand. 219; *Quarles v. Lacy*, 4 Munf. 251; *William & Mary College v. Powell*, 12 Gratt. 371; *Davis v. Davis*, 25 Gratt. 587; *Yates v. Law*, 86 Va. 117, 9 S. E. 508; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *Glasscock v. Brandon*, 35 W. Va. 84, 12 S. E. 1102.

Courts of equity viewed such settlements liberally in favor of the wife. *Davis v. Davis*, 25 Gratt. 587; *Ficklin v. Rixey*, 89 Va. 832, 17 S. E. 325.

(2) Presumption as to Validity.

Postnuptial settlements are presumed voluntary, and therefore void as to existing creditors, and the burden of proof is on those claiming under them. See ante, "Evidence," V, C, 2, d.

(3) When Voluntary and Settler Indebted.

Where a postnuptial settlement is voluntary and the settler is indebted, such settlement is fraudulent and void as against creditors. *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1. See also, *Cale v. Shaw*, 33 W. Va. 299, 10 S. E. 637.

Property Received by Marriage.—See generally, the title HUSBAND AND WIFE.

Formerly choses in action and other chattel property to which the wife became entitled during coverture were liable to the claims of the husband's creditors, and a settlement of them upon the wife with the assent of the husband before they were reduced into possession did not protect them from the claims of creditors. *Dold v. Geiger*, 2 Gratt. 98.

A gift by a husband to his wife is void as to his existing debts. *Good v. Good*, 39 W. Va. 357, 19 S. E. 382.

Where a judgment debtor by deed conveyed all his personal property in trust for his wife and children, it was held, void as to the existing judgment, as it was not based upon a consideration deemed valuable in law. *Russell v. Randolph*, 26 Gratt. 705.

(4) Validity as to Subsequent Creditors.

As against subsequent creditors postnuptial settlements are good where there is no fraud and the settler is not in debt when the settlement is executed. *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805.

(5) Validity to Extent of Bona Fide Consideration.

See post, "Consideration," V, C, 2, b; "Consideration," IV, G.

(6) Failure to Record.

See generally, the title RECORDING ACTS.

A postnuptial settlement made by a husband on his wife, of personal property derived from her father's estate, but of which he retains possession, not having been properly recorded, is void as against the creditors of the husband. *Lewis v. Caperton*, 8 Gratt. 148.

b. Consideration.**(1) In General.**

That a postnuptial settlement in favor of a wife, made in pursuance of a previous fair contract for a fair consideration, will be held good, is a doctrine supported by abundant authority. *William & Mary College v. Powell*, 12 Gratt. 371, 385; *Blanton v. Taylor*, Gilmer 209, 210; *Harvey v. Alexander*, 1 Rand. 219, 234; *Taylor v. Moore*, 2 Rand. 563, 579, 592; *Penn v. Whitehead*, 12 Gratt. 74, 81; *Davis v. Davis*, 25 Gratt. 587, 590; *Penn v. Whitehead*, 17 Gratt. 503, 512; *Strayer v. Long*, 86 Va. 557, 561, 10 S. E. 574; *Quarles v. Lacy*, 4 Munf. 251; *Nickell v. Tomlinson*, 27 W. Va. 697, 708; *Glasscock v. Brandon*, 35 W. Va. 84, 91, 12 S. E. 1102, 1104.

Although such settlement may have been made under such circumstances that it must be pronounced fraudulent and void as to the creditors of the husband, yet if the wife has relinquished her interest in property on the faith of such settlement, it will be held good to the extent of a just compensation for the interest with which she may

have parted. *William & Mary College v. Powell*, 12 Gratt. 371, 385; *Penn v. Whitehead*, 17 Gratt. 503, 512; *Penn v. Whitehead*, 12 Gratt. 74, 81; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *Blanton v. Taylor*, Gilmer 209; *Taylor v. Moore*, 2 Rand. 563; *Quarles v. Lacy*, 4 Munf. 251; *Walden v. Walden*, 33 Gratt. 88; *Burwell v. Lumsden*, 24 Gratt. 443; *Strayer v. Long*, 86 Va. 557, 10 S. E. 574; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Glasscock v. Brandon*, 35 W. Va. 84, 12 S. E. 1102. See also, post, "Consideration," IV, G.

(2) Consideration Voluntary—Settler Indebted.

Every voluntary postnuptial settlement is fraudulent and void as against creditors when the settler is indebted. *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615.

A settlement by a husband largely indebted, on a wife of lands and all his personalty, upon a consideration and pursuant to an agreement recited in the deed, was held void as to creditors in the absence of evidence to sustain the truth of the recitals. *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805.

Presumption.—Every such settlement will be taken as voluntary, unless those claiming under it can show that it was made for a valuable consideration, and it can not be shown either by the answer or by the recitals in the deed, but must be established by legal evidence. *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615. See post, "Evidence," VIII, I. See also, ante, "Transfers Which Are Voluntary or upon Consideration Not Deemed Valuable in Law," V.

(3) Relinquishment of or Charges upon Certain or Contingent Interests.**(a) Rule Stated.**

It is settled that the relinquishment by the wife of a certain or even a con-

tingent interest in her husband's estate will support a postnuptial settlement where there is no badge of fraud. *Blow v. Maynard*, 2 Leigh 29, 31; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805.

(b) Jointure or Dower.

See generally, the title DOWER, vol. 4, p. 782.

aa. Statement of General Rule.

It is settled that the releasing of her jointure or dower interest by the wife may constitute a valuable consideration that will support a postnuptial settlement, and that such settlement, made in consideration of a surrender of such interest or interests, may be supported against the claims of the creditors. *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *Blow v. Maynard*, 2 Leigh 29, 31; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Quarles v. Lacy*, 4 Munf. 251; *Strayer v. Long*, 86 Va. 557, 10 S. E. 574; *Walden v. Walden*, 33 Gratt. 88; *Burwell v. Lumsden*, 24 Gratt. 443; *Lee v. Bank of United States*, 9 Leigh 200; *William & Mary College v. Powell*, 12 Gratt. 371, 393; *Penn v. Whitehead*, 17 Gratt. 503; *Penn v. Whitehead*, 12 Gratt. 74, 81; *Glasscock v. Brandon*, 35 W. Va. 84, 12 S. E. 1102.

bb. Settlement before Relinquishment.

In *Strayer v. Long*, 86 Va. 557, 10 S. E. 574, it is declared that, a relinquishment of dower, to the extent of the other is a sufficient consideration for a postnuptial settlement as against the husband's existing creditors; and if it is made before the relinquishment, no distinct proof of the agreement is required, and though the settlement is made fraudulently as to the husband's creditors, the fraud will not be imputed to the wife. Nevertheless it must be duly recorded, else it is void as to the husband's creditors, without notice, whose claims accrued after its execution and before its admission to record. See also, *Glasscock v. Brandon*, 35 W. Va. 84, 12 S. E. 1102; *William*

& Mary College v. Powell, 12 Gratt. 371; *Lee v. Bank of United States*, 9 Leigh 200.

cc. Settlement after Relinquishment.

And this though the settlement may have been made subsequent to the relinquishment. *William & Mary College v. Powell*, 12 Gratt. 371, 385; *Taylor v. Moore*, 2 Rand. 563.

It is settled law in this state—that if a married woman relinquishes her claim for dower on the faith of a settlement or other property made by her husband, or even if she make a relinquishment under a mere promise that other property shall be settled upon her as a compensation, in either case such settlement in her favor will be held good to the extent of a just compensation for the interest so relinquished. *Burwell v. Lumsden*, 24 Gratt. 443.

If a married woman relinquishes dower in lands, under a promise that other property shall be settled on her as a compensation, such settlement will be good, although made after the relinquishment. *Taylor v. Moore*, 2 Rand. 563.

Setting Aside as to Excess.—If the value of property settled, exceeds the value of dower relinquished, the deed should be set aside as to the excess, and supported as to the residue. *Taylor v. Moore*, 2 Rand. 563.

(c) Wife's Equity.

As a consideration to support a postnuptial settlement to the wife, the wife's equity in property is deemed a valuable consideration. *Walden v. Walden*, 33 Gratt. 88; *Burwell v. Lumsden*, 24 Gratt. 443; *Blanton v. Taylor*, Gilmer 209; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *White v. Gouldin*, 27 Gratt. 491, 503.

From Whom Consideration Must Move.—It seems that although the evidence establishes the fact that the settlement upon the wife was upon a consideration moving from the father of

the wife, the deed reciting that the consideration was paid by the husband, yet the settlement should be upheld. *Marks v. Spencer*, 81 Va. 751; *Cronie v. Hart*, 18 Gratt. 739; *Straus v. Bodeker*, 86 Va. 543, 10 S. E. 570.

(d) Charge upon Estate for Husband's Benefit.

Making a charge on her own estate for her husband's benefit, will constitute a valuable consideration to support a settlement by the husband upon the wife. *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805.

(e) Property Formerly Used by Husband Forming Alleged Consideration.

No Distinct Promise at Time Used.—In *Beecher v. Wilson*, 84 Va. 813, 6 S. E. 209, a husband who was heavily indebted conveyed his land to his wife's separate use, reciting the settlement to be in consideration of his indebtedness to her on account of her money used by him in paying for said land and otherwise. There was at the time of its use no distinct promise, written or parol, that the money should be applied to the deferred payments of the lands, which was conveyed to himself, and afterwards treated as his own property, or that the use of the said money should be regarded as a debt from him to her. The court declared that such postnuptial settlement must be annulled as fraudulent as to his creditors.

(f) Meritorious Consideration.

See the title **CONTRACTS**, vol. 3, pp. 307, 376.

Though a conveyance in favor of wife and children is not founded on a valuable, but only on a meritorious consideration, a court of equity will give effect to it against subsequent creditors of the husband. *Sayers v. Wall*, 26 Gratt. 354. See also, *Riggan v. Riggan*, 93 Va. 78, 24 S. E. 920; *Keffer v. Grayson*, 76 Va. 517, 523; *Fox v. Jones*, 1 W. Va. 205.

(g) Board and Lodging—Services Rendered.

Validity to Support Contract in General.—See generally, the titles **CONTRACTS**, vol. 3, p. 307; **IMPLIED CONTRACTS**.

Law Will Not Imply Promise.—Board and lodging and the keep of a horse do not, as between husband and wife, constitute a consideration from which the law will imply a promise of payment, and no action can be maintained therefor in the absence of an express contract or engagement to pay for them. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

Subsequent Express Promise.—An express promise to pay made after the supplies have been furnished or the services rendered, can not be enforced against the promisor to the prejudice of his creditors. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

(h) Fraud as Affecting Rights.

Where a postnuptial settlement upon a wife is based upon a valuable consideration passing from the wife, the fraud of the husband will not affect the validity of the settlement. It would be a sufficient answer to the charge of fraud, on the part of the husband and wife, in executing the deed of settlement, to say that if there was fraud and she participated in it, still it will not be imputed to her by reason of her coverture. The participation of the wife in the fraud of the husband will not impair her rights, where she has given an equivalent for the property out of her dower. If, therefore, the wife relinquish her right of dower in other land, or gives other valuable consideration, to support the conveyance, the value of such dower ought to be saved to her, or her other rights protected, in opposition to the claims of the creditors of her husband. *Quarles v. Lacy*, 4 Munf. 251; *Blanton v. Taylor*, Gilmer 209; *William & Mary College v. Powell*, 12 Gratt. 371, 381; *Taylor v. Moore*, 2 Rand. 563;

Strayer v. Long, 86 Va. 557, 559, 10 S. E. 574; *Penn v. Whitehead*, 17 Gratt. 503, 512; *Penn v. Whitehead*, 12 Gratt. 74, 81; *Burwell v. Lumsden*, 24 Gratt. 443, 446; *Perry v. Ruby*, 81 Va. 317, 327; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Bates v. Swiger*, 40 W. Va. 420, 428, 21 S. E. 877; *Glasscock v. Brandon*, 35 W. Va. 84, 91, 12 S. E. 1102, 1104.

In *Blanton v. Taylor*, Gilmer 209, the decision turned upon the consideration that the wife, in the confidence, founded on actual contract with the husband, that she would have a compensation for her dower, had relinquished it; and the fraud was imputed solely to the husband, as otherwise the wife might be irreparably injured. But her privity to the fraud had still the effect of limiting her strictly to an equivalent. See also, *Quarles v. Lacy*, 4 Munf. 251; *Strayer v. Long*, 86 Va. 557, 559, 10 S. E. 574.

Valid to Extent of Consideration, though Void as to Creditors.—And although a postnuptial settlement may have been made under such circumstances as to be void as to creditors of the husband, yet if the wife relinquish her right in the property, or assumes the payment of debts of her husband, so as to make them charges on her separate estate, upon the faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with, or of the debts which she has assumed to pay. *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1.

c. Transfers or Settlements Which the Law Would Compel.

If the property of the wife which a court of equity would direct to be settled upon her, is conveyed by the husband to a trustee for her benefit, the deed will be sustained against creditors of the husband. *Poindexter v. Jeffries*, 15 Gratt. 363.

The same facts which would induce the court to compel a settlement by

the husband, or those claiming under him, or in his right, will uphold a settlement already made. *Smith v. Bradford*, 76 Va. 758.

Uncollected Share of Estate of Which Husband Distributee in Jure Mariti.—An insolvent husband may make a valid settlement upon his wife of his uncollected share of an estate of which he, in right of his wife, is a distributee. *Poindexter v. Jeffries*, 15 Gratt. 363; *Smith v. Bradford*, 76 Va. 758, 764.

Personal property was bequeathed to a married woman and her children. The husband sold the property and used the proceeds. Afterwards he conveyed his land in trust for his wife and children. Held, that the property was bequeathed to the wife and her children jointly; he became invested with her interest jure mariti, so that, as to her, his conveyance was voluntary; but as to the children, the conveyance was based on a valuable consideration, and must stand as a security to them. *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615.

d. Evidence.

See ante, "Evidence," IV, H, 3, b. (7); "Evidence," IV, H, 6; "Evidence," VIII, I.

D. VALIDITY AS TO PARTIES.

1. Validity as between Immediate Parties.

See post, "Rights and Liabilities," VII.

A voluntary conveyance is valid as between the immediate parties. *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382; *Chamberlayne v. Temple*, 2 Rand. 384. See also, *Clarke v. King*, 34 W. Va. 631, 12 S. E. 775; *Stokes v. Oliver*, 76 Va. 72; *Burkholder v. Ludlam*, 30 Gratt. 255; *Harvey v. Steptoe*, 17 Gratt. 289.

2. Validity as to Subsequent Purchasers.

Whilst under our statute a voluntary conveyance, without fraud, is void as to existing creditors, it is void only

as to them, and is good as to all others. When, therefore, it is said that a purchaser, with notice, from a voluntary donee, stands in the shoes of such donee and can occupy no higher ground than he, all that is meant is, that he holds subject to the claims of the original donor's creditors, to the same extent as the volunteer donee holds. Such a purchaser can not be affected by subsequent alienations from the original donor, of which he had no notice, and against which he could not provide. *Whitten v. Saunders*, 75 Va. 563.

Although a party to whom property is conveyed upon a fraudulent secret trust, may hold it as his own, against the grantor and his representatives, yet if the grantee assents to the trust, and executes it in part, it is not competent for such of the cestui que trust as may have gotten possession of the property, to set up the fraud for the purpose of defeating the claim of the other cestui que trust to their share of the property. *Turner v. Campbell*, 1 Pat. & H. 256; *Turner v. Campbell*, 3 Gratt. 77.

Though a grantee might, by repudiating the trust, claim and hold as his own, the property embraced in a fraudulent deed, yet, where he recognizes the trust, although he executes a deed "relinquishing his right to" a portion of the property for an alleged consideration, to one of the cestui que trust, his grantee acquires no title to the property, but simply his interest as trustee, and can not defeat the claims of his co-cestui que trust, by any claim of title derived from him. *Turner v. Campbell*, 1 Pat. & H. 256.

E. VALIDITY AS TO CREDITORS.

1. Existing Creditors.

a. In General.

Who Are Existing Creditors.—The word "creditors" as used in the statute of fraudulent conveyances includes all creditors, whether with or without notice. *Davis v. Bonney*, 89 Va. 755, 17

S. E. 229; *Guerrant v. Anderson*, 2 Rand. 408.

b. Common-Law and Statutory Doctrines.

(1) Common-Law Doctrine—Declared and Enlarged by 13 Eliza., Ch. 5.

It seems to have been a well-settled doctrine at common law that a voluntary conveyance, which interfered with or broke in upon the rights of existing creditors, would not be permitted to take effect to the prejudice of other just demands: and this according to many of the cases, without regard to the amount of the debts, or the extent of the property settled, or the circumstances of the party. Nevertheless, numerous cases are to be found, which in effect maintain the doctrine, that a conveyance, although voluntary, may be good, under circumstances, even as against existing creditors; and that the parties being indebted at the time is but an argument of fraud, the question still being in every case, whether the conveyance is a bona fide transaction, or a mere device to elude and defeat creditors. The subject is one involving the inquiry into the relations which the two great classes of creditors, prior and subsequent, occupy in relation to a voluntary settlement. And the question is, whether they occupy a common ground, so that the conveyance which would be adjudged fraudulent as to the former, would also be held fraudulent as to the latter; or will a discrimination be made, the effect of which will be to withdraw from inquiry in the case of a prior creditor the various circumstances attending the execution of the conveyance, such as the nature of the consideration, the value of the property settled, compared with that, if any, retained, the extent of the indebtedness, etc.; all of which are in the case of the subsequent creditor most proper to be considered; and upon which, in order to succeed, he must be able to fix the imputation of fraud in

the absence of direct and positive proof of the intent. Chancellor Kent clearly recognizes the distinction between the two classes. In the case of the prior creditor, he considers that any inquiry into the amount of debts existing at the time would be embarrassing if not dangerous; and he regards it as wholly unnecessary, considering the debtor as absolutely disabled from making any voluntary settlement to the prejudice of any existing debts; and such, he says, is the clear and uniform doctrine of the cases. See also, *Reed v. Livingston*, 3 Johns. Ch. R. 481, 500. Judge Story, on the other hand, evidently considers him as carrying the doctrine too far. He thinks that mere indebtedness would not per se avoid a voluntary conveyance even as to subsisting creditors, unless the other circumstances are such as justly to create a presumption of fraud. 1 Story's Eq. Jur., §§ 360-365, inclusive.

This question was the subject of a most animated and elaborate discussion between two of the former judges of the supreme court of Virginia, in the cases of *Hutchison v. Kelly*, 1 Rob. 123; *Bank v. Patton*, 1 Rob. 499, and *Hunters v. Waite*, 3 Gratt. 26, in which Judge Baldwin opposes the opinion of Chancellor Kent, and Judge Standard maintains the correctness of Chancellor Kent's opinion. But it seems that both these eminent jurists agree, that in the case of a subsequent creditor, a settlement can not be impeached on the mere ground of its being voluntary, if there be no actual fraudulent view or intent at the time it is made. To let in such a creditor it must be shown that there was mala fides or fraud in fact in the transaction. If the grantor, however, be indebted at the time he makes the voluntary conveyance, and due provision is made of all existing debts, it is maintained by some courts that it is clear, that all just imputation of fraud in respect to them is out of the question. The above discussion of the principles relating to

fraudulent and voluntary conveyances, their effect upon the rights of existing and subsequent creditors, at common law, is taken almost verbatim from the well-considered opinion rendered by Judge Lee in *Johnston v. Zane*, 11 Gratt. 552. See this case also for a valuable collection of English, and other authorities supporting propositions set forth in the principal case.

In the light of 13 Eliza., ch. 5, which is held to be declaratory of the principles of the common law, though "more extensive and salutary," the question as to the validity of a voluntary conveyance made by a debtor, who was perfectly solvent, and retained sufficient property out of which to pay all existing debts, continued to be controverted until the provision relating to "voluntary gifts, conveyances," etc., contained in the revisal of the Code in 1850 (Va. Code, 1887, § 2459), in which the view as held by Judge Stanard (dissenting opinion in *Hutchison v. Kelly*, 1 Rob. 123, 138) is adopted, namely, that any transfer of property upon a consideration not deemed valuable in law (or upon consideration of marriage) shall be void as to existing creditors. See also, Va. Code (1887), § 2458; W. Va. Code, 1899, ch. 74, § 2.

(2) Virginia Doctrine.

Prior and Subsequent to Statute.—See ante, "Common-Law Doctrine—Declared and Enlarged by 13 Eliza., Ch. 5," V, E, 1, b, (1).

Designating the principles applicable to a voluntary conveyance, in a controversy between the creditors of the grantor and the claimant under the deed, Baldwin, J., in *Hunters v. Waite*, 3 Gratt. 26 (1846), says that, "If a man in insolvent circumstances conveys away his property to strangers, or settles it upon his wife and children, the law concludes the design to be fraudulent against his creditors, and all evidence to the contrary is idle or delusive; and, so if he renders himself insolvent by a voluntary conveyance,

however meritorious in itself merely. It is in vain to speculate upon his motives, or adduce evidence of an honest purpose. It may be that he has acted through ignorance, or mistake or misconception. Apologies and excuses may be found to absolve him from moral turpitude, but to these the law can not listen. He is bound to know his own circumstances and the just demands against him; and the injustice and wrong to his creditors are palpable and unquestionable. On the other hand, if a man is in flourishing or unembarrassed circumstances, and exercises a reasonable and prudent discretion in gifts or advancements to his children, adapted to their wants and justified by his means, leaving an ample fund for the payment of his debts; there can be no propriety in the conclusion of a fraudulent purpose, from the mere fact of indebtedness at the time." At present, however, it is provided by statute, that a voluntary conveyance, etc., which is upon consideration not deemed valuable in law shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made, etc. Va. Code, 1887, § 2459.

Where an embarrassed debtor makes a voluntary conveyance of personal property, to an unmarried female, and afterwards, upon her marriage, the property is settled to the use of the wife for life, and at her death to her children, it is not liable for the debts of the first donor. *Bentley v. Harris*, 2 Gratt. 357.

"The deed in favor of the wife having been without consideration, this land is liable to pay the debt." *Nulton v. Isaacs*, 30 Gratt. 726.

In *Chamberlayne v. Temple*, 2 Rand. 384 (1824), it was held, that a voluntary conveyance of property to children, at a time when the donor is

largely indebted, is void against creditors. But the creditors meant are defined, as those "who are thereby delayed, hindered, or defrauded,"—and further, that only those can be defrauded who have a right to specifically charge the property, viz., lien creditors. See also, *Johnston v. Zane*, 11 Gratt. 552. And in *Huston v. Cantrel*, 11 Leigh 136, it was left a query whether a voluntary conveyance was fraudulent as to existing creditors of the grantor, if he retained other property amply sufficient at the time to pay all his debts. But see *Quarles v. Lacy*, 4 Munf. 251; *Bentley v. Harris*, 2 Gratt. 357. When the cases involving the above principles were declared, the present statute, Va. Code, 1887, § 2460, had not been enacted, providing that a creditor before obtaining a judgment or decree against his debtor may institute any suit before, that he could bring subsequent to, obtaining a judgment or decree, to avoid a transfer under §§ 2458, 2459. See ante, "Common-Law Doctrine — Declared and Enlarged by 13 Eliza., Ch. 5," V. E, 1, b, (1).

There are few decisions in Virginia involving this point exclusively, since the enactment of the statute in 1850, Va. Code (1887), § 2459. The tendency of the cases seems to be to give the statute its plain and evident meaning, and there is no conflicting construction observed. The rule seems settled that in respect to after-existing creditors a fraudulent deed differs from one that is merely void because not upon a consideration deemed valuable in law, in that the former is void as to such creditors, as well as those whose debts were created after the deed was made; while the latter is only void as to antecedent debts, and may be wholly sustained as to those coming in existence after its date. *Pratt v. Cox*, 22 Gratt. 330; *Penn v. Whitehead*, 17 Gratt. 503, 528; *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472; *Broadfoot v. Dyer*, 3 Munf. 350; *Rud-*

dle *v. Ben*, 10 Leigh 467; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Whitten v. Saunders*, 75 Va. 563.

Under this principle a debtor can not release or surrender rights available to his creditors. *Hauser v. King*, 76 Va. 731.

As to the effect of a release where the interest involved is of no practicable value, see ante, "Transfers or Settlements Which the Law Would Compel," V, C, 2, c.

(3) West Virginia Doctrine.

(a) Early West Virginia Doctrine.

There seems to be a conflict among the decisions in West Virginia, differing among themselves, as well as from the Virginia decisions, relating to the construction of similar sections in the respective Codes, regarding "transfers" and "charges" "upon a consideration not deemed valuable in law." The provisions are almost identical in their wording, as will appear from the following extracts: the West Virginia Code, 1899, ch. 74, § 2, is in part as follows: "Every transfer or charge ('transfer' including every gift, sale, conveyance and assignment, and the word 'charge' including every confessed judgment, deed of trust, mortgage lien and incumbrance), which is not upon consideration deemed valuable in law, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not upon that account merely be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." The Virginia enactment, Va. Code, Anno. (1904), § 2459, reads as follows: "Every gift, conveyance, assignment, transfer, or charge, which is not

upon consideration deemed valuable in law, or which is upon consideration of marriage (the latter clause not appearing in the West Virginia statute, it will be observed), shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers."

Sections 1 and 2, ch. 74, W. Va. Code. (1899), make a clear distinction between the rights of existing and subsequent creditors as to a voluntary conveyance; and such a conveyance can not be impeached by subsequent creditors on the mere ground of its being voluntary, and the party making it, or at whose instance it was made, being indebted to some extent, if there be no actual fraudulent view or intent in the party at the time. *Lockhard v. Beckley*, 10 W. Va. 87, 88. See also, similar provisions of Va. Code, 1887, §§ 2458, 2459. And see *Pratt v. Cox*, 22 Gratt. 330; *Penn v. Whitehead*, 17 Gratt. 503, 528.

If a man largely indebted at the time voluntarily and without consideration deemed valuable in law, incumbers all of his lands and invests the proceeds of the incumbrance debt in making valuable improvements upon his wife's separate real estate, and then becomes insolvent, and the incumbrance remains unsatisfied, such incumbrance debt will, in a court of equity, be regarded as a gift to the wife, and fraudulent as to his creditors, whose debts existed at the time the incumbrance was created, and the real estate of the wife in her possession, as well as the land incumbered, will be held liable for the payment of debts of

her husband, which existed at the time the incumbrance was created. *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242.

In *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242, 255, the court says: "By the first clause of the second section of chapter 74 of the Code of 1869 it is expressly declared that 'Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not on that account merely be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased after it was made.' Under the construction given to this clause, it is immaterial what may have been the intention of the grantor or assignor, or whether there was present in the minds of the grantor or grantee any intention to defraud any person or not; or it even may appear that the intentions of the grantor and grantee were entirely innocent, and even laudable, yet if the 'conveyance, assignment, transfer or charge' be merely voluntary, and 'made without consideration deemed valuable in law' it is by the statute declared to be 'void as to all creditors whose debts were contracted at the time it was made.'" See also, *Rose v. Brown*, 11 W. Va. 122; *Mayhew v. Clark*, 33 W. Va. 387, 10 S. E. 785; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

In *Greer v. O'Brien*, 36 W. Va. 277 (1892), 15 S. E. 74, a husband purchased a tract of land and directed it to be conveyed to his wife. It was charged that the husband was insolvent at the time of this gift to the wife, but the answer denied the fact of the indebtedness or insolvency. In the discussion of the case the effect of the "amount" of the husband's indebtedness as to existing creditors, was held immaterial to the decision as to them. Judge Lucas, in delivering the opinion

of the court, held, in substance, as follows; that since the enactment of § 2, ch. 74, West Virginia Code, 1891, (§ 2, ch. 74, W. Va. Code, 1899) voluntary conveyances are void as to prior creditors, not because they are fraudulent but because they are "voluntary," and because the consequent subordination of the rights of the donee to that of all prior creditors. And in the application of this act to voluntary conveyances or donations, made since its passage, which are confessedly and on their face voluntary, the act itself should be regarded as embraced in the purview of such donation or settlement. And further, that this section should receive the plain common sense, remedial construction, and not be frittered away by resorting to refinement, to the complicated and almost undeterminable questions of fact and evidence which formerly embarrassed the courts, but which the act referred to was intended to cut up by the roots. By thus construing such instruments, namely, that all existing debts are recognized as liens upon the property superior to the donee in equity and priority, much of the actual learning about conclusive presumptions of fraud, and much of the inquiry formerly required to maintain a financial standing with reference to his position in life, and his financial capacity to make reasonable advancements, ought to be regarded as cut up by the roots. Consequently the voluntary conveyance to the wife was declared void as to existing creditors, though valid as to subsequent creditors in the absence of any fraudulent intent. Thus, according to this decision, as it seems, the statutory effect is to render void as to existing creditors a gift by the debtor, even though the debtor may retain ample funds out of which his existing creditors may be paid. See also, *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Clarke v. King*, 34 W. Va. 631, 12 S. E. 755; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242.

If a married woman directly or indirectly convey her separate real property to her husband upon a consideration not deemed valuable in law, this is void as to her creditors whose debts shall have been contracted at the time it was made, if such creditors had the right, while the land was hers, to subject it or its rents and profits to the payment of their debts. As against existing creditors such voluntary conveyance is conclusively presumed to be fraudulent in law. *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

(b) Later West Virginia Doctrine.

But it would seem that the doctrine as declared in the above cases, consequently the construction of the statute, § 2, ch. 74, W. Va. Code, 1899, has been inadvertently overruled by the later decision of *Hume, etc., Co. v. Condon*, 44 W. Va. 553 (1898), 30 S. E. 56. In this case it was held, that the husband could make a donation to his wife (or return her a loan of money received, augmented by profits), if he retain an amount of tangible property largely more than sufficient to pay all his just indebtedness. Judge Dent, in delivering the opinion of the court, seemingly adopted the following language as his own: "The ancient rule that a voluntary postnuptial settlement can be avoided if there was some indebtedness existing has been relaxed, and the rule generally adopted in this country at the present time will uphold it, if it be reasonable, not disproportionate to the husband's means, and clear of any intent, actual or constructive, to defraud creditors." Citing *Kehr v. Smith*, 20 Wall. (U. S.) 35; *Hunter v. Hunter*, 10 W. Va. 321. And further, "this rule is generally adopted even where a statute expressly provides that a transfer from husband to wife in prejudice of the rights of subsisting creditors shall be invalid. A husband's love and affection for his wife, and a desire to secure her support, is ample reason for a gift to her. Still his actual intention is a mere question of fact;

but whether the gift is a reasonable one, considering his circumstances, seems to be a question of law. It is reasonable if his debts are trifling, or if he retains enough to readily pay them all; but unreasonable if his debts are so great as to embarrass him, or if he is insolvent, or if the gift leaves him insolvent, or if he denudes himself of all his property, or if the property he conveys is easily accessible to creditors, while that which he retains, though ample in amount, is inaccessible to them."

However, in the decision of this case, § 2, ch. 74, W. Va. Code, 1891 (W. Va. Code, 1899, § 2, ch. 74) was not referred to or discussed, nor was there any reference direct or indirect, in the majority opinion, to the case of *Greer v. O'Brien*, 36 W. Va. 277, 284, 15 S. E. 74. But Brannon, P., in his dissenting opinion referred to it, and declared as follows: "It is contrary to the Code provisions that every voluntary conveyance is void as to existing creditors, no matter how pure in intent; no matter whether the grantor had, or had not, enough property left to pay his debts; no matter what his debts amounted to. The amount of his indebtedness, and the amount of his property left besides that conveyed were proper matters, before the statute, for consideration, and are now, when we are seeking to set a deed aside as to subsequent creditors; but it is utterly immaterial and foreign to the question of whether a voluntary conveyance shall be set aside as to prior creditors. It seems to me that the decision in this case reopens the door to variable oral evidence and opinion as to a man's pecuniary worth, and his indebtedness, and his intent, which the statute was designed to close,—vexatious questions, which 'ought to be regarded as cut up by the roots,' to use the apt and forcible expression of President Lucas in discussing this statute in *Greer v. O'Brien*, 36 W. Va. 277, 284, 15 S. E. 74." See also, May-

hew *v.* Clark, 33 W. Va. 387, 10 S. E. 785.

c. Fraudulent Intent Not Essential.

To render a voluntary conveyance void as to existing creditors it is not essential that it be made with a fraudulent intent. But if made with fraudulent intent, it will, of course, be void as to all creditors. *Mayhew v. Clark*, 33 W. Va. 387, 10 S. E. 785; *Wilson v. Bank*, 25 W. Va. 255. See also, *Rose v. Brown*, 11 W. Va. 122; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587. And see ante, "The Intent to Hinder, Delay or Defraud," IV, E; post, "Validity as to Subsequent Purchasers," V, E, 2.

2. Validity as to Subsequent Creditors.

a. General Consideration.

In the absence of fraud, a merely voluntary deed will not be set aside at the instance of subsequent creditors of the grantor. *Building*, etc., *Ass'n v. Reed*, 96 Va. 345, 31 S. E. 514.

A voluntary transfer of property from husband to wife, is not, simply because voluntary, void as to subsequent creditors of the husband. *McClagherty v. Morgan*, 36 W. Va. 191, 14 S. E. 992; *Whitten v. Saunders*, 75 Va. 563.

"But if there be no creditors of the grantor, or if there be no evidence of actual fraud intended towards those who may become his subsequent creditors, such voluntary conveyance will not for that cause alone be deemed fraudulent even to subsequent creditors, and, hence, it has been repeatedly held, that a voluntary settlement in favor of a wife and children can not be impeached by subsequent creditors on the ground of being voluntary, more especially if the voluntary settlement is only of an inconsiderable amount of the husband's estate. *Sexton v. Wheaton*, 8 Wheat. 229. A single debt of an inconsiderable amount will not make a voluntary settlement fraudulent, for every man must be indebted for the common bills of his house, although he pays for them

every week. It must depend upon the value of the property conveyed, compared with his whole estate, and his pecuniary circumstances at the time. *Lush v. Wilkinson*, 5 Vesey 384. Where a bill was brought to establish a voluntary conveyance in favor of a wife and children the master of the rolls said 'no doubt can be entertained on this case if the settler was not indebted at the date of the deed. A voluntary conveyance by a person not indebted is clearly good against future creditors. Fraud will vitiate the transaction; but a settlement not fraudulent by a party not indebted at the time, although voluntary, is valid.' *Battersbee v. Farmington*, 1 Swanst. 106. In *Walker v. Burroughs*, 1 Atkins 94, it was said by Lord Hardwick that in order to avoid a voluntary deed it was necessary to prove that the grantor was indebted at the time of making the settlement or immediately afterwards. *Stevens v. Oliver*, 2 Brown's Ch. R. 90." *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242, 255.

Nevertheless, a court of equity will declare a voluntary conveyance fraudulent as to subsequent creditors, if from the circumstances and other evidence the court is convinced, that the deed was made with the intent to defraud such creditors. *Duncan v. Custard*, 24 W. Va. 730; *Mayhew v. Clark*, 33 W. Va. 387, 10 S. E. 785.

b. Intent Fraudulent.

A voluntary conveyance will be declared fraudulent as to subsequent creditors, if, from the circumstances and other evidence, the court is convinced the deed was made with intent to defraud such creditors; and, the conveyance being voluntary, it is immaterial whether the grantee had notice of such fraud. *Mayhew v. Clark*, 33 W. Va. 387, 10 S. E. 785. See also, ante, "The Intent to Hinder, Delay or Defraud," IV, E.

c. Notice to Grantee.

Where a conveyance is voluntary

and also made with the intent to defraud subsequent creditors, it is immaterial, the conveyance being voluntary, whether or not the grantee had notice of the fraud. *Duncan v. Custard*, 24 W. Va. 730; *Mayhew v. Clark*, 33 W. Va. 387, 10 S. E. 785.

VI. Operation and Effect.

A. FRAUDULENT IN FACT.

1. Between Immediate Parties.

See post, "Immediate Parties," VII, A.

a. In General.

A fraudulent conveyance, though void as to creditors, is good between the parties, and, therefore, the fraudulent grantor can not be permitted to allege his own fraud to avoid his deed. *Starke v. Littlepage*, 4 Rand. 368; *James v. Bird*, 8 Leigh 510, 31 Am. Dec. 668; *Terrell v. Imboden*, 10 Leigh 321; *Owen v. Sharp*, 12 Leigh 427; *Harris v. Harris*, 23 Gratt. 737, 759, 763, 770; *Thornburg v. Bowen*, 37 W. Va. 538, 544, 16 S. E. 825; *Horn v. Star Foundry Co.*, 23 W. Va. 522, 539; *Kyger v. Depue*, 6 W. Va. 288; *Montgomery v. Rose*, 1 Pat. & H. 5, 9; *Core v. Cunningham*, 27 W. Va. 206; *Thomas v. Soper*, 5 Munf. 28; *Alexander v. Deneale*, 2 Munf. 341; *Gay v. Moseley*, 2 Munf. 543; *Robertson v. Ewell*, 3 Munf. 1; *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704.

But see *Austin v. Winston*, 1 Hen. & M. 33, which holds, that where a transaction between a debtor and his creditor, is intended by them both to defraud the other creditors of the debtor, but the latter, under all the circumstances of the case, is not so culpable as the former, it would seem, that a court of equity ought not altogether to refuse relief to the debtor, but to apportion the relief granted to the degree of criminality in both parties, so as on the one hand to avoid the encouragement of fraud, and on the other, to prevent extortion and oppression. But the decision was ren-

dered by a divided court, and the conclusion reached by the majority of the court was one which evidently did not meet with the cordial approbation of even the majority, for Judge Carrington, one of the majority, concludes his opinion thus: "So far as respects myself, it is not to be considered that any principle is here fixed so as to operate as a precedent in other cases. This decree is adopted to fit the present case only; and it is hoped that so gross a fraud may not again be brought before this court." And Judge Green, in *Horn v. Star Foundry Co.*, 23 W. Va. 522, 548, in reference to this case, says: "In subsequent Virginia cases this case was accordingly not regarded as settling the law, and when spoken of afterwards it was either impliedly disapproved or apologized for, because of the particular circumstances surrounding this particular case. I do not regard it as authority to be followed." *Terrell v. Imboden*, 10 Leigh 321.

In *Farmers' Bank v. Corder*, 32 W. Va. 233, 9 S. E. 220, it is held, to be error for the court to set it aside in toto. See, in accord, *Linsey v. McGannon*, 9 W. Va. 154; *Thornburg v. Bowen*, 37 W. Va. 538, 16 S. E. 825.

In a suit by a judgment creditor to set aside a deed as fraudulent, it is error to set the deed aside in toto, as it is valid and binding between the parties to the fraud, and only void as to creditors. *Love v. Tinsley*, 32 W. Va. 25, 9 S. E. 44; *Duncan v. Custard*, 24 W. Va. 730.

b. Fraud by Grantor.

A deed made by a grantor to defraud his creditors is valid between the parties thereto. *Burtner v. Kevan*, 24 Gratt. 42, 43; *Tatum v. Tatum*, 101 Va. 77, 43 S. E. 184; *Harris v. Harris*, 23 Gratt. 737; *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751; *Gibbs v. Logan*, 22 W. Va. 208.

Grantor Can Not Assail.—It can not be assailed by the grantor or those claiming in privity with him. *Burtner*

v. Kevan, 24 Gratt. 42; *Tatum v. Tatum*, 101 Va. 77, 43 S. E. 184; *Harris v. Harris*, 23 Gratt. 737; *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751; *Gibbs v. Logan*, 22 W. Va. 208.

Limitation.—This rule of law can, however, have no application to a case where it appears that the grantor in such deed was, at the time it was made, mentally incapable of contracting. "That such was his condition we think is established by the weight of evidence. The conduct of the grantor in connection with this transaction, his execution of a deed conveying his home to his son-in-law without consideration; his confession of judgments upon debts which he did not owe; the contemplated action of his family under the advice of counsel to have him adjudged a lunatic, and to have a committee appointed for him; his intemperate habits and general conduct, followed by his death within six weeks after the deed of trust was executed, together with the direct and positive evidence of members of his family who were best acquainted with his mental condition that he was a mental and physical wreck, an imbecile in body and mind, satisfying us that he was mentally incapable of transacting business when the deed of trust was made and the judgments were confessed." *Tatum v. Tatum*, 101 Va. 77, 80, 43 S. E. 184.

Right to Exemption Where Conveyance Precedes Bankruptcy Proceeding.

—A bankrupt can not claim any exemption in property conveyed by him prior to the commencement of proceedings in bankruptcy in fraud of creditors, and afterwards revested in the estate. Such conveyance is good against him, and in attempting to place his property beyond the rights of his creditors, he places it beyond his own reach. This holding proceeds on the principle that a conveyance of land made by a debtor in fraud of his creditors is, nevertheless, valid and effectual

as to him. *Gibbs v. Logan*, 22 W. Va. 208.

c. Privies of Grantor.

Parties in privity with the grantor will not be permitted to allege the fraud of the grantor to avoid his deed. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751; *Tatum v. Tatum*, 101 Va. 77, 43 S. E. 184.

d. Participation of Grantee.

When there is actual fraud, both parties participating, a deed is utterly void ab initio, and is not permitted to stand as security for any purpose. The fraud infects the whole transaction. *Henderson v. Hunton*, 26 Gratt. 926.

"It is true that this court held, in the case of *Livesay v. Beard*, 22 W. Va. 585, that 'a deed fraudulent in fact is void in toto, and can not stand as security for grantees who have notice of the fraud.'" *Ruffner v. Welton Coal, etc., Co.*, 36 W. Va. 244, 15 S. E. 48, 52.

A partnership owned certain real estate, to which it had an equitable title; one of the partners, who put in all the capital stock, sold the real estate, without the knowledge of the other, to a purchaser, who had loaned him all the money which he had put in as capital stock, and agreed to take therefor, the partner's individual notes, which had been given to the purchaser for the money so borrowed, and certain notes of the partnership held by the purchaser; and such contract of sale of such real estate, having been entered into, this partner, without the knowledge of his copartner, induced the holder of the legal title of such real estate, to convey to the purchaser, who knew that enough assets of the partnership would not be left to satisfy the creditors of the partnership, and also that each of the partners was insolvent. Held, that this deed was null and void, as against the creditors of the partnership, and, being fraudulent, it could not be held as a security for the debt of the partnership, due to the pur-

chaser. *Snyder v. Lunsford*, 9 W. Va. 223.

In *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816, it was held, that if it appeared that the wife actively participated in an attempt to sustain a conveyance by claiming that a conditional and unfounded indebtedness was a part of the consideration for the property, the conveyance would be treated as fraudulent in fact, and void in toto as to the creditors of the husband, and would not be permitted to stand as security to the wife for the valid portion of the consideration paid by her, as against the creditors of her husband.

Antenuptial Settlement.—An antenuptial deed of marriage settlement will not be set aside at the instance of the husband's creditors, on the ground that the wife connived at the fraud, when the entire testimony shows that the wife, before marriage, had no knowledge of any fraud in the settlement. *Noble v. Davies*, 1 Va. Dec. 633.

Deed of Trust—Trustee Not a Party to the Fraud.—And although a deed of trust to secure a creditor be made with intent to defraud other creditors of the grantor, it will not be set aside in the absence of proof that either the trustee or the creditor secured was a party to the fraud. *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *Oberdorfer v. Meyer*, 88 Va. 384, 13 S. E. 756; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Penn v. Penn*, 88 Va. 361, 13 S. E. 707.

Sale—Fraudulent Representations.—If a person purchases goods on credit by means of fraudulent representations, or was under age at the time, it is no ground for annulling a sale of the goods made to secure a debt for borrowed money, due a person ignorant of such means, there being no collusion with the buyer to defraud other creditors. *Jones v. Christian*, 86 Va. 1017, 11 S. E. 984.

2. Creditors.

a. Void as to All Creditors of Same Class.

When fraud is once established

against a conveyance as to one creditor it vitiates such conveyance as to all other creditors of the same class. If there is an intent to delay, hinder or defraud a particular creditor, it is not necessary to establish an intent to delay, hinder or defraud all creditors. It is not, on the other hand, necessary to establish a specific design to delay, hinder or defraud the particular creditor who assails the transfer, for the intent to delay, hinder and defraud one creditor renders the transfer void as to all. *Lockhard v. Beckley*, 10 W. Va. 87. A plaintiff is not required to show a fraudulent intent to defraud him, but only to show that the deed was fraudulent as to a creditor of the same class, that is, one whose debt was prior to the conveyance. *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420.

Where it is shown, that there is fraud in the making of a deed conveying real estate, whether the actual fraudulent intent relates to existing creditors or is directed exclusively against subsequent creditors, the effect is precisely the same, and subsequent as well as existing creditors may, for such fraud, successfully impeach the conveyance. *Silverman v. Greaser*, 27 W. Va. 550; *Lockhard v. Beckley*, 10 W. Va. 87, 88; *Pratt v. Cox*, 22 Gratt. 330; *Johnson v. Wagner*, 76 Va. 587; *Core v. Cunningham*, 27 W. Va. 206.

A deed fraudulent as to any provision therein contained, is void in toto as against creditors who are entitled to take advantage of the fraud. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203.

Acts under Deed to Prejudice of Creditors Invalid.—Under a deed fraudulent on its face, no valid act can be done to the prejudice of creditors not secured therein. *Livesay v. Beard*, 22 W. Va. 585.

b. Participation of Grantee.

If the grantee in a deed be a bona fide purchaser for a valuable consideration, his or her title is unassailable, whatever may have been the motives

or intentions of the grantor in executing the deed. It is absolutely essential that both parties shall concur in the fraud, to invalidate the deed. *Herring v. Wickham*, 29 Gratt. 628.

Where Grantee Acquires Notice of Intent after Deed Executed.—In a suit to set aside a fraudulent deed, where it appears that the grantee acquired notice of the fraud before he had paid bonds given for deferred payments of purchase money, and also had notice of the plaintiff's execution against his grantor, a decree should be entered against the grantee in favor of the plaintiff for the amount of such bonds and the interest thereon from maturity. *Newberry v. Bank of Princeton*, 98 Va. 471, 36 S. E. 575.

3. Property Given on Parol Trust.

Although, where personal property is given to one upon a trust by parol for another, the declaration of trust by parol may be valid as between the donee and the cestui que trust, yet as between the cestui que trust and the creditors of the donee the case is essentially different. *London v. Turner*, 11 Leigh 403.

4. Annulment—Effect upon Exemptions.

See post, "Annulment—Claim of Exemptions," VII, A, 1, f.

5. Subsequent Validation.

In *Huston v. Cantril*, 11 Leigh 136 (1840), a father, who was indebted at the time made a deed of gift of personal chattels to his infant daughter, which was duly recorded; subsequent to that time the daughter married and after the father's death, a creditor filed a bill against the daughter and her husband, impeaching the deed as fraudulent, and seeking to subject the property to the payment of his demand. The court held, that whatever might have been the character of the conveyance in its origin, it was rendered good and valuable against creditors upon the marriage of the daughter, who thereupon was to be considered a pur-

chaser by relation for valuable consideration. But see Va. Code, 1887, § 2459, which declares that marriage shall not be deemed a sufficient consideration to support a gift, conveyance, etc., against existing creditors.

B. VOLUNTARY OR UPON CONSIDERATION NOT DEEMED VALUABLE OR ADEQUATE IN LAW.

See ante, "Transfers Which Are Voluntary or upon Consideration Not Deemed Valuable in Law," V.

In *Grayson v. Richards*, 10 Leigh 57, a father by deed of gift conveyed land to his son, and shortly after this conveyance, the son voluntarily surrendered the deed to the father to be canceled, with design to divest the title out of himself and restore it to the father, to the deed so canceled. The court held, upon these facts, that the son's title was not divested by the cancellation of the deed, and that the land was chargeable in equity with the debts of the son. And further, if the creditor had obtained a judgment against the son, subsequent to the cancellation of the deed, under which the son had taken the oath of insolvency, he was not only entitled to satisfaction of his judgment out of the land as still the property of the son, but he could also claim satisfaction out of it by the simple contract debt which the son owed him; and other creditors of the son, who had not recovered judgments against him, but came in at the same time, should also be entertained to claim satisfaction of the debts due them out of the same amount.

In *Farmers' Bank v. Corder*, 32 W. Va. 233, 9 S. E. 220, although where a deed was made directly from a husband to his wife, and, as part of the consideration, she agreed to pay one joint creditor of her husband \$300, and another \$100, with interest on the amount, which debt the husband owed to these parties, and to secure which amount the vendor's lien was reserved,

it was held that the deed might be set aside as to general creditors as fraudulent, yet the liens thus reserved must be respected as liens on the equitable title conveyed as of the date of the record of the deed, if the claims were valid in other respects.

VII. Rights and Liabilities.

A. IMMEDIATE PARTIES.

1. Vendor.

a. Right to Equitable Relief Generally.

See generally, the titles EQUITY, vol. 5, p. 125; FRAUD AND DECEIT, ante, p. 448; RESCISSION, CANCELLATION AND REFORMATION.

Equity will not relieve a party from the consequence of his fraudulent act nor aid him in an effort to profit by it. *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612; *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61; *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402; *Farmers' Bank v. Gould*, 48 W. Va. 99, 103, 35 S. E. 878; *Ratliff v. Ratliff*, 102 Va. 881, 47 S. E. 1007; *Harris v. Harris*, 23 Gratt. 737. "This rule applies not only to the original parties to the fraudulent transaction but also to their heirs and to all parties claiming under or by title derived from them, where no equitable rights intervene to protect such parties." *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612; *Poling v. Williams*, 55 W. Va. 69, 71, 46 S. E. 704; *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751; *Tatum v. Tatum*, 101 Va. 77, 43 S. E. 184.

Thus a husband can not impeach the title of his wife or her heirs to land conveyed to her at his instance in order to defraud his creditors, as a court of equity will not relieve him from the consequences of his own fraud. *Ratliff v. Ratliff*, 102 Va. 881, 47 S. E. 1007.

b. Right to Rescind.

If a party who, to hinder and delay his creditors, fraudulently conveys his property to another, can not, except

under peculiar circumstances, maintain a bill to rescind the contract. The grantor and grantee being generally in *pari delicto*, neither is entitled to come into equity. *James v. Bird*, 8 Leigh 510.

c. Right to Have Deed Set Aside.

Where a conveyance has been made with intent to hinder, delay and defraud creditors of the grantor, all the estate of the grantor, subject to the rights of creditors, passes by the deed to the grantee, and equity will not, at the suit of the grantor or any person claiming under him, as purchaser from him after such conveyance, set the deed aside. *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704.

No interest or estate in land so conveyed remains in the fraudulent grantor for his benefit, which can form the basis of such a contract of sale by him, as will create an equity respecting the land. *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704.

d. Cancellation.

To defeat a grantor in the cancellation of a deed because it was made with intent to defraud creditors, there must be a liability chargeable to the grantor at its date. *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266.

e. Rights Where Vendee Reconveys.

A conveyance of property for the purpose of defrauding the creditors of the vendor, though fraudulent as to them, is valid as to all other persons, and, so long as the vendee holds such property, it is subject to claims of his creditors to the same extent as any other property to which he has title. But, until such creditors obtain a lien upon the property, the vendee's right of alienation is perfect in respect to it, and it is not a fraud upon his creditors for him to reconvey it to his vendor. Until then the creditors of the vendee have no legal or equitable claim in respect to it superior to that of the vendor, and, if the fraudulent vendee reconveys such property to the vendor,

it is generally held, that the creditors have no right to have the reconveyance set aside as fraudulent. *Farmers' Bank v. Gould*, 48 W. Va. 99, 102, 35 S. E. 878.

"In some jurisdictions, however, this right of conveyance is denied, on the ground that the fraudulent vendor had no equitable claim to the property, and it is held, that the creditors of the vendee may, notwithstanding the reconveyance, subject the property to the satisfaction of their claim." *Chaplin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56; *Walton v. Tusten*, 49 Miss. 569; *Smith v. Lane*, 3 Peck 205; *Farmers' Bank v. Gould*, 48 W. Va. 99, 102, 35 S. E. 878.

f. Annulment—Claim of Exemptions.

Where a fraudulent conveyance of property is subsequently annulled at the suit of creditors, the grantor is not estopped as against the creditor to assert his right to homestead in the property. *Hatcher v. Crews*, 83 Va. 371, 5 S. E. 221; *Marshall v. Sears*, 79 Va. 49; *Shipe v. Repass*, 28 Gratt. 716; *Boynnton v. McNeal*, 31 Gratt. 456; *Mahoney v. James*, 94 Va. 176, 180, 26 S. E. 384; *Wray v. Davenport*, 79 Va. 19.

Where a bill is filed to set aside as fraudulent a deed made by a married woman, her husband having died leaving infant children dependent on their mother for a support; and the deed is set aside as fraudulent and the widow claims the homestead, the right of the widow to claim the homestead is superior to the lien given creditors by § 2460, Va. Code, 1887, relative to setting aside fraudulent conveyances, on filing their bill. *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 212, 7 Va. Law Reg. 269.

g. Married Women as Vendors.

Where it is clearly shown that a married woman holds a bona fide debt against her husband, she is entitled to the same legal rights as any other creditor, except as to remedy. *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357.

And in the absence of fraud, a settlement upon a wife by her husband, will not be disturbed unless it manifestly appears to be grossly excessive. *Burwell v. Lumsden*, 24 Gratt. 443; *Payne v. Hutcheson*, 32 Gratt. 812; *Kanawha Val. Bank v. Wilson*, 25 W. Va. 242. So improvements afterwards put upon the property by the husband or father can not be subjected by creditors to the payment of their debts, unless such improvements were put upon the property with intent to hinder, delay or defraud the creditors of the husband or father. *Lockhard v. Beckley*, 10 W. Va. 87.

If a deed be set aside as fraudulent and void as to creditors of the grantor, because the same was made with intent to hinder, delay and defraud such creditors, and a part of the consideration of such deed was the satisfaction of a bona fide debt due from the grantor to the grantee, such fraudulent grantee is not entitled to charge the lands thereby attempted to be conveyed with the amount of such bona fide debt. *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242.

Where a wife is induced to unite with her husband in conveying away her interest in his real estate, upon condition that certain and specific property shall be settled on her in consideration of her thus parting with her rights, if such settlement is set aside and annulled at the instance of the husband's creditors, she has the right to be placed in the same position, and restored to the same rights, with which she was invested by law before she united in the deed of which the specific settlement was the consideration. However, this must be without prejudice to the rights of creditors or purchasers. *Davis v. Davis*, 25 Gratt. 587. So if property of the wife which a court of equity would direct to be settled upon her, is conveyed by the husband to a trustee for her benefit, the court will sustain the deed against creditors of the husband. *Poindexter*

v. Jeffries, 15 Gratt. 363. And in *Bentley v. Harris*, 2 Gratt. 357, it is held, that if an embarrassed debtor makes a voluntary conveyance of personal property, to an unmarried female, and afterwards, upon her marriage, the property is settled to the use of the wife for life, and at her death to her children, it is not liable for the debts of the first donor.

2. Vendee.

a. Affected with Fraud.

(1) In General.

In *Fischer v. Lee*, 98 Va. 159, 35 S. E. 441, the court declared that proof of the fraud of a grantor or transferrer of property is not sufficient of itself to avoid an assignment or transfer thereof, where value has been paid, but it must also be proved that the grantee or transferee had notice of the fraud or evil design of his vendor, or of facts and circumstances naturally calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to inquire before consummating the purchase, and that such inquiry, if diligently pursued, would have led to the knowledge or notice sought to be imputed.

Where the grantee in a deed made to defraud the creditors of the grantor knows of the fraudulent intent of the grantor, or has notice of facts sufficient to excite the suspicions of a prudent man and put him on inquiry, he makes himself a party to the fraud. *Timms v. Timms*, 54 W. Va. 414, 46 S. E. 141.

Where it clearly appears, in a chancery cause brought by a creditor to set aside a deed made by his debtor for all of his property, that such debtor, for the purpose of escaping such creditor, conveys all of his real and personal estate to a purchaser, even for value, who has knowledge of the creditor's pursuit, and is aiding the debtor to escape the same, such purchaser will be held to have participated in the fraudulent purpose of his grantor, and

his conveyance will be avoided as to such creditor. *Murdoch v. Baker*, 46 W. Va. 78, 32 S. E. 1009; *Hart v. Sandy*, 39 W. Va. 644, 20 S. E. 665; *Gillespie v. Allen*, 37 W. Va. 675, 17 S. E. 184.

And the doctrine is similarly stated in *Newberry v. Bank of Princeton*, 98 Va. 471, 36 S. E. 575, where it is said, that if the grantee in a fraudulent deed had knowledge, at the time of the conveyance, of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and inquire before consummating the transaction, and such inquiry would have necessarily led to a discovery of the fact with notice of which he is sought to be charged, he will be considered to be affected with such notice, whether he made inquiry or not. But while the fact of notice may be inferred from circumstances, as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of mala fides.

(2) Where Only a Part of the Grantees Have Notice of Fraudulent Intent.

But where a deed of several grantees jointly is fraudulent in fact, but it being proven that the grantor executed it with intent to defraud his creditors, it will be void only as to such grantees as had notice of the fraud, and may stand as security for the consideration paid by such grantees as had no notice of such fraud. *Livesay v. Beard*, 22 W. Va. 585; *McGinnis v. Curry*, 13 W. Va. 29.

(3) Fictitious Debt Secured by Mortgage.

It seems that in case of a mortgage executed for a fictitious debt, with fraudulent design to deceive and hinder the mortgagor's creditors, both

mortgagor and mortgagee being parties to the fraud, though the title might pass to the mortgagee at law, a court of equity should not give him its aid to enforce the mortgage. *Jones v. Comer*, 5 Leigh 350.

(4) Subrogation to Rights of Original Holder.

Where a conveyance is set aside as fraudulent as to creditors, the fraudulent vendee in such conveyance, who has paid a vendor's lien on the land conveyed as part of the consideration for the fraudulent purchase, will be subrogated to the rights of the original holder of the vendor's lien against the land. *Kimble v. Wotring*, 48 W. Va. 412, 37 S. E. 606.

Where the fraudulent purchaser had taken an assignment of an equitable lien on the purchase property which represented a part of the purchase money due from the vendor, although the deed was set aside as fraudulent, the purchaser was given his priority as holder by assignment of the vendor's lien. *Board v. Wilson*, 34 W. Va. 609, 12 S. E. 778; *Poe v. Paxton*, 23 W. Va. 607; *Schmertz v. Hammond*, 47 W. Va. 527, 35 S. E. 945; *James v. Burbridge*, 33 W. Va. 272, 10 S. E. 396.

(5) Personal Liability to Creditors.

In *Williamson v. Goodwyn*, 9 Gratt. 503, the vendor sold a number of slaves at a price much below their value, for the purpose of defrauding his creditors, and soon afterwards died. The vendee executed to him her bonds for the purchase money, and the vendor assigned the bonds to bona fide creditors. The vendee sold a part of the property and discharged the bond, and then conveyed the remainder of the property to the widow and child of her vendor. Upon the bill filed by the creditor of the deceased vendor to set aside these deeds as fraudulent, the court set them aside, and the property conveyed in the last of them was sold and the proceeds were applied to

pay the claims of the creditors. And as all the creditors of the deceased vendor were not satisfied out of this fund, his vendee was held liable to satisfy them to the extent of the price of the property sold by her, the vendee. See post, "Personal Decree," VIII, K, 6.

(6) Setting Up Laches or Limitations.

See generally, the titles LACHES; LIMITATION OF ACTIONS.

If a debtor in his lifetime conveys his lands to a grantee by deed, and after the death of the debtor certain of his creditors file their bill to set aside the deed as fraudulent and to subject the lands to the payment of their debts, the grantee of such lands may contest the claims of the creditors on the ground that they are barred by the statute of limitations or otherwise. *Werdenbaugh v. Reid*, 20 W. Va. 588.

(7) Evidence of Complicity.

Where the circumstances connected with a conveyance, fraudulent as to the grantor, plainly establish the complicity of the grantee in the fraudulent intent, it is not necessary to show by direct and positive proof notice to the grantee of such intent. *Murdoch v. Baker*, 46 W. Va. 78, 32 S. E. 1009.

b. Bona Fide Purchaser.

The title of a purchaser for a valuable consideration, is not affected unless it appears that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. W. Va. Code Anno. (1906), § 3099; Va. Code Anno. (1903), § 2458.

A bona fide purchaser for valuable consideration, who had no notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor, is protected. *Blackshire v. Pettit*, 35 W. Va. 547, 14 S. E. 132; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Root-Tea-Na-Herb Co. v. Rightmire*, 48 W. Va. 222, 230, 36 S. E. 359; *Garland v. Rives*, 4 Rand.

282; *Lockhard v. Beckley*, 10 W. Va. 87; Va. Code (1887), § 2458; W. Va. Code (1899), ch. 74.

A bona fide sale, for a fair price, to an innocent purchaser, should not be set aside at the instance of the creditor of the grantor, on the grounds of alleged fraud, for the sole reason that in the opinion of sundry witnesses the property might have brought a larger price if sold on credit. *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671.

Upon a bona fide sale of personal property though the vendee does not take possession at the time of the sale, yet if he does get possession before an execution is issued against the vendor, his title is good as against the creditors of the vendor. So also, where a bona fide vendee of personal property has gotten possession of the property before the issuing of an execution against the vendor, his title is good as against the creditor of the vendor, though after such possession by the vendee, he employs the vendor as his agent to sell the property; and the vendor is in possession as the agent of the vendee at the very time that the execution issues, and is levied upon it. *M'Kinley v. Ensell*, 2 Gratt. 333.

Who Is a Purchaser for Value.—A widow having received her distributable share of the personal estate of her husband, is not a purchaser for value, so as to be entitled to set up the defense of purchaser for value without notice. And if in such case the husband has obtained slaves by a conveyance fraudulent as to the creditors and grantor, and one of the slaves has been allotted to the widow, a slave in her possession may be taken in execution at the suit of the creditor of the grantor, though the husband and those claiming under him have been in possession of the slave more than five years. *Snoddy v. Haskins*, 12 Gratt. 363.

Fraud Induced by One of Several Grantors.—And in *Whitehorn v. Hines*,

1 Munf. 557, the court declares that a bona fide purchaser, without notice of fraud, having received a deed from two persons (one of whom fraudulently induced the other to join therein), is not responsible in equity; but the loss ought to fall on the fraudulent vendor.

c. Vendee of Original Grantee.

A purchaser with notice, who buys of a purchaser without notice, will not be affected by a deed which declares the transfer of certain chattel property to be a loan, but which is invalid as to a purchaser without notice, from the loanee, because not recorded as required by law. *Lacy v. Wilson*, 4 Munf. 313.

One who purchases from a fraudulent grantee with notice of the fraud and of the invalidity of his title, can acquire no better right than the fraudulent grantee has. He can not be protected as a bona fide purchaser, but must stand in the shoes of his grantor. *Goshorn v. Snodgrass*, 17 W. Va. 717; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828.

If a purchaser with notice, buys from a bona fide purchaser for value, and without notice, from a trustee who makes a tortious sale, he will take a valid title. This is done out of respect for the title of the bona fide purchaser, who otherwise would not receive the protection which his position entitles him to. *Montgomery v. Rose*, 1 Pat. & H. 5.

In *Coleman v. Cocke*, 6 Rand. 618, it was held, that although if a son obtain a conveyance for land purchased by his father, the conveyance may be set aside for fraud by a creditor of the father, whilst the land is in the hands of the son; yet, if the son sell and convey the land to a third person for valuable consideration, who has no notice of the fraud between the father and the son, such third person being a bona fide purchaser, he will be protected in his purchase against the creditors of

the father, from the operation of the statute of frauds, by its proviso (Va. Code, 1887, § 2458). And if the deed of such bona fide purchaser be not duly recorded, yet he will be protected in his purchase against a creditor of the father, who obtains a decree against the father, after the bona fide purchase so made, because such a purchaser has a prior equity to such creditor. For, if the original vendor had never made a deed to the son, yet the purchaser, holding the equitable title transferred from the father to the son, and from the son to him, would have had a better right to call on the original vendor for the conveyance of the legal title, than any creditor of the father obtaining a judgment against him, after his transfer of the equitable right to the son.

If a person defrauds another of slaves, and afterwards makes a deed conveying them to a trustee to secure a debt, and the trustee sells the property to a bona fide purchaser for value and without notice, and the purchaser then conveys the property to a third person, the latter purchaser is entitled to hold the slaves against the person defrauded, whether he had notice of the fraud or not. In the former case, he holds a valid title under the purchaser; in the latter, he is himself a bona fide purchaser without notice of the fraud. *Montgomery v. Rose*, 1 Pat. & H. 5. And where a deed conveys and assigns property in trust, to be applied to discharging a bond executed by a wealthy and unembarrassed father to his daughter, to be paid to her on her marriage, it is valid as against creditors of the father, becoming such after the marriage of the daughter, although at the time of the execution of the deed, the father was embarrassed to insolvency. *Welles v. Cole*, 6 Gratt. 645. So where a child, who is an infant, is deemed a purchaser for valuable consideration, of a slave, the circumstance that the child resides in the family of its father, and

there keeps the slave, over whom it exercises every act of ownership, will not entitle the creditors of the father to disturb the possession of the child, although the father had included the slave in a mortgage, to indemnify the mortgage against certain securityships. *Braxton v. Gaines*, 4 Hen. & M. 151.

A purchaser from the grantee in a fraudulent deed is not prejudiced by prior notice of a pretended contract of sale of the land so conveyed, made between such fraudulent grantor and a third person. *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704.

d. In Relation to Third Persons.

If grantee or third party must suffer from the grantor's fraud, the grantee, who put it in the grantor's power to commit the fraud, must bear the consequences. *Slater v. Moore*, 86 Va. 26, 9 S. E. 419.

B. CREDITORS.

1. In General.

Any creditor who has been injured by a fraudulent deed has the right to the protection of the court; and the legal rights of such creditors can not be made to depend upon what any other creditor, or a majority of the creditors, may say or do with regard to the debtor's property after the preferred creditors have been satisfied. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203. And a creditor at large may maintain a suit in equity to set aside as fraudulent a deed conveying real estate, made by his debtor, both the debtor and his grantee living and being out of the commonwealth. *Peay v. Morrison*, 10 Gratt. 149.

A court of equity will, at the suit of a creditor of an insolvent debtor, pursue property, the avails of his labor, in the hands of parties uniting with him to screen the same from his creditors, or in the hands of volunteer purchasers from such parties. *Com. v. Ricks*, 1 Gratt. 416.

Where a father who is trustee for his wife and children, and as such in-

vested with a discretion to spend the income of the trust subject for their maintenance and support, collects the income, and mingles it with his own, and makes extensive improvements on the trust subject, but settles no account of his transactions, he will not be permitted, to the prejudice of his creditors, to assert that he has supported his wife and children from his private means, so as thereby to enhance the value of the trust subject; he will be held to have supported them out of the trust funds, and his creditors will be permitted to follow his estate into the trust subject. *National Val. Bank v. Hancock*, 100 Va. 101, 40 S. E. 611.

2. Transfer Voluntary.

A voluntary conveyance which interferes with, or breaks in upon the rights of existing creditors, will not be permitted to take effect to the prejudice of their just demands, but as to such creditors is absolutely void, without regard to the amount of the debts, the extent of the property so conveyed, the motives that prompted the settlement, or the condition or circumstances of the party at the time. *Lockhard v. Beckley*, 10 W. Va. 87. See ante, "Transfers Which Are Voluntary or upon Consideration Not Deemed Valuable in Law," V.

In *Rose v. Brown*, 11 W. Va. 122, a husband procured a voluntary conveyance to be made to his wife, of a house and lot. At the time the conveyance was made, he was not indebted more than \$218. On that day there was paid on the property \$1,500, which he had before given to his wife, and within the next two years he had \$3,000, which from time to time, he paid on said property, and discharged the purchase money; and debts to the amount of about \$1,250 had afterwards accumulated, after such conveyance and during the time such payments were being made. Upon these facts being presented the court

held that they were insufficient to make a *prima facie* case of fraudulent intent, on the part of the husband, at the time the voluntary conveyance was by him procured to be made, consequently, the conveyance was not fraudulent in fact. But, nevertheless, in fraud of his existing creditors, he did divert his means from the payment of his debts, and invest such means in the property, so voluntarily conveyed to his wife; therefore his creditors could charge the real estate for the payment thereof.

3. Fraudulent Intent.

Where there is no pretense of fraud in procuring a deed, creditors of a grantor upon debts contracted since the execution of the deed can not subject the land to the payment of their debts. *Irvine v. Greever*, 32 Gratt. 411. See ante, "The Intent to Hinder, Delay or Defraud," IV, E.

To avoid a deed at the suit of a subsequent creditor, actual fraud must be shown. *Johnston v. Zane*, 11 Gratt. 552.

4. Vendee Takes Possession after Vendor's Death.

If there is an absolute bill of sale of certain personal property for valuable consideration, and the vendor notwithstanding the deed retains uninterrupted possession, and dies in possession of the property, although the vendee takes possession after his death, a creditor of the vendor, who takes administration of the estate, may file a bill in equity against the vendee, and subject such property to the debt due to the administrator, as it is fraudulent and void as to the administrator, who is also a creditor of the vendor. The rights of the vendor's creditors attach on the subject immediately upon the vendor's death—therefore, before the vendee came into possession. *Shields v. Anderson*, 3 Leigh 729.

5. Property Diverted to Improvement of Another's Estate.

If a man incur debts for moneys ad-

vanced or loaned to him, which with large amounts of other moneys of his own, are voluntary and without consideration deemed valuable in law, used and invested by him in making valuable improvements upon the real estate so settled upon his wife, and in consequence thereof he becomes insolvent, and the moneys so advanced or loaned to him remain unpaid, such creditors may charge the moneys upon the real estate in the possession of his wife. *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242. See ante, "Conveyance under Circumstances That the Law Would Require," IV, H, 3, b, (1).

6. Property Diverted to Pay Insurance Premiums.

And under Va. Code, 1887, § 2459, so far as the means of an insured are withdrawn from creditors to pay premiums, they are entitled out of the proceeds of the policy to have the sums so paid, applied to their claims. *Stigler v. Stigler*, 77 Va. 163. See ante, "Payment of Insurance Premiums," IV C, 3.

If a deed of trust secures several creditors, and one or more of the debts secured is fictitious and fraudulent, that fact does not invalidate the deed as to bona fide creditors secured by it, not guilty of any fraud. *Cohn v. Ward*, 36 W. Va. 516, 15 S. E. 140.

A creditor can not purchase the goods of his debtor at a price in excess of his debt, when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors. Each purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not. *Hart v. Sandy*, 39 W. Va. 644, 20 S. E. 665.

The statute to prevent fraudulent conveyances applies to no conveyance made bona fide for valuable consideration, and does not prevent a debtor in failing circumstances from preferring one class of creditors to another. However, in such case, the judgment

creditor has a right to an account of the trust fund, and to the payment of his debt out of the surplus, if any, after satisfying the preferred creditors and those who accede to the composition. *Skipwith v. Cunningham*, 8 Leigh 271.

It is held, in *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, that the fact, that an insolvent husband voluntarily bestowing his labor and skill in the business of farming carried on by his wife upon land which is her separate property, will not, in the absence of fraud, render the products of the property of the husband liable for his debts. If such products, after the support of the family, leave a surplus in property attributable to his skill and labor, equity will make a just apportionment between his wife and creditors. But see W. Va. Code, 1899, ch. 74, § 2; Va. Code, 1887, § 2459.

7. Compromises by Creditors.

Under the Virginia Code of 1887, §§ 2856, 2857, and 2859, regarding compromises by creditors, a creditor who compromises with one of several joint obligors, and assigns his full share of the obligation, may sue the other obligors without making the released obligor a party. And by such compromise the right of contribution between the joint obligors is not, under these sections, impaired. *Penn v. Bahnson*, 89 Va. 253, 15 S. E. 586.

8. Right to Uphold Validity of Some Debts and Assail Others.

And a creditor secured by a deed of trust, while claiming under the deed, may, nevertheless, assail the validity of other debts secured in the same deed. His attitude as purchaser does not impair his right as creditor to assail such debts as fraudulent or otherwise void. *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279, 6 Va. Law Reg. 613.

9. Property Conveyed on Secret Trust —Rights of Grantor's Creditors.

Where a vendor makes a fraudulent bill of sale of a female slave, absolute on its face, in order to protect the prop-

erty from his creditors, but there is a secret trust that the grantee shall hold the property for the benefit of grantor's daughters, the daughters can not establish a secret trust in equity, and have the decree for the slave as against the creditors of the grantor. *Owen v. Sharp*, 12 Leigh 427.

10. Insolvent Father Pays Part of Purchase Money and Has Land Conveyed to Son.

In *Burbridge v. Higgins*, 6 Gratt. 119, a person who was largely indebted, purchased land and paid a part of the purchase money, and had the land conveyed to his son; subsequently the son conveyed it in trust to secure the balance of the purchase money. The son then sold the land to a third person at an advance upon the price given by the father. After this a decree creditor of the father filed a bill to set aside the conveyance as fraudulent against creditors; and pending this suit the balance of the original purchase money was paid by the last purchaser out of the money due from him to the son. The court held, that the deed of trust given to secure the balance of the purchase money on the first sale, being still outstanding, though satisfied after the commencement of the suit, the plaintiff was entitled to have the whole of the purchase money, after satisfying the trust, and not a moiety only, applied to the discharge of his debt.

11. Creditor's Right to Personal Decree.

And creditors who successfully assail a fraudulent conveyance made by their debtor, are entitled to a personal decree against the fraudulent alienee, when the latter has, in the meanwhile, aliened the property to a third person. The amount of such personal decree is not limited to the price paid by the fraudulent alienee, nor to the price received by him in a subsequent alienation, but by the actual value of the debtor's interest in the property, not to exceed, however, the amount of the

plaintiffs' claims against him. And in such a case, if actual fraud has been established against the alienee, he will not be permitted to set off against the value of the debtor's property received by him, a debt due to him by the debtor, even though such debt was a part of the consideration for the conveyance. *Ellington v. Moore* (Va. 1897), 4 Va. Law Reg. 608.

Quære, whether credit would be allowed the fraudulent alienee, actual fraud being established against him, for a valid prior incumbrance on the property, due to the alienee himself, if such incumbrance was a part of the consideration for the conveyance. *Ellington v. Moore* (Va. 1897), 4 Va. Law Reg. 608.

C. ASSIGNOR AND ASSIGNEE.

The assignment of a promissory note carries with it all remedies of the assignor, including the right to attack a fraudulent conveyance. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

Although an assignee of a bond which has been taken in payment of purchase money of land, may have notice of fraud in the sale of land, yet he can not be placed in a worse condition than his assignor, the vendor, with reference to the payment of the purchase money. *Highland v. Highland*, 5 W. Va. 63.

A purchaser of a pre-existing note may sue in equity to avoid a conveyance made in fraud of the rights of the holder before his purchase. The rule that a mere naked right to sue to avoid a fraud is not assignable does not apply to a case where such right is merely incidental to a subsisting substantial property which has been assigned, and which is itself intrinsically susceptible of legal enforcement. *National Val. Bank v. Hancock*, 100 Va. 101, 40 S. E. 611.

D. DONOR AND DONEE.

In *Wilson v. Buchanan*, 7 Gratt. 334, one Webb, who was largely indebted in proportion to his property, made a gift

of slaves to his married daughter; and her husband remained in possession of them for eight years. Judgment having been recovered on some of these debts, and also on other debts contracted since the gift, Buchanan became the surety of Webb in the forthcoming bonds; and was compelled to pay them. Afterwards he recovered judgment against Wilson for the amount paid by him on behalf of Webb, and as all the property of Webb had been sold at that time, by the direction of Buchanan, his (Buchanan's) executions were levied on the slaves given by Webb to his daughter, and their increase. Suit was instituted by Wilson, the son-in-law, in whose possession the slaves had been, against Buchanan and the sheriff who made the levy. The court held, that the slaves were liable to satisfy the debts of Webb.

A court of equity ought not to give its aid to a plaintiff claiming under a deed of gift from a person who made a previous transfer of the same property to another for the purpose of defrauding creditors; the object of the bill being to enforce a secret trust between such transferor and transferee. *Roane v. Vidal*, 4 Munf. 187.

E. LOANOR AND LOANEE.

If a debtor remains in possession of slaves for five years, under a parol loan, they are liable to satisfy his creditors, though the possession is resumed by the lender before executions are levied upon them. *Beale v. Digges*, 6 Gratt. 582; Va. Code, 1887, § 2461.

In *Lacy v. Wilson*, 4 Munf. 313 (1814), a similar provision to § 2461 of Virginia Code, 1887, in force in 1814, was construed. The court declared that, the loan of the slave by a father to his daughter during her life, and a gift over to her children after her death (being admitted to record on proof by one witness only), is not good against her husband's creditors, or purchaser from him, without notice of

such deed; possession of such slaves having remained with the husband for five years without interruption. See also, *Beasley v. Owen*, 3 Hen. & M. 449.

In *Gay v. Moseley*, 2 Munf. 543, it was held, that a slave lent either before or after the act to prevent frauds and perjuries, having remained since the commencement of that act, more than five years in the loanee's possession, without any demand made on the part of the lender, must be considered the absolute property of the party so remaining in possession, as to creditors of, and purchasers under him.

A similar but more extensive doctrine was expounded in *Fitzhugh v. Anderson*, 2 Hen. & M. 289, in which case a father, anterior to our statute of frauds, having delivered certain slaves to his son, which were proved by verbal evidence (without any deed of writing), to have been lent, for an indefinite period, and the son having retained the uninterrupted possession for many years, used the property as his own, and acquired credit on the strength of his possession; in a controversy between the father, or volunteer claimants under him, and creditors of, or fair purchasers from the son, the court said that, "the father shall be deemed to have given him the slaves; and on general principles of law and equity, independently of any statutory provision, the title of the creditors and purchasers will be protected. The circumstance that the father, afterwards, by his last will and testament bequeathed the slaves to the son for life, remainder to his children, makes no difference in the case."

A demand of slaves by the lender, who thereupon receives, and immediately redelivers them to the loanee, to be held on the same terms, as before such demand, receipt and redelivery being in private, is not sufficient to bar the rights of creditors, under the act to prevent frauds and perjuries. *Boyd v. Stainback*, 5 Munf. 305.

And where possession has remained with the loanee, or with those claiming under him for five years, and is then assumed by the lender, the possession must continue with the lender the full period of five years from the time it was actually assumed, before the title will be revested in the lender as against the creditor of the loanee. *Pate v. Baker*, 8 Leigh 80.

But a loan of slaves, though not declared by deed in writing duly recorded, and therefore void as to creditors, the loanee having continued in possession five years without such demand, as would bar their right, is nevertheless effectual between the parties and their representatives. If, therefore, the loanee die in possession of such slaves, they are not to be considered assets belonging to his estate, nor can they be recovered as such; but they are liable to his creditors so far as their claims remain unsatisfied by the assets in the hands of his executor or administrator, but no farther. *Boyd v. Stainback*, 5 Munf. 305.

And where a father sends a slave to his son upon a loan, but the agent who takes the slave to his son neglects to inform him that the slave is a loan, such neglect of the agent does not affect the right of the father to have the slave considered as a loan. Consequently, if the father dies within five years from the time when the slave so went into possession of the son, and having by his will disposed of the slave, of which the administrator of the son has notice, the slave may be recovered for the father's estate, after five years from the loan. *Dickinson v. Dickinson*, 2 Gratt. 493 (1846).

F. TRUSTEE AND CESTUI QUE TRUST.

In order to make void a deed of trust, notice of the grantor's fraudulent intent must in some way be brought home to the trustee, or to the creditor. *Douglass, etc., Co. v. Laird*, 37 W. Va. 687, 17 S. E. 188; *Baer Sons'*

Grocer Co. v. Williams, 43 W. Va. 323, 27 S. E. 345. Thus, a deed which conveys land to secure a bona fide debt due to the grantee, and also a debt to the grantor's wife, which is voluntary and fraudulent as to his creditors, and the nature of which debt is known to the grantee, is null and void as a security for the first as well as the last-mentioned debt, as against subsequent incumbrancers and creditors of the grantor. *Lewis v. Caperton*, 8 Gratt. 148.

It is a settled principle that the beneficiaries in a deed of trust are affected with notice to the trustee, although he did not know of the existence of the deed or of an intention to make it until it was recorded, and then immediately declined the trust. *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481.

Where a trust deed secures many debts in separate classes or to different persons, the simple fact that a part of the debts secured are shown to be invalid or voluntary will not make the deed invalid as a security for other and bona fide debts secured therein. *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41. However, a debtor can not convey his property to a trustee to secure creditors and reserve an interest in or control over the property inconsistent with the grant, and adequate to its defeat, but a direction of the trustee, "When so required by the creditors, to take charge of said property and sell the same at public auction" is not of itself such reservation of interest or control as to avoid the deed. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

The trustee and beneficiaries in a deed to secure bona fide debts, without notice, are purchasers for valuable consideration, within the meaning of the exception in the statute. Va. Code, 1849, ch. 188, § 3, p. 717; Va. Code, 1887, § 3601; and will be preferred to an execution creditor of the grantor in the deed, as to a chose in action thereby

conveyed. *Evans v. Greenhow*, 15 Gratt. 153.

If a sale be fraudulent (so as to render the sale void as between the purchaser, or cestui que trust, and the creditors of the original debtor), yet if the deed is good, it still operates to shield the property (conveyed for the benefit of the cestui que trust) from the execution of the creditors of the original debtor; in other words, it operates as effectually to prevent an execution from being levied on the property as if there had been no sale. *Clayton v. Anthony*, 6 Rand. 285.

Although a party to whom property is conveyed upon a fraudulent secret trust, may hold it as his own, against the grantor and his representatives, yet, if the grantee assents to the trust, and executes it in part, it is not competent for such of the cestuis que trust as may have gotten possession of the property, to set up the fraud for the purpose of defeating the claim of the other cestuis que trust to their share of the property. *Turner v. Campbell*, 3 Gratt. 77.

G. PERSONAL REPRESENTATIVE.

See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

Where a debtor in execution was discharged under the insolvent debtor's act, the sheriff was vested with all the property and rights of property of the insolvent, and as the representative of the creditors, and possessing all their legal and equitable rights he could avoid a fraudulent conveyance of the insolvent and recover back the property. *Shirley v. Long*, 6 Rand. 735; *Clough v. Thompson*, 7 Gratt. 26; *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472; *Staton v. Pittman*, 11 Gratt. 99, 103; *Tate v. Liggit*, 2 Leigh 84, 105; *Beverley v. Brooke*, 2 Leigh 426, 445. See also, *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

H. THE STATE.

The state has the same right as one of its citizens to maintain a suit in

equity to set aside a fraudulent conveyance, and subject the land of the defendant to its demands. Thus, the state can maintain a suit to set aside a fraudulent conveyance and subject the land of the defendant to the payment of a judgment for a fine recovered against the defendant for the unlawful sale of spirituous and other liquors. *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439.

I. STRANGERS TO TRANSACTION.

"Having no debt against B, the plaintiffs have no right to call in question B's sale and conveyance of his land to his vendee." *Henking v. Anderson*, 34 W. Va. 709, 12 S. E. 869.

VIII. Remedies.

A. GENERAL CONSIDERATION.

A Suit to Set Aside Conveyances on Ground of Fraud Is Not a "Controversy Concerning Land."—A suit to set aside several deeds on the ground of alleged fraud and to subject the lands thereby conveyed to the debt of the complainants, is not in the category of "controversies concerning the title or boundaries of land," within the meaning of the constitution of Virginia, art. 6, § 2. *Fink v. Denny*, 75 Va. 663.

B. NATURE OF RELIEF GRANTED.

1. Dependent on Subject Matter.

Where a husband has transferred property to his wife in fraud of the rights of a creditor, the latter, if the subject of the transfer be personal property, and was made by deed or other conveyance, has two remedies: He may institute a suit in equity to impeach the conveyance on the ground of fraud, have it set aside, and the property subjected to the payment of his debt, or he may proceed at law, obtain a judgment for his debt, and, in disregard of the conveyance, levy his execution upon and sell the property fraudulently transferred. *Harvey v. Fox*, 5 Leigh 444; *Green v. Spaulding*,

76 Va. 411; *Hoge v. Turner*, 96 Va. 629, 32 S. E. 291.

A suit in chancery properly lies, against a defendant, who, claiming title under a deed alleged to be fraudulent, has taken possession of and converted to his own use sundry articles of personal property; the plaintiff praying the court to set aside such fraudulent deed, and compel the defendant to render a just account of the property so wrongfully taken, and to pay the value thereof to the plaintiff. *Cocke v. Harrison*, 6 Munf. 184.

2. Rescission, Cancellation and Reformation.

See generally, the titles EQUITY, vol. 5, p. 125; RESCISSION, CANCELLATION AND REFORMATION.

A suit in equity can not be maintained to cancel a deed made to hinder, delay or defraud creditors, though the grantor and grantee are equally guilty, and equity will take no step to help either, but will leave them where they placed themselves under the maxim, "In pari delicto potior est conditio defendentis." *Edgell v. Smith*, 50 W. Va. 349, 350, 40 S. E. 402. See also, ante, "Operation and Effect," VI.

"In *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266, the very common principle is stated that 'the plaintiff can not sustain a suit in equity to cancel a deed made to defraud creditors, as the law is, that both grantor and grantee are equally guilty, yet equity will take no step to help either, but leave them where they placed themselves, under the maxim, In pari delicto potior est conditio defendentis.'" *Horn v. Star Foundry Co.*, 23 W. Va. 522; *Cain v. Cox*, 23 W. Va. 594; *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612; *Stout v. Phillipi Mfg., etc., Co.*, 41 W. Va. 339, 23 S. E. 571. *Corrothers v. Harris*, 23 W. Va. 177, puts the short proposition, held everywhere in equity courts: "Equity will not interfere between parties to the relief of one against the other in a

fraudulent transaction." *Edgell v. Smith*, 50 W. Va. 349, 353, 40 S. E. 402.

3. Discovery.

See generally, the title DISCOVERY, vol. 4, p. 656.

Quære, whether a creditor at large can maintain a bill in chancery against the executor of the debtor, for a discovery and account of assets, and satisfaction. *Poindexter v. Green*, 6 Leigh 504.

4. Creditors' Bill.

See generally, the titles CREDITORS' SUITS, vol. 3, p. 780; EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

5. Subrogation.

See generally, the title SUBROGATION.

6. Intervention.

See generally, the title INTERVENTION.

7. Injunction and Receiver.

See generally, the titles INJUNCTIONS; RECEIVERS.

A creditor of certain retail store-keepers bought their stock of goods, got credit for his debt, and assumed certain of their debts. Certain wholesale merchants, with only personal demands against them, got an injunction and had a receiver appointed to take charge of and sell the goods. There being no evidence of fraudulent intent, it was held, that the injunction and receiver were improper. *Rorrer v. Gugenheimer*, 87 Va. 533, 12 S. E. 1054.

Where a deed is made by a father to his son of land for one-half of its value with the fraudulent intent of hindering, delaying and defrauding his creditors, and the deed of trust is executed at the same time to secure the payment of the bond for the purchase money, which bond is assigned to a third person, and the trustee in the deed of trust advertises the land for sale, and the creditor of the father at the time of the conveyance to the son obtains an injunction to prohibit the

sale of the land by the trustee, the injunction ought not on motion to be dissolved whether the third person to whom the bond was assigned, was or was not a party to the fraud. *Beall v. Shaull*, 18 W. Va. 258.

Prior to judgment a creditor can not maintain a bill for an injunction to prevent a debtor from disposing of his property in fraud of creditors. *Rhodes v. Cousins*, 6 Rand. 188; *Tate v. Ligat*, 2 Leigh 84; *Kelso v. Blackburn*, 3 Leigh 299.

In *Terrell v. Imboden*, 10 Leigh 321, an obligee in a bond secured by a deed of trust, made a deed transferring the bond and deed of trust for the benefit of his creditors. Afterwards, at the request of the obligor, the obligee signed a receipt, stating, that on the day of the date thereof he received the amount of the bond. The bond was in fact executed without consideration, and the receipt was in fact given without any payment. The creditors for whose benefit the bond was assigned had no notice of its being without consideration until after the assignment; but the obligor knew of the assignment when he took the receipt. In a suit between the obligor and those claiming under the assignment, an injunction awarded to restrain the sale of the property conveyed to secure the bond, was dissolved; and the court of appeals affirmed the order of dissolution.

The court, at the suit of a judgment creditor, set aside a sale by a debtor of personal property as fraudulent and void, and directed the purchaser to deliver the property to a commissioner, who was directed to sell it. The purchaser failed to deliver the property to the commissioner, and then the court directed an account of its value in order to subject the purchaser for the amount. Held, that this was the correct practice. *McNew v. Smith*, 5 Gratt. 84.

Where a bill was filed to set aside certain deeds on the grounds of fraud upon the rights of creditors of the

grantor, it was held, that the lands should be placed in the hands of a receiver, to be rented out for the benefit of those who should be entitled thereto. *Cole v. McRae*, 6 Rand. 644.

The title to property, in a suit to set aside a conveyance as being in fraud of the rights of creditors, is not affected by the appointment and qualification of a receiver. *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229; *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349.

In a suit to set aside a deed of trust as in fraud of the rights of creditors, the bill alleged that the grantors were insolvent, that if the claims of the creditors preferred in the deed were paid as therein provided for, nothing would be left for the plaintiff, that the trustee appointed in the deed of trust was a brother of one of the largest of the preferred creditors and had taken possession of the property, and was selling it, and applying the proceeds in accordance with the terms of the deed. Held, that the allegations did not show a case of such emergency as would authorize a court of equity to appoint a receiver without notice to the defendants of the application for such appointment, although such notice was not expressly provided for by the West Virginia Code, ch. 13, § 28, authorizing the appointment of a receiver in the suit in chancery involving the property of the corporation, firm or individual, where there was danger of the loss or misappropriation of the property. *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5.

Where, in a suit to set aside a deed of trust as in fraud of creditors, the bill alleges that the trustee appointed in the deed is a brother of one of the largest creditors who are preferred and that it would be in the interest of other creditors that a different person should be substituted, it does not allege that he has acted dishonestly, or that he had any knowledge of the alleged fraudulent intent of his grantors, such bill does not make a sufficient showing

to warrant the appointment of a receiver, as a substitute for the trustee. *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5.

C. PARTIES WHO MAY ASSERT INVALIDITY.

1. Original Parties.

See ante, "Operation and Effect," VI.

One party guilty of fraud in a transaction can have no relief in equity against another person, though equally guilty of fraud in the same. *Stout v. Philippi Manuf., etc., Co.*, 41 W. Va. 339, 23 S. E. 571.

2. Creditors and Subsequent Purchasers.

a. Generally.

See ante, "Operation and Effect," VI.

b. Character of Creditor—Exhaustion of Legal Remedy.

Prior to the Code of 1849, it was held, that a creditor at large could not have the aid of a court of equity to prevent or interfere with, in any way, the disposition which his debtor might make of his property, unless such creditor had first proceeded as far as he could at law. To subject real estate, he must have obtained a judgment at law. To subject personal estate, he must have obtained a judgment and execution, and have it levied or returned, so as to show that his remedy at law had failed. This was held to apply to creditors attacking a voluntary conveyance as fraudulent, on the ground of its being fraudulent and void as to themselves; likewise as to those attacking conveyances as fraudulent in fact. *Chamberlayne v. Temple*, 2 Rand. 384 (1824); *Rhodes v. Cousins*, 6 Rand. 188 (1828); *Cole v. McRae*, 6 Rand. 644 (1828); *Tate v. Liggat*, 2 Leigh 84 (1830); *Kelso v. Blackburn*, 3 Leigh 299 (1831); *McCullough v. Sommerville*, 8 Leigh 415 (1836); *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135. The provision as contained in the Virginia Code of 1849 was, that the creditor before obtaining a judgment or decree for his claim, could institute any

suit which he might institute after obtaining such judgment or decree to avoid a gift, conveyance, etc., declared void by the statutes (Va. Code, 1887, §§ 2458, 2459). See W. Va. Code, 1899, ch. 133, § 20; *Russell v. Randolph*, 26 Gratt. 705, 713; *Wallace v. Treacle*, 27 Gratt. 479; *Keagy v. Trout*, 85 Va. 390, 397, 7 S. E. 329; *Batchelder v. White*, 60 Va. 103, 106; *Hoffman v. Fleming*, 43 W. Va. 762, 28 S. E. 790; *Tuft v. Pickering*, 28 W. Va. 330; *Watkins v. Wortman*, 19 W. Va. 78; *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135; *Duerson v. Alsop*, 27 Gratt. 229, 236. See also, *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. 874, 875; *Baer v. Wilkinson*, 35 W. Va. 422, 14 S. E. 1, 3; *Reynolds v. Gawthrop*, 37 W. Va. 4, 16 S. E. 364, 365; *Clafin v. Foley*, 22 W. Va. 443; *Jackson v. Hull*, 21 W. Va. 601, 613; *Clark v. Figgins*, 31 W. Va. 156, 159, 5 S. E. 43, 645; *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443, 456, 4 S. E. 431, 438; *Poindexter v. Green*, 6 Leigh 504. Thus the old rule, that a creditor must pursue his remedy to its furthest extent at law before a court of equity would entertain jurisdiction to grant him relief, has been abrogated by the statute above alluded to, and supported by the cases construing the statute. However, under the provisions as first contained in the Code of 1849, the question, whether a creditor, whose claim was not due, came within the purview of the statute, was controverted and long unsettled.

A foreign judgment is a debt; and a suit in equity can be maintained on it to avoid a fraudulent or voluntary conveyance without first obtaining a judgment at law in this state, under § 2, ch. 133, Code, W. Va. 1868. *Watkins v. Wortman*, 19 W. Va. 78.

As held, in *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. 874, a transfer from one joint debtor to another will not give equity jurisdiction to entertain a suit by that creditor of the grantor, in advance of lien by judgment or otherwise, to subject the prop-

erty to his debt. See also, *Witz v. Lockridge*, 39 W. Va. 463, 19 S. E. 876.

Where a grantee in a fraudulent conveyance has reconveyed the property to the debtor (grantor), a court of equity has no jurisdiction of a suit by the creditor to subject the property, in advance of a lien by judgment or otherwise, merely because of such fraudulent conveyance. *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. 874; *Witz v. Lockridge*, 39 W. Va. 463, 19 S. E. 876.

In *State v. Bowen*, 38 W. Va. 91, 18 S. E. 375, Judge English declares that, where a bill is filed by the state to set aside a fraudulent conveyance made by its judgment debtor, and to subject land in the hands of a fraudulent grantee to the payment of its judgment, it is not necessary that an execution should have issued on the judgment, and that a return of nulla bona should be had, before such bill can be sustained. Nor is it necessary to convene the creditors of such judgment debtor, or to allege and show that the rents, issues, and profits of the land sought to be subjected will not pay the debt in five years.

If a person, to avoid threatened liability, convey his real estate to his brother to secure a bona fide indebtedness, and such brother, after all danger of such liability has passed, reconvey such real estate, the creditors of such brother, although he be heavily involved, who have not acquired the right in some manner to charge their debts against such real estate during the time the title thereto vested in their debtor, can not attack such reconveyance as voluntary, fraudulent, and void as to their debts. *Farmers' Bank v. Gould*, 48 W. Va. 99, 35 S. E. 878.

Such reconveyance is not voluntary, within the meaning of the statute rendering invalid voluntary conveyances as to creditors, but the true ownership of the property is a sufficient consideration therefor, and, to successfully at-

tack the same, actual fraud against the attacking creditors must be shown, participated in by the parties to the conveyance. *Farmers' Bank v. Gould*, 48 W. Va. 99, 35 S. E. 878.

c. Impeachment by Persons Representing Creditors.

The right to avoid a fraudulent conveyance, it seems, is not personal to the then existing creditor. His successors and assigns may enforce the right. Thus, the subsequent purchaser of a pre-existing note may attack a transfer. *National Val. Bank v. Hancock*, 100 Va. 101, 40 S. E. 611; *Staton v. Pittman*, 11 Gratt. 99; *Clough v. Thompson*, 7 Gratt. 26; *Shirley v. Long*, 6 Rand. 735; *Highland v. Highland*, 5 W. Va. 63. See also, *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

d. Estoppel and Waiver.

Where land was conveyed in consideration that the grantee pay grantor's debts, and the grantee subsequently conveyed part to grantor's mother in satisfaction of one of said debts, and certain creditors of the grantor, filed a petition in bankruptcy to set aside the conveyances as fraudulent, and compromise being made, the bankruptcy proceedings were abandoned, and grantor's mother gave her notes, secured on the land conveyed to her, to pay certain of her son's debts; and afterwards another of his creditors instituted suit to subject this land to his debts, and under decree in this suit one of the creditors was one of the purchasers, the averment of fraud in said petition does not estop said creditor from maintaining that he was an innocent purchaser. *Penn v. Penn*, 88 Va. 361, 13 S. E. 707.

D. CHARACTER OF CLAIM.

2 Minor's Institutes 670, treating of the right to avoid voluntary conveyances, says that the statute upon the subject protects persons suing *ex maleficio*, as for adultery or seduction, or in tort, and a fortiori, those claiming *ex contractu*, as for a debt, or for

breach of an official bond, and that whether as the original creditor or his assignee. *National Val. Bank v. Hancock*, 100 Va. 101, 40 S. E. 611; *Clough v. Thompson*, 7 Gratt. 26; *Staton v. Pittman*, 11 Gratt. 99; *Shirley v. Long*, 6 Rand. 735.

E. VENUE.

See generally, the title **VENUE**.

F. JURISDICTION.

See generally, the title **JURISDICTION**.

1. Equitable Jurisdiction Generally.

See post, "In Equity," VIII, F, 3, b.

a. Preservation of Property.

A court of equity, ancillary to its jurisdiction to set aside a fraudulent transfer of property, may take the necessary steps to preserve the property involved during the pendency of the litigation. *Keneweg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773.

b. Inspection, Examination and Accounting.

In a suit in Virginia to set aside a conveyance for fraud, the grantor and grantees denied fraud, and explained the bona fides of the transaction. Depositions were taken. The circuit court decreed that the conveyance was fraudulent and null as to grantor's creditors. An appeal was taken to the district court of appeals, and the decree reversed, and the cause remanded for an account of all dealings between the grantor and grantees before executing the deed, inspection of all grantee's mercantile books, and examination of themselves on oath before a commissioner. The grantees notified plaintiffs when and where in the city of B (their home), before a commissioner of Virginia, they would submit their books for inspection and themselves for examination on oath. Then and there the books were inspected and the grantees cross-examined on oath by counsel for plaintiff. The commissioner made copies of the books, and certified the copies and grantees' depositions to the

circuit court. These were laid before a commissioner in Virginia. He refused to consider them, but made a special statement. The circuit court, inspecting his report, decreed that plaintiffs had failed to make out their charge of fraud, and dismissed their bill with costs. Held, by a majority of the court, in its directions for an account of dealings, inspection of books and examination on oath of grantees, its purpose was to get at the truth; and the inspection and examination in the city of B answered for that purpose, as well as the like inspection and examination in Virginia could have done. And the circuit court needed not to compel the books and the grantees to be brought to this state for inspection and examination. *Avis v. Lee*, 77 Va. 553.

Held, by Richardson, J., and Lewis, P.: In pursuance of directions of district court of appeals, the circuit court should have required not only the account of all dealings between grantor and grantees before execution of deed, and the inspection of all mercantile books of grantees, and the examination on oath of grantees themselves, to have been taken and made before its own commissioner in Virginia, but should also have required the commissioner to ascertain whether the deed was intended by the parties thereto to be an absolute conveyance, or only a mortgage. *Avis v. Lee*, 77 Va. 553.

c. Lien as a Condition Precedent.

See ante, "Character of Creditor—Exhaustion of Legal Remedy," VIII, C, 2, b.

d. Dependent on Maturity of Debt.

(1) Virginia Doctrine.

(a) Early Doctrine.

In *Devries v. Johnston*, 27 Gratt. 805, the question whether a suit in equity to annul a fraudulent conveyance could be brought before the debt was due, came before the supreme court, and the circuit court divided evenly upon it, Judges Moncure and Anderson stand-

ing for the affirmative of the proposition, and Christian and Staples for the negative. No authority was cited by Judge Anderson, who wrote the opinion filed, in support of his position. See also, *Frye v. Miley*, 54 W. Va. 324, 327, 46 S. E. 135.

(b) Later Doctrine.

In the case of *Simon v. Ellison*, 2 Va. Dec. 203, it is held, that a suit attacking a conveyance as in fraud of creditors can not be maintained by creditors whose claims are not due. See also, *Frye v. Miley*, 54 W. Va. 324, 327, 46 S. E. 135.

(c) Present Rule under Va. Code (1887), § 2460, as Amended.

Prior to the amendment of the Virginia Code (1887), § 2460 (acts, 1893-94, p. 614), a creditor whose claim was not due and payable could not institute a suit under the authority of this statute attacking a transfer of property by his debtor on the ground that it was fraudulent as to creditors. By the acts of 1893-94, p. 614, § 2460, was so amended as to permit a creditor, whether his claim be due and payable or not, to institute such suit as is there provided for. See Va. Code, Anno. (1906), § 2460; Poll. Supp., Va. Code (1904), § 2460; *Simon v. Ellison*, 2 Va. Dec. 203.

Where suit was instituted prior to the acts of 1893-94, amending § 2460 so as to permit a creditor whose claim was not due and payable to institute suit to set aside a conveyance, assignment, etc., as fraudulent, and was pending subsequent to its enactment, the court could not take jurisdiction under this section, where the claims were not due and payable, and the bill could not be so amended as to give jurisdiction which the court did not have when the original suit was instituted. *Simon v. Ellison*, 2 Va. Dec. 203.

(2) West Virginia Doctrine.

(a) Early Doctrine.

Inadvertent rulings in *Chrislip v.*

Teter, 43 W. Va. 356, 27 S. E. 288, and *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363, were to the effect that a suit to set aside a fraudulent conveyance under W. Va. Code (1899) ch. 133, § 2, instituted for a legal demand by a creditor at large before the debt on which it was predicated became due and payable, could be sustained.

(b) Present Doctrine.

But the inadvertent rulings in *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. 288, and *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363, were criticised and disapproved in *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135, and the doctrine declared that a suit to set aside a fraudulent conveyance under § 2, ch. 133, of the West Virginia Code, 1899, instituted for a legal demand by a creditor at large before the debt on which it was predicated becomes due and payable, could not be sustained.

"But for this statute, it is plain that no such suit could be brought. It is an enabling statute, doing away with the rule which prevented relief under certain conditions. It does away with that rule only to the extent of the right given by the statute, namely, to sue in equity to annul a fraudulent conveyance before reducing the claim to judgment. Whether such suit can be brought before the debt is due is an entirely different matter. This last question came before the Virginia court of appeals in *Devries v. Johnston*, 27 Gratt. 805, and the court divided evenly upon it, Judges Moncure and Anderson standing for the affirmative of the proposition, and Christian and Staples for the negative. It is, therefore, no precedent, and Judge Anderson, who wrote the only opinion filed, cites no authority whatever, for his position. A later Virginia case, *Simon v. Ellison*, 2 Va. Dec. 203, holds that, 'Suit attacking a conveyance as in fraud of creditors can not be maintained by creditors whose claims are not due.' It is said that this court

in *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. 288, has held, that such suit may be maintained for a debt not due. It appears from the statement of the case that the debt was not due, and that the suit was maintained, but the point can not be regarded as having been adjudicated in that case, for it seems never to have been brought to the attention of the court. Not a word of comment on that phase of the case is found in the opinion and there is nothing in it to suggest that counsel relied upon it or brought it to the attention of the court. Even if it be considered as an adjudication, it is clearly the result of inadvertence rather than consideration. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981, and *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363, are urged and relied upon as supporting the position taken by counsel for the appellant. What has been said of the case of *Chrislip v. Teter*, applied to that of *Bank v. Prager & Son*. Neither in the opinion nor in the briefs, so far as a hasty examination of the latter reveals, is there any mention of the fact that the debt of the plaintiff was not due, as a material point in the case. It can not be regarded as a sedate and considerate decision on that point. In the other case, *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981, the proceeding was by attachment and the attachment was held good. Therefore, the jurisdiction which was taken and maintained stood upon an entirely different ground from that urged in this case, and the decision and views expressed in the opinion afford no support to the position taken by the appellant here. Judge Brannon says, in the opinion in that case: 'But the bill, while setting up a fraudulent transfer, does so only as evidence to sustain the attachment, and does not go for the property transferred. Hence the bill could not be sustained, independently of the attachment, on that ground.' *Frye v. Miley*, 54 W. Va. 324, 327, 46 S. E. 135.

e. Object to Enforce Secret Trust.

A court of equity ought not to give its aid to a plaintiff claiming under a deed of gift from a person who made a previous transfer of the same property to another for the purpose of defrauding creditors; the object of the bill being to enforce a secret trust between such transferrer and transferee. *Roane v. Vidal*, 4 Munf. 187.

f. Where Mental Weakness Increased by Intoxication.

A court of equity, upon the application of the grantor, will not interfere to set aside a conveyance made to hinder, delay and defraud creditors, on the ground of the natural weakness of mind, increased by habits of intoxication, of the grantor, if he had legal capacity to contract, unless it is shown that some advantage was taken, or undue influence exerted, to procure the conveyance. *Smith v. Elliott*, 1 Pat. & H. 307.

g. Right to Jury Trial.

See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; JURY.

In a case where a court of equity has jurisdiction of the subject matter of the suit, whatever may be the nature or amount of the demand, the parties thereto are not entitled to a trial by a jury, except where the same is prescribed by law. *Broderick v. Broderick*, 28 W. Va. 378.

h. Directing Inquiry.

In an action against a husband and wife to set aside an antenuptial deed of marriage settlement on the ground that the same was given with intent to defraud the creditors of the husband, and that the wife had connived at the fraud, the testimony showed that the wife, before marriage, had no knowledge of any fraud. Held, that the court properly refused to direct an issue out of chancery to try the question of fraud, and that a decree declaring the deed valid as to the wife was in accordance with the evidence. *Noble v. Davies*, 1 Va. Dec. 633.

i. Issue Out of Chancery.

See generally, the title **ISSUES TO THE JURY**.

Where creditors file a bill attacking a conveyance in trust for the wife of the debtor and allege that the consideration was paid by the debtor, and the debtor answers that a portion of the purchase money was derived from a sale of the wife's interest in the estate of her father, and the balance was derived from the profits of the land purchased, it is proper for the court to direct an inquiry as to whether there was any agreement that the proceeds of the sale of the wife's property should be applied to her separate use, and whether it had been so applied. *Cronie v. Hart*, 18 Gratt. 739.

2. Concurrent Jurisdiction at Law and in Equity.

In cases of actual fraud, a court of equity has concurrent jurisdiction with a court of law, in remedying the fraud. And equity usually follows the law, and gives relief to the same extent as a court of law. And therefore, where a creditor comes into equity to set aside a conveyance tainted with actual fraud, and the grantee has notice of the fraud, the conveyance should be set aside in toto. *Garland v. Rives*, 4 Rand. 282.

Where an elegit is levied on land of the debtor, but the inquisition does not set out the moiety by metes and bounds, and possession is not delivered to the creditor; and the debtor makes a conveyance of the land to third persons; and afterwards the elegit and return are quashed, on the motion of the creditor, who then files a bill impeaching the conveyance as fraudulent, a court of equity has jurisdiction to entertain the suit. *Claiborne v. Gross*, 7 Leigh 331.

3. Where Homestead Deed Attacked.

See ante, "Equitable Jurisdiction Generally," VIII, F, 1.

a. At Law.

In an action at law the question may arise upon the evidence, whether a

homestead deed was executed as a part, and in furtherance of a design to hinder and delay and defraud creditors of the householder in the recovery of their just debts. And if this state of facts are found to be true the deed will be vitiated and invalidated thereby, and relief granted creditors as to whom it is fraudulent. *Rose v. Sharpless*, 33 Gratt. 153.

b. In Equity.

See the titles **ADEQUATE REMEDY AT LAW**, vol. 1, p. 161; **CREDITORS' SUITS**, vol. 3, p. 780; **JURISDICTION**. And see ante, "At Law," VIII, F, 3, a; "Homestead Deeds," IV, C, 9.

(1) Early Doctrine.

In *Russell v. Randolph*, 26 Gratt. 705, 713, a bill in equity was entertained attacking a homestead deed under the provisions of par. 2, ch. 179, Va. Code, 1860 (corresponding section in Va. Code, Anno., 1904, § 2460), on the grounds that it was fraudulent as to the rights of creditors.

To same effect see *Kahn v. Kern* (1889), unreported, decided by Chancellor Fitzhugh, in the chancery court of the city of Richmond. The supreme court refused to grant an appeal in this case.

And in *Short v. McGruder*, 22 Fed. Cas. 46, Judge Hughes entertained a bill in equity attacking as fraudulent a homestead deed, setting aside property under the provisions of the homestead law in Virginia.

(2) Later Doctrine.

But in *Simon v. Ellison*, 2 Va. Dec. 203, the supreme court refused to entertain a bill under the authority of § 2460, Va. Code (1887), as amended, attacking a homestead deed on the ground that it was fraudulent as to the rights of creditors. The implied holding is to the effect that such bill would be entertained, not under the authority of § 2460, it is true, but merely on grounds of general equitable jurisdic-

tion, if the attacking creditors had obtained a lien by judicial process.

The case of *Simon v. Ellison*, 2 Va. Dec. 203, does not go to the extent of holding that a bill in equity is not an available remedy to set aside homestead deeds on the ground that they are fraudulent, but merely rules that a bill in equity will not lie under authority of § 2460, as amended, attacking a homestead deed on the grounds that it is fraudulent, as such a dealing by the debtor with his property is not a conveyance or assignment within the contemplation of § 2460. The implied holding is to the effect that the ancient remedy, existent before the Code of 1849, by bill in equity is even now available to a creditor who has a lien by judicial process, which would give equity jurisdiction to entertain such suit independently of statutory provisions.

4. Allegation as to Jurisdiction.

See post, "Allegations and Averments," VIII, H, 2, f.

5. Limitations and Laches as Bar to Suit.

See generally, the titles LACHES; LIMITATION OF ACTIONS.

Voluntary Conveyances.—The limitation of a suit to avoid an absolute conveyance on the sole ground that it is voluntary is five years from the time "the right to avoid it accrued." (Va. Code, 1887, § 2929.) *Kinney v. Craig*, 103 Va. 158, 48 S. E. 864. The provision as it originally appeared in Va. Code, 1849, ch. 149, § 13, and as it now appears in W. Va. Code, 1899, ch. 104, § 14, reads, "five years from the making of the deed," etc.; and in *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364, the court so construes it, declaring that the period of limitation begins to run from "the making" of the deed. *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410; *McCue v. McCue*, 41 W. Va. 151, 23 S. E. 689; *Scraggs v. Hill*, 43 W. Va. 162, 27 S. E. 310; *Thorn v. Sprouse*, 46

W. Va. 225, 33 S. E. 99. In *Bickle v. Chrisman*, 76 Va. 678, the point was made by the plaintiff, that "the limitation did not begin to run, until there was a right of action." The court declared that this was undoubtedly correct with respect to almost all of our statutes of limitation, but under the provision as contained in Va. Code, 1873, ch. 146, § 16 (identical with § 13, ch. 149, Va. Code, 1849), the statute began to run "from the date of the execution of the deed," and not, as usual under our statutes, from the time the right of action accrued. This distinction is also made in *Welsh v. Solenberger*, 85 Va. 441, 445, 8 S. E. 91, decided in 1888, shortly after the Code of 1887 took effect. The change as contained in the Code of 1887, providing that the statute should begin to run from the accrual of the right of action, was evidently made for the purpose of relieving creditors against the hardships of the former law. If such was the intention, it was accomplished to an extent, yet the law as it thus stood was not wholly satisfactory, as no right of action would accrue, until there was a right to recover on the claim, which might not mature for years after the making of the conveyance. This inconvenience was overcome, and remedied, by Acts 1893-94, ch. 566, pp. 614, 615, amending and reenacting § 2460 of the Code, and providing that "a creditor, before obtaining a judgment or decree for his claim, may, whether such claim be due and payable or not, institute suit to avoid the gift, conveyance," etc. The above is substantially the opinion as expressed in an editorial by Judge Burks, 1 Va. Law Reg. 597, before the construction of the amendment by the Virginia court of appeals. The learned jurist concludes as follows, "that, under the law as it now stands, inasmuch as a creditor may institute and prosecute a suit to avoid a conveyance at any time before his claim has become due and payable," the five years pre-

scribed by § 2929 must be computed from the time his right accrued to avoid the conveyance under § 2460 as amended by the act of 1894, though his claim be not due and payable." Therefore the statute would begin to run from the time the voluntary conveyance is made, no question of fraudulent concealment being brought into the case. The above conclusion is reached in *Vashon v. Barrett*, 99 Va. 344, 38 S. E. 200, 7 Va. Law Reg. 36.

Effect When Fraud Is an Element.—

Under the Virginia Code, 1887, § 2929, limiting the period in which suits may be brought to set aside conveyances or transfers of property, on consideration not deemed valuable in law, cases of actual fraud are not included. *Snoddy v. Haskins*, 12 Gratt. 363; *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 267; *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686; *Kinney v. Craig*, 103 Va. 158, 48 S. E. 864. This for the reason that such conveyance does not come within the purview of any statutory provision now in force. Of course, the right to institute such a suit can be lost in equity by remissness and delay in its assertion. It is true that delay in assertion of a right is always discountenanced in a court of chancery; that it does not encourage stale claims, and that a party may lose his right to complain of the fraud by delay, especially where the delay is accompanied by the loss of evidence or the death of parties, or such conditions exist as to render the court unable to pass upon the questions involved without serious risk of doing injustice. As a general rule though, in the application of statutes of limitation, equity follows the law, and wherever a demand would be barred at law, an equitable demand of the like character would be barred in equity. The bar is applied by analogy. In the cases of fraud the authorities are conflicting, as to whether at law the statute begins to run from the commission of fraud or from its discovery. It seems, however, without contro-

versy, to be the settled doctrine in courts of equity, that the statute begins to run only from the discovery of fraud. This seems to be founded on the rule in courts of equity, that the cause of action arises as soon as a party has a right to apply to the court of equity for relief, and such right arises only when the party has actual knowledge of the fraud, or when with due diligence such knowledge could be obtained. *Rowe v. Bentley*, 29 Gratt. 756; *Shields v. Anderson*, 3 Leigh 729; *Massie v. Heiskell*, 80 Va. 789, 804; *Cresap v. McLean*, 5 Leigh 381; *Bumgardner v. Harris*, 92 Va. 188; 23 S. E. 229; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364. See also, *McCarty v. Ball*, 82 Va. 872, 1 S. E. 189; *Hutcheson v. Grubbs*, 80 Va. 251; *Ayre v. Burke*, 82 Va. 338, 4 S. E. 618; *Switzer v. Noffsinger*, 82 Va. 518, 523; *Cottrell v. Watkins*, 89 Va. 801, 810, 17 S. E. 328; *Coles v. Ballard*, 78 Va. 139, 149.

But by the terms of § 2467 of the Virginia Code, 1878, prior to the late amendments (acts, 1895-96, p. 295, prescribing "ten" instead of "twenty" days), if the conveyance is recorded within twenty days after due acknowledgment, it is as valid against creditors, as if recorded on the day of acknowledgment. And the act of limitation to suits to avoid voluntary conveyances does not cease to run simply because no settlement has been had between parties, and the exact amount due has not been ascertained. So the mere fact that a creditor does not know that the conveyance made by his debtor is without consideration, does not stop the running of the statute of limitations. To have that effect such ignorance must proceed from the fraud of the grantee, and this should be plainly charged. The burden of proving that the transfer, alleged to be voluntary, was made more than five years before the institution of the suit to have it set aside, is on the party pleading the statute. *Vashon v. Barrett*, 99 Va. 344, 38

S. E. 200, 7 Va. Law Reg. 36. And the limitation applies to a marriage settlement also, attacked upon the ground of its being voluntary. *McCue v. Harris*, 86 Va. 687, 10 S. E. 981. See, in general connection, *Snoddy v. Haskins*, 12 Gratt. 363; *Williams v. Blakey*, 76 Va. 254.

Laches.—To set aside a deed for fraud, suit must be brought without unreasonable delay after discovery. *Edgell v. Smith*, 50 W. Va. 349, 350, 40 S. E. 402; *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909; *Whittaker v. Southwest, etc., Imp. Co.*, 34 W. Va. 217, 12 S. E. 507.

On a debt contracted by F. in 1865, T. got judgment in 1873. In 1870, F. bought lands which were conveyed to his sister. In 1883, after death of F. and sister, the lands were sold to settle the sister's estate. Then T. brought his bill to apply the proceeds to pay F.'s debts, on the ground that the lands were conveyed to the sister without consideration, to defraud F.'s creditors, and failed to explain delay to sue sooner. Held, that the bill should be dismissed for laches. *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743.

G. LIEN OF ATTACKING CREDITOR.

1. Virginia Doctrine.

In *Wallace v. Treacle* (1876), 27 Gratt. 479, § 2, ch. 179, Code 1849 (Va. Code, 1860, ch. 179, § 2), came before the court for the first time for its true construction. Christian, J., delivering the opinion of the court, said: "I think there could be no doubt that it was the intention of the legislature to declare that a party creditor who filed his bill to avoid a fraudulent conveyance acquired a lien upon the property conveyed in such void conveyance, if he obtained a decree setting it aside, and in that event the lien attaches from the day the bill is filed." See also, *Noyes v. Carter*, 2 Va. Dec. 218.

By the Virginia Code, 1887, § 2460, it is expressly declared that when in

such case a creditor institutes a suit to avoid a gift, conveyance, etc., on the grounds of its being void as to creditors and purchasers, such creditor shall have a lien from the time of bringing his suit. *Craig v. Hoge*, 95 Va. 275, 276, 28 S. E. 317. And this advantage is not lost to a creditor secured by a deed of trust which is attacked as fraudulent, as he may, while claiming under the deed, assail the validity of other debts secured in the same deed. His attitude as purchaser does not impair his right as creditor to assail such debts as fraudulent or otherwise void. *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279, 6 Va. Law Reg. 613. In *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317, it was held, that if a creditor plaintiff succeeds in his attack upon a particular preferred debt secured in the deed, the debt being fraudulent, such debt will be eliminated from the security, but the creditor will not be substituted to the priority of the eliminated debt; the deed will stand just as it was, with the exception of the fraudulent debt; which will be excluded. See also, *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279, 6 Va. Law Reg. 613. This lien, however, is conditional. As against creditors, with or without notice, and purchasers for value without notice, the lien is valid only from the time that the plaintiff creditor files his memorandum of lis pendens, as provided by Va. Code, 1887, § 2460; acts, 1893-94, p. 614. *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229. The lien fastens only upon the property conveyed, and not, like the lien of a judgment, on all the debtor's estate. *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229. In *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 212, 7 Va. Law Reg. 269, an action was brought by defendants as creditors to set aside a voluntary conveyance by plaintiffs, and the conveyance was set aside. Afterwards the plaintiff's husband died and she petitioned to have the property set aside as her homestead. It was held, that the petition should be granted under

Va. Code, 1887, § 3642, providing that the homestead may be set apart at any time before it is subjected to sale, notwithstanding § 2460 providing that the creditor causing such conveyance to be set aside shall have a lien on the property from the commencement of the action. See also, *Wright v. Hancock*, 3 Munf. 521.

The priority of a creditor's lien obtained by first filing a memorandum concerning a creditors' suit to set aside a fraudulent conveyance as required by Va. Code, 1887, § 2460, is not affected by the fact that the lien attached after the rendition of a decree in favor of such creditor and of another creditor who commenced the suit. *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229.

A creditor who joins in a suit to set aside a fraudulent conveyance some time after the filing of the bill is entitled to a lien prior to that of the creditor commencing the suit where the former filed such memorandum and the latter did not. *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229.

Lien of Petitioning Creditor.—And it is further provided by Va. Code, 1887, § 2460, that when a creditor comes into a suit which is brought by another creditor, to assail a fraudulent or voluntary conveyance, he shall have a lien from the time of filing his petition. This section was amended by acts, 1893-94, ch. 556, pp. 614, 615, so as to allow the petition to be filed in the clerk's office at rules. 2 Va. Law Reg. 433.

2. West Virginia Rule.

a. Where Preference Not Involved.

Where general creditors by bill, answer or petition assail a deed of their debtor conveying lands as fraudulent, and succeed, they have a lien on the land for their respective debts from the filing of such bill, answer or petition. *Hughes v. Hamilton*, 19 W. Va. 366; *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. 874; *Witz v. Lockridge*, 39 W. Va. 463, 19 S. E. 876;

Sweeney v. Grape Sugar Co., 30 W. Va. 443, 18 S. E. 431.

A creditor who first files his bill to cancel a fraudulent conveyance is entitled to priority in the distribution of the proceeds of a sale of the property. *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854.

A creditor at large is not entitled to priority over one who has obtained a judgment against the debtor, subsequent to the date of the fraudulent conveyance, but before the filing of the bill by such creditor at large to set it aside, although he is entitled to priority over one who obtains his judgment after the filing of such bill. *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382.

A creditor who, after his debtor has made a fraudulent or voluntary conveyance of his real estate, but before any other creditor files a bill in equity to set aside such conveyance, obtains a judgment in a court of law against such debtor, has a lien, by virtue of his judgment, upon the real estate so conveyed, from the date of the judgment, superior and prior to that of the creditor assailing the deed. *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382.

b. Where Preference Involved.

In General.—But the rule under the West Virginia Code (1899), ch. 74, § 2, as amended by act of 1891, ch. 123, p. 353, avoiding preferences, is that a creditor who is the first to assail the fraudulent conveyance of an insolvent debtor does not thereby acquire as the reward of his diligence a preference over other creditors.

"The former rule in equity of rewarding the diligence of the creditor who first assailed the fraudulent deed of an insolvent debtor with a preference over the other creditors must give way to the statute as inconsistent therewith upon this statute as thus amended. This equitable rule of rewarding the diligence of the first assailing of the fraudulent deed of an insolvent debtor sometimes led to such

hardship, especially where the deed had to be held to be fraudulent on its face, that the preference given the vigilant assailant was sometimes worse than fraud." *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554.

Where a transfer of property has been declared void as to creditors, the proceeds of the same are distributable among all the creditors of the grantor according to their legal priorities, no preference being given to the party who first moves to set the transfer aside. *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554. See also, ante, "Lien of Attacking Creditor," VIII, G.

"In *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554, under the ruling of which appellant claims, if the assignment is set aside it would result in giving plaintiff an illegal preference under § 2, ch. 74, Code. The question alone of unlawful preference was there involved and syl. 5, 'The creditor who is first to assail the fraudulent conveyance of an insolvent debtor does not thereby acquire as the reward of his diligence a preference over the other creditors,' could only apply in such case as was there before the court, and can not be construed to apply in a proceeding to set aside a gift, conveyance, assignment, etc., under § 1, ch. 74, Code, where the question of preference is not involved. Such a construction would be a repeal by this court of § 2, ch. 133, Code, which it is not competent to do, and the said syllabus, if susceptible of such construction, should be so modified as to confine it to proceedings to avoid illegal preferences. This court has not given it such broad construction as will appear from *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382, and *Wilson v. Carrico*, 50 W. Va. 336, 40 S. E. 439." *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363.

Where Attacked by Answer.—Formerly it was held, that where an assignment of personal property, giving preference to creditors accepting its terms,

was sought to be enforced in equity by creditors who had accepted its terms, and other creditors filed answers attacking it for fraud, such answers may be regarded as cross bills; and where such defendants were defeated in the court below and they alone appealed, and procured a reversal of the decree, and the deed was declared void, they have priority, there being no liens before their answers were filed, and are entitled to be first paid out of the fund. *Clark v. Figgins*, 31 W. Va. 156, 5 S. E. 643.

Creditor Who Fails to Contribute to Costs and Expenses.—The attacking and preferred creditors are entitled to have their indebtedness paid in full out of property transferred in unlawful preference under § 2, ch. 74, W. Va. Code, as against a creditor who fails to unite in and agree to contribute to the costs and expenses of the suit instituted to avoid such preference. *Wilson v. Carrico*, 50 W. Va. 336, 40 S. E. 439.

Rights of Preferred Creditors to Attempt to Sustain Preference.—The preferred creditors who attempt to sustain the preference given them, are entitled, to the full extent of their indebtedness, to share pro rata, in the distribution of the property unlawfully transferred, with the attacking creditors. *Wilson v. Carrico*, 50 W. Va. 336, 40 S. E. 439.

3. Between Junior and Senior Creditors.

A junior judgment creditor who succeeds in having a conveyance or transfer set aside, obtains priority over senior judgment creditors. *Cohn v. Ward*, 36 W. Va. 516, 15 S. E. 140.

4. As against Prior Judgment Creditor.

A creditor at large is not entitled to priority over one who has obtained a judgment against the debtor, subsequent to the date of the fraudulent conveyance, but before the filing of the bill by such creditor at large to set it aside, although he is entitled to pri-

ority over one who obtains his judgment after the filing of such bill. *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382.

A creditor who, after his debtor has made a fraudulent or voluntary conveyance of his real estate, but before any other creditor files a bill in equity to set aside such conveyance, obtains a judgment in a court of law against such debtor, has a lien, by virtue of his judgment, upon the real estate so conveyed, from the date of the judgment, superior and prior to that of the creditor assailing the deed. *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382.

5. As between Judgment Creditors.

When all the creditors, assailing a fraudulent or voluntary conveyance, are judgment creditors, the lien of each dates from the time he obtained his judgment, and not from the date of the filing of his bill, answer or petition, attacking the fraudulent or voluntary conveyance, and the priorities among them must be settled according to the dates of their judgments. *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382.

6. Creditor Obtaining Judgment Subsequent to Another Suit.

A executed a deed of trust, bearing date on the 31st day of May, 1897, to secure the payment of an alleged debt, to his brother. On the 15th day of June, 1897, X, a creditor of A commenced its suit; and, at the August rules following, filed its bill against A and others, to set aside the deed of trust as fraudulent, and to subject the property thereby conveyed to the payment of its demand. On the 21st day of June, 1897, Y recovered a judgment against A; and on the 7th day of July, 1897, commenced his suit; and, at July rules of the same year, filed his bill against A, and others, for the purpose aforesaid. The deed of trust was set aside by decree entered in both suits, heard together. Held, that the demand of X has priority over the judgment in favor of Y; and is entitled to be paid in full out of the proceeds of the sale

of the property, before the judgment of Y or any part thereof shall be paid. *Geiser Mfg. Co. v. Chewning*, 52 W. Va. 523, 44 S. E. 193.

7. Intervening Creditors.

In a suit attacking a conveyance for fraud, priorities in the distribution of the proceeds, as between intervening petition creditors, will be determined by the date of filing the petitions. *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854.

8. Creditors Overthrowing Portion of Secured Debts.

Creditors not secured in a deed of trust, who sue to overthrow it on the ground that the debts secured and preferred are fraudulent, and succeed in overthrowing some only of the debts secured, are not advanced in priority so as to take the rank of the debts overthrown, and get payment out of the property conveyed in preference to bona fide creditors preferred by the deed, but the whole property remains to answer the demands of the bona fide preferred creditors, according to the deed. *Cohn v. Ward*, 36 W. Va. 516, 15 S. E. 140.

In *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, it is held, that creditors assailing a deed of trust as illegal and fraudulent, and succeeding as to one, and only one, of the claims thereby secured, are not entitled to occupy, in the order of payment out of the trust fund, which is treated as a whole, the place thus made vacant, or to displace, or in any manner lessen or impair, the claims of the bona fide creditors, who are without fault, and therefore retain the place given them in the trust deed.

H. THE PLEADINGS.

1. In General.

Filing Judgment and Execution.—In *McNew v. Smith*, 5 Gratt. 84, the court declared that, in a suit by a judgment creditor to set aside fraudulent conveyances of property by his debtor, the judgment and execution being admitted

by the pleadings, the failure to file copies of them in the cause, is not ground for reversal of the decree of the court below, setting aside the conveyances; especially if no objection was taken in that court to the failure to file them.

2. Bill or Petition.

a. Consolidating Causes.

Where creditors by several judgments file separate bills in chancery, impeaching a conveyance of land by a debtor, as fraudulent; an order of consolidation of the causes by the chancellor on motion of one of the plaintiffs, is improper. *Claiborne v. Gross*, 7 Leigh 331.

b. Single Bill Attacking Several Conveyances.

Where a debtor makes divers fraudulent conveyances to different grantees, all colluding with him to defraud his creditors, the latter may proceed, by a single creditor's bill to assail them, or any one or more, of such conveyances; and, as there is no contribution among tortfeasors, the fraudulent alienees who are made parties can not complain that others in the same category are omitted. *Ellington v. Moore*, 4 Va. Law Reg. 608 (Va. 1897). See generally, the title CREDITORS' SUITS, vol. 3, p. 780.

c. Creditors Uniting in One Suit.

Any number of creditors may unite in one suit to set aside a deed made in fraud of their rights, although their claims are distinct and separate. *Anderson v. Mossy Creek Woolen Mills Co.*, 100 Va. 420, 41 S. E. 854.

d. Right to Intervene by Petition.

Right to File.—A creditor may file his petition in a cause pending, which has for its object the vacation of a fraudulent conveyance, and, upon proper allegations, be made a party to the suit, and the bill, exhibits, answers, depositions, orders, and decrees, and all the proceedings in said cause, may, upon proper prayer, be read as part of

his petition. *Richardson v. Ralph-snyder*, 40 W. Va. 15, 20 S. E. 854.

As held in *Pappenheimer v. Roberts*, 24 W. Va. 702, in a suit brought by judgment creditors to set aside a conveyance on the ground of fraud, any judgment creditor, who has not been made a party, formally or informally, and who has an unsatisfied judgment against the debtor, which was recovered before the suit was brought, may at any time before a final decree file his petition in the cause setting up his judgment and praying to be made a party to the suit, and to have his rights under his judgment adjudicated; and if this right be denied him, it will be error for which the decree of the lower court, denying such right, will be reversed in the court of appeals.

In a suit to set aside a deed to a wife on the ground that the consideration therefor moved from her husband, and that the deed is in fraud of the rights of his judgment creditors, it is error to refuse to allow a third person, who was not a party to the suit, to file a petition in the cause, showing that the consideration was wholly furnished by him, and asking to be admitted as a party and allowed to assert his rights therein. He should not be put to an independent suit when all of his rights can be fully determined in the pending suit. Such petition may be filed at any time before a final decree. *Rau v. Shaver*, 102 Va. 68, 45 S. E. 873.

When a deed of trust creditor has become a bona fide owner in fee of a married woman's real estate, he has the right to intervene in a suit instituted by a general creditor of such married woman seeking to rent such property, for the purpose of resisting such rent. *Cox v. Horner*, 43 W. Va. 786, 28 S. E. 780.

Dismissal.—Where in a suit by one creditor to enforce a debt against land of his debtor fraudulently conveyed, another creditor files a petition in the cause setting up another distinct debt against the debtor and to subject the

same land, and the second creditor is not a party to the first suit, nor are his rights mentioned therein, an order under the title of the first suit dismissing the case agreed on the motion of the plaintiff does not dismiss the petition of the other creditors or bar its further prosecution. *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 169.

c. Formal and Necessary Parties.

(1) Generally.

See generally, the title PARTIES.

In a bill brought by judgment creditors to set aside as fraudulent certain deeds, the plaintiff should make formal parties to his suit, either as plaintiffs or defendants, those who have obtained judgments in the courts of record in the county in which the lands of the debtor are situated, which are sought to be subjected to the payment of the judgments, and also all creditors who have obtained judgments in courts of record, or before justices in any part of the state, and have had them recorded in the judgment lien docket of the county. Because if in such a suit all the judgment creditors are not made parties, either formally or informally, and this fact is disclosed by the record, the appellate court will reverse any decree directing the sale of the lands or the distribution of the proceeds thereof. *Pappenheimer v. Roberts*, 24 W. Va. 702; *Neely v. Jones*, 16 W. Va. 625.

(2) Subsequent Purchasers.

A bill is filed to subject lands to the satisfaction of a judgment after the death of the debtor, and charging fraud in certain conveyances by the debtor to his son. The son having conveyed some of the lands to third persons, all such persons must be made parties to the cause. *Henderson v. Henderson*, 9 Gratt. 394.

(3) Creditors Who Are Secured.

If a deed of trust purports to indemnify one of the parties, as to whom the deed is charged to be fraudulent, as surety of the grantor for certain debts

due to specified creditors, these creditors, as well as those secured directly, and whose debts are not assailed by the bill, are necessary parties. *Billups v. Sears*, 5 Gratt. 31.

(4) Alienees.

Where Intent to Defraud.—Where there is a suit brought by a judgment creditor to set aside as fraudulent and void certain deeds alleged to have been made by the judgment debtor with intent to hinder, delay and defraud the plaintiff in the collection of his debt, in order to charge the lands thereby conveyed with the payment of his judgment, the alleged fraudulent alienees are necessary parties to the suit, although they may have conveyed all lands granted to them, respectively, to other persons who are defendants in the suit. *Pappenheimer v. Roberts*, 24 W. Va. 702.

In *Almond v. Wilson*, 75 Va. 613, it is held, that any number of alienees may be made parties defendant to a suit to set aside conveyances on the ground of fraud, although, as between the alienees themselves, no charge of combination or confederacy is made.

Conveyance Voluntary.—But in a suit by creditors of a husband to subject property which he has voluntarily conveyed away to the payment of their debts, the grantee of the husband is not a necessary party; because the conveyance, notwithstanding it may be void as to creditors, will be, nevertheless, valid between the parties to it. *Herzog v. Weiler*, 24 W. Va. 199.

(5) Assignees.

In General.—In a suit to annul a bond and trust deed as fraudulent, it appearing that the same had been assigned to the grantor's wife, the court, before decreeing on the merits, should require her to be made a party, and the failure to do so is reversible error, though the point was not made in the lower court. *Thornton v. Gaar*, 87 Va. 315, 12 S. E. 753; *Welsh v. Solenberger*, 85 Va. 441, 444, 8 S. E. 91.

In a bill by a creditor to set aside a conveyance of his debtor as fraudulent, a deed of trust having been given by the vendee to secure the purchase money, and the debtor and the trustee in the deed of trust stating in their answers that the bonds given for the purchase money had been assigned by the debtor before the institution of the suit to a person named, the plaintiff should be required to make such person a party to the suit, if upon a rule for the purpose, it appears he is an assignee of any of said bonds. *Tichenor v. Allen*, 13 Gratt. 15, 16.

Assignee in Bankruptcy.—In a creditors' bill to annul deeds made by a debtor, on the ground of fraud, alleging that the debtor was thereafter adjudged a bankrupt, and had never obtained a discharge, the assignee in bankruptcy is a necessary party. *Tabb v. Hughes*, 1 Va. Dec. 630.

(6) Sheriff and Execution Creditors.

Where there is a bill to set aside fraudulent conveyances made by an insolvent debtor, the sheriff of the counties in which the lands lie, and the execution creditors interested in the property, should be made parties. *Clough v. Thompson*, 7 Gratt. 26.

(7) Personal Representative.

In a suit by a creditor, instituted after the death of the debtor, to set aside a deed of land made by him as voluntary and fraudulent, and to subject the land to the payment of his debt, the personal representative of the debtor is a necessary party. *Boggs v. McCoy*, 15 W. Va. 344.

(8) Trustee and Cestui Que Trust.

To a bill to set aside fraudulent conveyances made by an insolvent debtor, the trustee and cestui que trust in the deeds should be parties. *Clough v. Thompson*, 7 Gratt. 26.

(9) Heirs.

A recovered a personal decree against B, sheriff, and as such administrator of X, and issued execution on this decree, which was returned nulla bona.

On the execution was indorsed several claims by different parties for fees, all but one of which A contested. Y, one of the ten sureties of B, in his lifetime, with his wife, conveyed a tract of land to his son. A filed a bill against the administrator of Y, and the wife and son of Y, to set aside the deed as fraudulent, and to subject the land to the payment of his debt. The defendants demurred to the bill; but the court overruled the demurrer, and gave them leave to answer. The son appealed. Held, that it was unnecessary to make the heirs of Y parties in the cause, as the deed, if fraudulent as to creditors, was valid between the parties, and the heirs therefore could have no interest in the question. *Hall v. James*, 75 Va. 111.

(10) Claimants of Interest in Debt.

A recovered a personal decree against B, sheriff, and as such administrator of X, and issued execution of this decree, which was returned nulla bona. On the execution was indorsed several claims by different parties for fees, all but one of which A contested. Y, one of the ten sureties of B, in his lifetime, with his wife, conveyed a tract of land to his son. A filed a bill against the administrator of Y and the wife and son of Y to set aside the deed as fraudulent and to subject the land to the payment of his debt. The defendants demurred to the bill; but the court overruled the demurrer, and gave them leave to answer. The son appealed. Held, that the bill was a creditor's bill, and it was not necessary to make the persons claiming an interest in the debt of A parties in the suit, as they could come in and set up their claim in the progress of the cause. *Hall v. James*, 75 Va. 111.

(11) Exceptions and Objections.

If the want of proper parties appears on the face of the bill, such omission will be demurrable, and the defect may be taken advantage of by demurrer, or at the hearing of the cause. But

where a demurrer for such cause is sustained, the plaintiff should have leave to amend his bill. *Pappenheimer v. Roberts*, 34 W. Va. 702.

It is true no objection for want of proper parties was taken in the court below. But the rule is well settled that in such a case the objection may be taken by the court at the hearing, or even for the first time by the appellate court. *Jameson v. Deshields*, 3 Gratt. 4; *Lynchburg Iron Co. v. Taylor*, 79 Va. 671; *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. 91; *Thornton v. Gaar*, 87 Va. 315, 317, 12 S. E. 753.

f. Allegations and Averments.

(1) In General.

In *Watkins v. Wortman*, 19 W. Va. 78, a creditor filed a bill in chancery against a debtor and his wife and others alleging a recovery by him of a judgment in another state against the debtor; that execution issued thereon and was returned unsatisfied; that the debtor had removed to the state of West Virginia in which the court had jurisdiction, and purchased two tracts of land and paid for them; that one of the tracts he had caused to be conveyed to his wife with intent to defraud his creditors; that the other tract had been conveyed to one of the other parties defendant; that whether this was accidentally so done, it was equally fraudulent as to creditors; that there was no personal property, out of which the debt was to be made; that unless both tracts of land were subjected to the payment of his debt, the debt would be lost. The defendants demurred to this bill. And the demurrer was overruled by the lower court, and the court of appeals sustained the judgment overruling such demurrer.

And in *Watkins v. Wortman*, 19 W. Va. 78, it was further held, that, whether the allegation of the bill as to the second contract of land was sufficient or not, yet as the allegation to the first contract was sufficient to give the court of equity jurisdiction, it was

proper to include any other property of the debtor, so that it could be first made liable in protection of the alleged voluntary or fraudulent vendee.

(2) Nonresidence.

In a bill in chancery, against a debtor as an absent debtor or defendant, and other defendants resident, holding lands by voluntary or fraudulent conveyances from the debtor, to have a decree against the debtor for the debt, and against the home defendants to subject the lands to the debt, the bill, in order to give the court jurisdiction, under the statute concerning attachments and suits against absent defendants (1 Rev. Va. Code, ch. 123), must distinctly aver the nonresidence of the debtor; and, if the home defendants in their answers say that the debtor is a resident, though they do not plead that matter in abatement to the jurisdiction, the plaintiff, to sustain the jurisdiction, must prove the fact of the debtor's residence abroad; and if his nonresidence be not distinctly averred in the bill, or, if so denied by the home defendants, be not proved, the court has no jurisdiction, and a decree for the plaintiff will be reversed on that ground. *Kelso v. Blackburn*, 3 Leigh 299.

(3) Fraud.

It is not sufficient to make a general charge of fraud in a bill. In addition to the general charge, the facts constituting the fraud, though not what is merely evidence, must be given. *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748; *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *First Nat. Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. 250.

Generally, fraud should be charged by setting forth the particular manner in which the act was done, and the end and design to be accomplished. If these show that fraud was designed and perpetrated it is not necessary to aver

the legal conclusion that they constitute fraud. But the charge that a deed was made with intent to hinder, delay, and defraud creditors is not the mere statement of a legal conclusion, but a charge of a material fact. *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523.

Where fraud is relied on to set aside a conveyance it must be plainly averred and distinctly proved that the grantee had knowledge of the fraudulent intent of the grantor, or in some way participated in the fraud. In the case in judgment, the evidence falls far short of the probative force necessary to establish fraud on the part of the grantee. *Wheby v. Moir*, 102 Va. 875, 47 S. E. 1005.

To overthrow the title of a purchaser on the grounds of fraud, it is necessary to allege in the bill that the grantor committed the act fraudulently to defraud creditors; and the facts must be given; and, moreover, it must be alleged that the purchaser fraudulently conspired with him, or had notice of the grantor's fraudulent intent, or had notice of the fraud rendering the grantor's title void. *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. 553.

Consideration Voluntary.—When the transaction is attacked by a subsequent creditor, upon the ground of actual fraud, the fact that the transfer or conveyance is not upon a consideration deemed valuable in law may be treated as evidence of the fraud, and need not be alleged in the bill. *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451.

Bill to Subject Improvements.—A bill which seeks to subject improvements put on a wife's property by a husband, in fraud of his creditors, must allege sufficient facts to show the existence of such fraud, or it will be demurrable. *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61.

Variance.—Where a bill to set aside conveyances contains positive and spe-

cific allegations of fraud, such allegations are taken as true on the bill being taken as confessed. *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. 91; *Price v. Thrash*, 30 Gratt. 515.

A plaintiff who alleges fraud must clearly and distinctly prove the fraud alleged in the bill. *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766.

As to the presumption and burden of proof in such cases, see post, "Presumption and Burden of Proof," VIII, I, 1.

If the fraud is not strictly and clearly proved as it is alleged, relief can not be granted. *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766.

(4) Privity of Grantee.

The privity of a grantee in the fraud of his grantor is sufficiently charged by charging that the deed was made not only without any consideration deemed valuable in law, but with intent to hinder, delay, and defraud the creditors of the grantor. It is not necessary to charge expressly that the grantee had notice of the fraud intended by the grantor. *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523.

In a suit to set aside a deed on the actual fraud of the grantor, the privity of the grantee in the fraud of the grantor is sufficiently alleged by charging that the deed was made, not only without any valuable consideration, but with intent to hinder, delay, and defraud the creditors of the grantor. The charge as made necessarily implies such privity, though the better practice is to charge it expressly. *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686.

Whilst it is clearly the better practice to charge in terms that the grantee had notice of the grantor's fraudulent intent, yet if the charge made necessarily implies such notice, it is sufficient. *Flook v. Armentrout*, 100 Va. 638, 42 S. E. 686; *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523.

(5) Identity of Property.

Where mention of the land sought to be subject as the property of a cosurety as fraudulently conveyed to his wife gives no description of the clue of identity, except the naming of the county in which it lies, and there is nothing in the proceedings that renders it more certain, it is too indefinite to authorize any legal proceeding to subject the same. *Holsberry v. Poling*, 38 W. Va. 186, 18 S. E. 485.

g. Multifariousness.

See generally, the title MULTIFARIOUSNESS.

Where a bill in equity is brought to subject to the lien of the plaintiff's judgment his debtor's estate alleged to have been fraudulently conveyed to various persons, who are charged with having combined and colluded with the debtor to defraud the plaintiff, and who are all made parties, the bill is not multifarious. *Com. v. Drake*, 81 Va. 305.

If a bill in equity is brought to subject to the lien of a plaintiff's judgment his debtor's estate, which is alleged to have been fraudulently conveyed to various persons, all of whom are made defendants; but there is no charge of combination or confederacy among the alienees, the bill is not multifarious for this cause. *Almond v. Wilson*, 75 Va. 613.

A bill is not obnoxious to the objection of multifariousness which charges that a deed of trust which it assails confers on the trustee powers inconsistent with his duty to the creditors secured, and adequate to defeat the trust, and also charges that one of the debts secured is fraudulent, narrating the circumstances which lead up to the latter charge. The narrative is surplusage. *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330.

h. Amendment.

When an original bill shows a case wherein there can be no relief because it is based on and grows out of a conveyance fraudulent as to creditors, no

amended bill is allowable to the guilty plaintiff. *Edgell v. Smith*, 50 W. Va. 349, 350, 40 S. E. 402.

Where a bill contains sufficient allegations for one character of relief sought, and insufficient for others, and the circuit court overrules a demurrer thereto, and grants relief to the full extent of the prayer of such bill, the supreme court will reverse the decrees entered, sustain the demurrer in part, and remand the cause, with leave to the plaintiff to amend. *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61.

Effect of Amended Bill.—Where an original bill sets out facts sufficient to show that a conveyance from one of the defendants to another was fraudulent in law as to the complainant, and prays that it may be set aside, and, in the event that a part of the land thereby conveyed, upon which complainant's debt is a specific lien, proves insufficient, that a personal decree be rendered against the grantor and for general relief, an amended bill charging that said conveyance was made with intent to hinder, delay and defraud the complainant in the collection of his debt does not make a new case. *Kinney v. Craig*, 103 Va. 158, 48 S. E. 864.

i. Dismissal.

Circumstances Making Proper a Dismissal of the Bill.—And where the evidence shows that a creditor was without means to have loaned money, which was claimed to be due, and was, previous to the suit, living adulterously with the pretended debtor, and that the claim and suit was a collusive scheme between the husband and the pretended creditor, to defraud the wife of the pretended debtor out of property, it will be proper to dismiss the bill. *Waller v. Johnson*, 82 Va. 966, 7 S. E. 382.

A executed his notes to B for an amount three or four times greater than was due and owing from A to B, and executed a deed of trust on a

certain tract of land to secure its payment—this tract of land being all the visible real estate owned by A at that time. At a sale, made under the deed of trust, B became the purchaser of the land at less than its real value. Upon these facts being alleged in a bill filed by subsequent judgment creditors of A, and who were also creditors at the time of the execution of the deed, and being sustained by the evidence, it was held, that it was error to dismiss the bill, without an inquiry being first directed to ascertain the true amount due from A to B, at the time of the sale, as well as of the value of the land, with the view of determining the proper mode and measure of relief to which the plaintiffs might be entitled, as connected with the deed of trust and sale. *Smoot v. Newberry*, 8 W. Va. 400.

3. Answer, Demurrer and Issues.

a. The Answer.

Where a bill seeks to set aside a deed of conveyance as voluntary and fraudulent, and the grantee, in his answer, denies any knowledge of fraud in the transaction, in the absence of any replication to the answer, such allegation will be taken to be true. *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804.

If a bill charges a postnuptial settlement to be voluntary, the answer does not shift the burden, and is not evidence for the respondents, but the offense must be proved. *Perry v. Ruby*, 81 Va. 317; *Hatcher v. Crews*, 78 Va. 460.

b. Demurrer.

See generally, the title DEMURRERS, vol. 4, p. 456. And see ante, "Exceptions and Objections," VIII, H, 2, e, (11).

Where, in a bill to set aside as fraudulent certain deeds, the want of proper parties appears on the face of the bill, such omission will be demurrable, and the defect may be taken advantage of by demurrer or at the hearing. But

if the demurrer for such cause is sustained, the plaintiff should have leave to amend his bill. *Pappenheimer v. Roberts*, 24 W. Va. 702.

As was said by Judge Carr in *Blow v. Maynard*, 2 Leigh 31: "If the defendant, charged with fraud in accepting and holding under a voluntary deed, could, by her own answer, supply proof of a contract and the execution of it, and of a valuable consideration for the deed, then, in truth, it may be said that to require proof of a consideration at all is a mere farce." *DeFarges v. Ryland*, 87 Va. 404, 408, 12 S. E. 805.

c. Issues.

What Constitutes the Point in Litigation.—And when a bill is against fraudulent alienees, the matter in litigation is a fraud charged in the management and disposition of the debtor's property, in which charge all the defendants are interested, though in different degrees and proportions. *Almond v. Wilson*, 75 Va. 613.

Determining Issues.—In *Quarles v. Kerr*, 14 Gratt. 48, a trustee filed a bill to enforce the trust deed, and the court decreed the sale and distribution of the trust subject among the creditors provided for, except one, who was excluded under the provisions of the deed, because he sued out an execution on his judgment. The creditor who was excluded then filed a bill to set aside the trust deed, on the ground that it was fraudulent on its face. The court held that the question whether the deed was fraudulent was not put in issue in the first case, and therefore could not be decided; and that as the decree in the first case was interlocutory merely, it could be no bar to the second suit.

4. Variance.

See ante, "Variance," VIII, H, 4.

Though it is true that the case stated in a bill in equity must be sustained by the evidence, this rule will not forbid relief to the plaintiff where the case

proved does not materially vary from the case stated; as where two deeds are charged to be without consideration, and intended to delay and hinder the plaintiff, and the proof is that the second being a deed to a trustee for the separate use of the debtor's wife, was without valuable consideration, the decree should be for the plaintiff. *Campbell v. Bowles*, 30 Gratt. 652.

I. EVIDENCE.

1. Presumption and Burden of Proof. a. Fraud.

(1) In General.

The maxim, "Fraud must be proven and is never to be presumed," is true only when understood as affirming that the contract or conduct apparently honest and lawful must be regarded as such, until shown to be otherwise by evidence, either positive or circumstantial; but fraud may be inferred from facts calculated to establish it; and fraud should be so inferred when the facts and circumstances are such as to lead a reasonable man to the conclusion that the property of a debtor has been attempted to be withdrawn from the reach of his creditors, with the intent to prevent them from recovering their just debts; and if *prima facie* such fraudulent intent be thus established, it must be regarded as conclusively established, unless it is rebutted by facts and circumstances which are proven. *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Bronson v. Vaughn*, 44 W. Va. 406, 29 S. E. 1022; *Sipe v. Earman*, 26 Gratt. 563; *Herring v. Wickham*, 29 Gratt. 628; *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329; *Land v. Jeffries*, 5 Rand. 600. And as held, in *Stonebraker v. Hicks*, 94 Va. 618, 27 S. E. 497, in the absence of fraud apparent on the face of the deed, or necessarily inferred from its terms, fraud will not be presumed, but must be proved with clearness and certainty.

Fraud may be inferred from the facts and circumstances appearing in the case. *Knight v. Nease*, 53 W. Va. 50,

51, 44 S. E. 414; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 964.

The provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish conclusive evidence of a fraudulent intent; but the presumption of law is in favor of honesty, and the court can not presume fraud unless the terms of the instrument preclude any other inference. *Williams v. Lord*, 75 Va. 390.

(2) Onus Probandi.

The onus probandi is on him who alleges fraud, and if the fraud is not strictly and clearly proved as it is alleged, relief can not be granted, although the party against whom relief is sought may not have been perfectly clear in his dealings. *Harden v. Wagner*, 22 W. Va. 356; *Pusey v. Gardner*, 21 W. Va. 469; *Scott v. Rowland*, 82 Va. 484, 4 S. E. 595; *Fischer v. Lee*, 98 Va. 159, 35 S. E. 441; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960; *Keneweg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773, 775; *Smith v. Smith*, 48 W. Va. 51, 55, 35 S. E. 876; *Edgell v. Smith*, 50 W. Va. 349, 358, 40 S. E. 402; *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41.

Until the facts and circumstances relied on and proved to establish fraud make out a case from which fraud will at least be presumed, the defendant to a bill to set aside a transaction as fraudulent is not required to explain such facts and circumstances, although they are not altogether free from suspicion. *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497.

Where a subsequent creditor of a grantor assails, in a chancery suit, a deed made by the grantor as voluntary and fraudulent, the recitals in the deed that the grantee had paid the grantor a valuable consideration is not evidence against the creditor of such payment; and the burden of proving that a val-

uable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor. *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847.

(3) Shifting of Burden.

When the evidence shows a prima facie case of fraud, the burden shifts to the upholder of the transaction to establish its fairness. *Herring v. Wickham*, 29 Gratt. 628; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Engleby v. Harvey*, 93 Va. 440, 445, 25 S. E. 225; *Sutherland v. March*, 75 Va. 223; *White v. Perry*, 14 W. Va. 66; *Martin v. Smith*, 25 W. Va. 579; *Boggess v. Richards*, 39 W. Va. 567, 20 S. E. 599; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *American Net., etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960.

b. As Affected by Consideration.

It is well settled that the consideration named in a deed may be enquired into. *Summers v. Darne*, 31 Gratt 791, 804. But he who undertakes to show a different consideration, must do it by satisfactory proof. *Click v. Green*, 77 Va. 827. And when the consideration is inquired into, and it is shown that the conveyance is founded upon a valuable consideration, the burden of proving that the deed is fraudulent in fact, rests upon the creditor assailing it. *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41.

Where a deed is assailed by a creditor of the grantor, on the ground that it was not upon consideration deemed valuable in law, the burden of proving that the deed was made for a valuable consideration rests on the grantee, or persons claiming the benefit of the deed. *Knight v. Nease*, 53 W. Va. 50, 51, 44 S. E. 414.

When a conveyance is attacked by creditors of the grantor on the ground of fraud, the burden is upon the grantee to prove full payment of an adequate

consideration for the property, and, if it appear that, in addition to the land, he received from the grantor certain choses in action, his failure to show such payment of such consideration for the assignment of such choses in action as well as part of the alleged purchase money of the land, is potent evidence of fraud in the entire transaction. *Colston v. Miller*, 55 W. Va. 490, 491, 47 S. E. 268.

Where the creditor of a grantor assails in a chancery suit a deed made by a grantor as voluntary and fraudulent, the recitals of the deed that the grantee had paid the grantor a valuable consideration are not evidence against the creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960.

Where a creditor files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money, or, if the deed was executed in payment of existing debts, to prove the existence and validity of such debts. *Knight v. Capito*, 23 W. Va. 639.

When such conveyance is made in consideration of a pre-existing indebtedness, it is a badge of fraud for the grantee to retain the evidence of such indebtedness in his possession uncanceled, after the conveyance has been completed. *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816.

Mere inadequacy of consideration in the absence of fraud will not invalidate a conveyance. *Tebbs v. Lee*, 76 Va. 744.

Where a creditor files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such

creditor's debts are older than the deed, the burden is on the grantee, to prove the payment of the purchase money, or, if the deed was executed for the payment of existing debts, to prove the validity of such debts. *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960.

c. As Affected by Possession.

See ante, "Possession, Use and Apparent Ownership Unchanged," IV, F, 2.

The vendor's continuing in possession of goods and chattels after an absolute sale raises a legal presumption that the sale is fraudulent as to creditors of the vendor, which throws upon the vendee, imperatively, the burden of proving the fairness and good faith of the transaction; and this can not be done without sufficient evidence that the sale was for a fair and valuable consideration, and that the vendor did not continue to have an interest in the property by secret understanding; and in the absence of all evidence to show such consideration, or in the absence of all evidence from which the inference can be fairly drawn, that the vendor did not continue to have an interest in the property, the legal presumption that he did, and that the sale was not for such consideration, becomes absolute and conclusive; and the same will be the conclusion, though there is some evidence on these subjects, if it is insufficient to rebut the strong legal presumption arising from the vendor's retention of possession after the sale. *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. 171; *Curd v. Miller*, 7 Gratt. 185; *Bindley v. Martin*, 28 W. Va. 773.

And the fact of possession remaining with the mortgagor five years without demand made and pursued by one process of law on the part of the mortgagees, does not make a case in which, under the statute of frauds, the property is taken to be with the possession, and liable to the creditors of the person in possession. *Rose v. Burgess*, 10 Leigh 186.

d. Transactions between Relatives.

See ante, "Confidential Relations," IV, H.

In transactions between a father and his child, husband and wife, brother and sister, between whom there exists a strong natural motive to provide for each other, at the expense of existing creditors, it requires less proof to show fraud, where they are sought to be impeached as fraudulent; and, on the other hand, when a prima facie case is made, it requires much stronger proof to show fair dealing than would be required if the transaction were between strangers. *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451; *Coleman v. Cocke*, 6 Rand. 618.

If a conveyance be made by a father to his son in consideration of old debts alleged to be due from the father to the son, and the same is impeached by his creditors as having been made with intent to hinder, delay and defraud them in the collection of their debts, the son will be held to stricter proof of his honesty in dealing with his father, than a stranger would be. *Knight v. Capito*, 23 W. Va. 639.

Where a bill is filed by a creditor alleging that a deed from a father to his son was in fact voluntary, although reciting on its face a valuable consideration, and the son in his answer denies the allegation, and claims that he paid a valuable consideration for the land, the burden of proof is on the son, to show that a valuable consideration was paid, and the recital of the deed is no evidence against the creditor. *Himan v. Thorn*, 32 W. Va. 507, 9 S. E. 930.

When the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction should be considered or was intended as a loan to the husband by the wife, and not

a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift. *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871.

c. Transactions between Husband and Wife.

See ante, "Husband and Wife," IV, H, 3.

Where creditors of the husband seek to subject real estate claimed by the wife, which has been conveyed to her, either directly or indirectly from her husband, the burden of showing that it was paid for by her out of her separate estate rests upon her, and, in the absence of such proof, it would be presumed that the purchase money was furnished by her husband. *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 267; *Mayhew v. Clark*, 33 W. Va. 387, 10 S. E. 785; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560; *Yates v. Law*, 86 Va. 117, 9 S. E. 508; *Spence v. Repass*, 94 Va. 716, 27 S. E. 583; *Crowder v. Garber*, 97 Va. 565, 34 S. E. 470; *McConville v. National Val. Bank*, 98 Va. 9, 34 S. E. 891; *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279; *Maxwell v. Hanshaw*, 24 W. Va. 405; *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451; *Stockdale v. Harris*, 23 W. Va. 499; *McMasters v. Edgar*, 22 W. Va. 673; *Rose v. Brown*, 11 W. Va. 122; *Core v. Cunningham*, 27 W. Va. 206; *Herzog v. Weiler*, 24 W. Va. 199, 203; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828; *Martin v. Warner*, 34 W. Va. 182, 12 S. E. 477; *Walker v. Peck*, 39 W. Va. 325, 19 S. E. 411; *Kinnier v. Woodson*, 94 Va. 711, 27 S. E. 457; *Yates v. Law*, 86 Va. 117, 9 S. E. 508.

In a suit by creditors to set aside a deed to secure notes executed to the grantor by his wife, the grounds for setting aside being fraud, where the wife claims that the original transaction represented a loan by her to him, the burden is on her to show that fact, and also a contemporaneous promise

by him to pay the debt. *Darden v. Ferguson*, 2 Va. Dec. 496.

Where a husband conveys a judgment to a trustee for the benefit of his wife, or executes a deed of trust for the same purpose, the burden is thrown upon the wife to show, as against creditors attacking either for fraud, that the transaction was fair and bona fide, to so secure to her a subsisting and valid debt. *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451.

If property is alleged to have been purchased by a wife, or a conveyance of property is made to her during coverture, the burden is upon her to prove distinctly that she paid for it with means not derived from her husband. Evidence that she made the purchase, or that the property was conveyed to her, amounts to nothing, unless it is accompanied by clear and full proof that she paid for it with her own separate estate; and in the absence of such proof the presumption is that her husband furnished the means to pay for it and it will be subject to his debts. *McMasters v. Edgar*, 22 W. Va. 673; *Stockdale v. Harris*, 23 W. Va. 499; *Brooks v. Applegate*, 37 W. Va. 373, 16 S. E. 585; *Grant v. Sutton*, 90 Va. 771, 19 S. E. 784.

Where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift; and in order to constitute such delivery a loan, as against the creditors of the husband, the wife must prove an express promise of the husband to repay, or establish by the circumstances that it was a loan, and not a gift. *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871.

In *Morriss v. Harveys*, 75 Va. 726, the court declared that, while it is true that neither a judgment nor the substitution of other securities will prevent a court of equity, when a deed is sought to be impeached, as voluntary, from looking to the original cause of

action to ascertain whether it was a subsisting debt contracted at the time the deed was made, and where the right of third persons have intervened, as in the case of a settlement upon a wife and children, it is certainly competent for them to show, if they can, that not only the judgment, but the debt upon which it is founded, has been satisfied and discharged by the substitution of a new security. The burden of proving that a transfer by the husband to his wife's brother was bona fide and for a valuable consideration rests upon the wife and upon the creditors. And in *Herzog v. Weiler*, 24 W. Va. 199, an insolvent husband transferred to his wife's brother, by deed for an alleged valuable consideration, his personal property; soon thereafter the brother transferred the property in like manner to another brother, and the latter immediately transferred it to his sister, the wife of the insolvent husband, as a gift in consideration of fraternal affection. In a controversy between the wife and the creditors of the husband as to the right to have the property subjected to the payment of debts contracted by the husband before he made the transfer, the above principle was laid down.

Where there is a transfer of property, either directly or indirectly, by an insolvent husband to his wife during coverture, it is justly regarded with suspicion; and unless it fairly appears that it was entirely free from any wrongful intent or purpose to withdraw the property from the husband's creditors, it will not be sustained. And in such transfer there is a presumption against the wife in favor of the husband's creditors which she must overcome by affirmative proof. *Maxwell v. Hanshaw*, 24 W. Va. 405.

f. Indebtedness as an Element.

Hutchinson v. Kelly, 1 Rob. 123 (1842), the presumption of fraud, in respect to voluntary conveyances when there are existing debts, came before

the court for consideration. The conclusion drawn from the cases by Chancellor Kent in *Reade v. Livingston* (N. Y.), 3 Johns. Ch. Rep. 500, that if the grantor be indebted at the time of a voluntary conveyance it is presumed to be fraudulent in respect to debts then existing, and no circumstances can repel the legal presumption of fraud, was approved by Judge Stanard but was disapproved by Judge Baldwin, who rendered the opinion of the court. The principle was declared by Judge Baldwin to be, that, while the indebtedness of the grantor at the time of a voluntary conveyance raises a legal presumption against its validity, yet the presumption is only prima facie and not conclusive. The principles laid down in this case were approved in the *Bank of Alexandria v. Patton*, 1 Rob. 499 (1843). See also, ante, "Transfers Which Are Voluntary or upon Consideration Not Deemed Valuable in Law," V.

g. Intent of Grantor.

Under W. Va. Code, 1899, ch. 74, relating to fraudulent conveyances, etc., a bona fide purchaser for a valuable consideration, who has no notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor, is protected. But when the plaintiff has shown that the conveyance was made by the grantor with intent to delay, hinder, or defraud creditors, then the grantor must meet this by showing that he was a purchaser for value, and without notice of the fraudulent intent of his grantor; and the recital in the deed of the payment of the purchase money is not sufficient. *Blackshire v. Pettit*, 35 W. Va. 547, 14 S. E. 132. See also, ante, "The Intent to Hinder, Delay or Defraud," IV, E.

And where the facts and circumstances connected with a fraudulent conveyance necessarily establish the complicity of the grantee in the fraudulent intent of the grantor, it is not

necessary by direct proof to show notice of such intent to the grantee. *Core v. Cunningham*, 27 W. Va. 206.

h. Date When Debt Contracted.

The onus is on the creditor to show that his debt was contracted before the deed was recorded, in order to render the property liable therefor. *Scott v. Jones*, 76 Va. 233.

2. Competency and Admissibility.

a. In General.

Large latitude is always given to the admission of evidence where the charge is fraud. *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505. And it seems well settled, that the rule in *pari delicto potior est conditio defendendis*, does not apply, where the policy of the law requires that a fraudulent or vicious conveyance should be enforced; and, therefore, where a debtor makes a fraudulent conveyance of his property, for the purpose of protecting it from his creditors, the fraudulent grantee may enforce such conveyance in a court of law, and the debtor will not be allowed to defeat the claim by proving fraud. *Starke v. Littlepage*, 4 Rand. 368.

So the maxim, "*Nemo allegans suam turpitudinem audiendus est*," if it be law, does not apply, where it is the creditors of the parties who assail the deed, and call on one of them to prove the fraud. *Brown v. Molineaux*, 21 Gratt. 539.

Where Pleadings Do Not Charge Fraud.—Where, in the pleadings, no charge of fraud is made, evidence is inadmissible to show that the arrangement made, whereby land conveyed absolutely to a third party was to be paid for with plaintiff's money, and held in trust for her, was made fraudulently, with a view to hinder, delay, and defraud plaintiff's creditors. *Leath v. Watson*, 89 Va. 722, 17 S. E. 4.

b. Evidence Inadmissible by Reason of the Incompetency of Parties to Testify.

See generally, the titles HUSBAND AND WIFE; WITNESSES.

Husband and Wife.—In *William & Mary College v. Powell*, 12 Gratt. 371, a postnuptial settlement was made by a husband upon his wife. The wife afterwards died; then a bill was filed by a creditor of the husband, against her children, to set aside the settlement as fraudulent as to the creditor. The court held that the husband was not a competent witness to prove the consideration upon which the settlement was made. So where the husband and wife are both parties, and interested, their evidence is not admissible, because they are incompetent to testify. See, in accord, *Perry v. Ruby*, 81 Va. 317; *Burton v. Mill*, 78 Va. 468; *Thornton v. Gaar*, 87 Va. 315, 12 S. E. 753; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805; *Scott v. Rowland*, 82 Va. 484, 4 S. E. 595.

It is well settled that, in a suit in equity by a creditor to impeach a conveyance from a husband to his wife for fraud, neither the husband nor the wife is competent to testify, upon the ground that both are directly interested in the result of the suit. *Hoge v. Turner*, 96 Va. 629, 32 S. E. 291; *William & Mary College v. Powell*, 12 Gratt. 371, 372; *Burton v. Mill*, 78 Va. 468, 470; *Perry v. Ruby*, 81 Va. 317; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Crabtree v. Dunn*, 86 Va. 593, 11 S. E. 1053; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805.

Upon the same principle, both husband and wife are equally incompetent in a suit by the wife on an indemnifying bond, where the creditor has elected to proceed at law. It is true that to the suit in equity both husband and wife would be parties, while in the action upon the indemnifying bond the wife is alone a party to the record, but the matter in controversy, the alleged fraudulent transfer, is as much an issue in the one case as in the other. Neither the husband nor the wife could testify in a suit in equity to impeach for fraud a conveyance from a husband

to his wife, because both are interested in the result of the suit; and, for the same reason, neither of them is competent to testify where the question of fraud is being tried in a proceeding at law. The husband, though not a party to the record, is directly interested in the result of the action, and this is sufficient to disqualify the wife as a witness. *Hoge v. Turner*, 96 Va. 629, 630, 32 S. E. 291.

c. To Prove Consideration.

See generally, the titles EVIDENCE, vol. 5, p. 295; PAROL EVIDENCE.

When the deed is assailed by third parties on the ground of fraud, it is admissible to show, in addition to the consideration expressed in the deed, that a substantial and valuable consideration was paid, or the converse. *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799. And this principle is extended to the introduction of parol evidence to show other valuable consideration, where a deed is made in consideration of "natural love and affection," and the further consideration of "one dollar." *Harvey v. Alexander*, 1 Rand. 219.

In *Eppes v. Randolph*, 2 Call 125, decided in 1799, and before the provision making any gift, conveyance, etc., upon consideration of marriage, void as to existing creditors (see Va. Code, 1887, § 2459), and therefore not in the light of that provision, it was held, that although a deed does not mention that it was made in consideration of a marriage contract, the party may, nevertheless, aver and prove it.

d. Recitals in Deed.

It is the settled law of this state that the recital in a deed of the payment of a valuable consideration for the property therein conveyed is not admissible as evidence of such payment as against a stranger or a creditor of the grantor assailing the deed as voluntary, and fraudulent as to him. *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41; *Childs v.*

Hurd, 32 W. Va. 66, 9 S. E. 362; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960. See also, *Blubaugh v. Loomis*, 48 W. Va. 666, 37 S. E. 794.

The recital in a postnuptial settlement of a consideration for the deed, is evidence against persons claiming under the settler, but not against the creditors of the settler contesting the fairness or the validity of the deed. *Blow v. Maynard*, 2 Leigh 29; *Lawrence v. Blow*, 2 Leigh 29; *Perry v. Ruby*, 81 Va. 317; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1.

Under Va. Code, 1887, § 2461, after a loan to a person with whom, or with those claiming under him, possession has remained five years, a deed is made by the lender, declaring the original loan and continuing it; but this deed is never admitted to record, the deed can not affect the creditor of the person in possession and ought not to be received as evidence against such creditors. *Pate v. Baker*, 8 Leigh 80.

e. Declarations and Admissions.

See generally, the title DECLARATIONS AND ADMISSIONS, vol. 4, p. 325.

Self-Serving Declarations.—A party's self-serving declarations can not be put in evidence in his own favor, whether he be living or dead at the trial. *Edgell v. Smith*, 50 W. Va. 349, 357, 40 S. E. 402. See also, *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799.

Prior to and at the Time of Executing Transfer.—Parol declarations of a grantor previous to the execution of a deed, and at the very moment of executing it, are admissible to explain the intention with which it was made. *Land v. Jeffries*, 5 Rand. 211.

Subsequent to Transfer.—It is a well-settled rule of evidence that the declarations of the grantor, made subsequent to the conveyance, are not admissible to affect the title of his grantee; and this is most certainly true

if made a year subsequent. *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799; *Claytor v. Anthony*, 6 Rand. 285; *Edgell v. Smith*, 50 W. Va. 349, 357, 40 S. E. 402.

The statements of a vendor made after a sale and conveyance of realty or personalty, and during the continuance in possession of the vendor as agent and manager of the vendee, are not evidence in chief either to disprove the purchaser's title or to establish fraud in the sale, when the other evidence in the case failed to involve the transaction between the parties in such doubt or uncertainty or raise a reasonable apprehension of collusion, as would warrant a resort to the statements of the vendor after he had parted with the property, though holding a possession inconsistent with the change of ownership. *Robinson v. Pitzer*, 3 W. Va. 335.

Where fraud in the sale and purchase of property is in issue, the evidence of other frauds of like character, committed by the same party, at or about the same time, is admissible. *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505.

f. Documentary Evidence.

See generally, the title DOCUMENTARY EVIDENCE, vol. 4, p. 756.

In a suit between S., trustee in a deed for the wife of the grantor, and B., a creditor of the grantor, the deed is held to be fraudulent to the amount of one thousand, four hundred and eighty-three dollars; much more than sufficient to pay B.'s debt. W., another judgment creditor of the grantor, files a bill, in which he states his debt and the decree in the former suit; and asks that S. may be decreed to pay plaintiff's debt out of the balance remaining in his hands for which the deed was declared fraudulent. And he files a copy of the record in the first case. S. answers, denying that the deed was fraudulent, and objecting to

the record of the former suit as evidence. Held, if the bill is to be considered as charging fraud in the deed, the answer puts that fact in issue; and the plaintiff not having been a party or privy in the first suit, the record is not competent evidence. *Winston v. Starke*, 12 Gratt. 317.

3. Weight and Sufficiency.

a. General Consideration.

The evidence of fraud must be sufficient to satisfy the conscience of the court. *Moore v. Ullman*, 80 Va. 307; *Burruss v. Trant*, 88 Va. 980, 14 S. E. 845.

It requires more than mere suspicion to establish fraud. *Keneweg v. Schilansky*, 47 W. Va. 287, 34 S. E. 773, 775. See also, *Gross v. Lewis*, 54 W. Va. 433, 46 S. E. 174.

While no rule can be laid down as to the extent of evidence required to set aside a conveyance as fraudulent, it must satisfy the chancellor's conscience, and it may be, and generally must be, circumstantial. *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Moore v. Ullman*, 80 Va. 307. See also, post, "Circumstantial Evidence," VIII, 1, 3, b.

And if a deed bears upon its face such marks or badges of fraud as to clearly show that the intent of the grantor was to delay, hinder, or defraud his creditors, such deed is fraudulent on its face, and the court will so hold it on inspection. In such case the thing itself speaks, and conclusively proclaims the fraudulent intent, because the grantor is taken to intend what he does, and the natural or necessary consequences of his act. *Dougllass, etc., Co. v. Laird*, 37 W. Va. 687, 17 S. E. 188. And evidence will not be received to contradict such conclusion. *Long v. Meriden, etc., Co.*, 94 Va. 594, 27 S. E. 499.

Where a father confessed judgment in favor of his son, and creditors of the former brought his bill charging

that the judgment was without consideration and intended to hinder, delay, and defraud the father's creditors; the latter answered specifically, denying the charges. The case being heard on the bill and answer without depositions was dismissed. Held, no error. *Saunders v. James*, 85 Va. 936, 9 S. E. 147.

The answer to a bill under oath denied fraud, and averred that the lands were conveyed to a sister to satisfy a judgment she had against F. There was no proof of fraudulency of judgment. Executions had been held up by order of the sister. The plaintiff relied on loose declarations as to ownership of the lands. F. had acted for years as the sister's agent, and she had an income from other property. Held, that the fraud was not proved. *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743.

To sustain the claim of payment of consideration in a case where a conveyance is attacked as in fraud of creditors, when the amounts are large, the testimony of the grantee, if uncorroborated by receipts, memoranda, or other documentary evidence, must be clear, positive, definite, consistent with other evidence offered by him, and free from self-contradiction. *Colston v. Miller*, 55 W. Va. 490, 491, 47 S. E. 268.

A deed of trust requiring a release from creditors accepting it was held good on its face but fraudulent in fact, because the pleadings and evidence showed, that the grantor was a merchant, and within three months before the deed was executed he bought on credit about \$5,000 worth of goods and sold for cash below their market value, and when the deed was made he had only about \$2,000 worth of goods on hand, and no accounts due him for goods sold except \$81, and admitted only \$58.27 on hand in cash, and made no explanation whatever showing how he had disposed of the cash received for the goods. *Clarke v. Figgins*, 27 W. Va. 663, 664.

Effect of Preponderance.—If a husband conveys a tract of land to his wife, and the conveyance is attacked by his creditors, the deed should be set aside if the evidence is conflicting; though the preponderance is against the good faith of the transaction. *Noyes v. Carter*, 2 Va. Dec. 218.

b. Circumstantial Evidence.

See generally, the title CIRCUMSTANTIAL EVIDENCE, vol. 2, p. 817.

While the burden of proving a deed fraudulent as to creditors is upon the creditors, positive evidence of fraudulent intent is not required, but it may be deduced from the circumstances of the transaction and the relation and situation of the parties to it and to each other. Circumstantial evidence if adequate to satisfy the court of such fraudulent intent, is sufficient, and often the only evidence attainable. *Reynolds v. Gawthrop*, 37 W. Va. 3, 10 S. E. 364; *Moore v. Ullman*, 80 Va. 307; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892; *Parker v. Valentine*, 27 W. Va. 677; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780.

While fraud must be clearly proved and the burden of proof rests on him who alleges it, it may be proved by circumstances. *Herring v. Wickham*, 29 Gratt. 628; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Engleby v. Harvey*, 93 Va. 440, 445, 25 S. E. 225; *Sutherland v. March*, 75 Va. 223, 236; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523; *Moore v. Ullman*, 80 Va. 307; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *White v. Perry*, 14 W. Va. 66, 86; *Martin v. Smith*, 25 W. Va. 579, 589; *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938; *Lockhard v. Beckley*, 10 W. Va. 87; *Livesay v. Beard*, 22 W. Va.

585; *Sturm v. Chalfant*, 38 W. Va. 248, 18 S. E. 451; *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451; *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170.

It is not always necessary that direct affirmative or positive proof of fraud be given. It may be, and usually is, proved by circumstantial or presumptive evidence. If the evidence is sufficient to satisfy the mind and conscience of the existence of the fraud, it will be sufficient, although it does not lead to a conviction of absolute certainty. The fraud need not be proved beyond a reasonable doubt. *Knight v. Nease*, 53 W. Va. 50, 44 S. E. 414; *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170; *Moore v. Gainer*, 53 W. Va. 403, 44 S. E. 458.

Fraud can not generally be proven by explicit evidence. In no class of cases does circumstantial evidence play a more active and appropriate part than in fraud cases, and necessarily so, else fraud would run riot in the land, and honest creditors would be at the mercy of chicanery and covin. The parties plan to hide. The law warrants the use of such evidence. It is not necessary that fraudulent intent be proven beyond doubt, so that a case of fair and reasonable probability be established, nor readily explainable on other hypothesis. *Vandevort v. Fouse*, 52 W. Va. 214, 43 S. E. 112; *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854; *Horne v. Huffman*, 52 W. Va. 40, 51, 43 S. E. 132.

Circumstantial evidence is not only sufficient to establish fraud, as between a grantor and grantee in relation to creditors, but, on account of the secrecy of such transactions, is often the only evidence that can be obtained. *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170.

c. Nature and Circumstances of the Transaction.

See ante, "Elements and Badges of Fraud," IV, F.

A fraudulent intent need not be established by express proof but may be shown by just legal implication from the evidence where the circumstances are such that the intent may be justly inferred. *Pratt v. Cox*, 22 Gratt. 330. *Johnson v. Wagner*, 76 Va. 587, 591.

As expressed in *Martin v. Rexroad*, 15 W. Va. 512, fraud should be legally inferred from the facts and circumstances of the case, when the facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the sale was made with the intent to hinder, delay or defraud existing or future creditors. And further, where the facts and circumstances in any case are such as to make a prima facie case of fraudulent intent, they are to be taken as conclusive evidence of such intent, unless rebutted by other facts and circumstances in the case. *Goshorn v. Snodgrass*, 17 W. Va. 717; *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 287; *Himan v. Thorn*, 32 W. Va. 507, 9 S. E. 930; *Parker v. Valentine*, 27 W. Va. 677; *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748; *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Ferguson v. Daughtrey*, 94 Va. 308, 26 S. E. 822; *Hedrick v. Walker*, 17 W. Va. 916. See also, *Shaver v. Swartz*, 1 Va. Dec. 56.

In order to set aside a deed on the ground of fraud, the fraud must not only be charged, but clearly proved, and guilty knowledge or participation of the grantee must be shown. But the transaction itself may furnish proof of the fraud so satisfactory and conclusive as to outweigh the answers of the defendants denying the fraud, or even the evidence of witnesses. In the case at bar the fraud of the grantor and participation of the grantee are fully established. *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507.

d. Insolvency.

See generally, the title BANKRUPTCY AND INSOLVENCY, vol.

2, p. 232. And see ante, "Elements and Badges of Fraud," IV, F.

Insolvency does not deprive the owner of property of the right to sell it, unless the sale be made with intent to hinder, delay and defraud his creditors; and even then, the title of the purchaser will not be invalidated if the sale is for valuable consideration, and the purchaser has no notice of the fraudulent intent of the grantor. It is not necessary, however, to prove positive knowledge of the fraudulent intent of the grantor. *Ferguson v. Daughtrey*, 94 Va. 308, 26 S. E. 822.

The fact that a deed of trust of all of an insolvent's property, executed to secure part of his creditors, provides for payment of the surplus to the grantor, is not of itself evidence of fraudulent intent. *Harvey v. Anderson*, 2 Va. Dec. 385.

e. Consideration.

See ante, "Consideration," IV, G; "Consideration," V, C, 2, b.

Where fraudulent intent against creditors is sought to be made out against a transfer of his property by a debtor on the sole ground of inadequacy of consideration, without any other element tending to show fraud, the inadequacy must be so great as fairly to induce the belief of fraudulent intent. *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560.

But it is evidence of fraud for a debtor who is in failing circumstances to convey property for a grossly inadequate consideration. *Livesay v. Beard*, 22 W. Va. 585.

f. Bill Pro Confesso.

And in *Price v. Thrash*, 30 Gratt. 515, it was held, that fraud could be proven by a bill taken pro confesso, in which notice of the fraud is clearly charged. *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. 91.

4. Witnesses.

See generally, the title WITNESSES. And see ante, "Evidence Inadmissible by Reason of the Incompe-

tency of Parties to Testify," VIII, I, 2, b.

Where a deed of trust is impeached as fraudulent, the trustee may be a witness, if he has no interest in the support of the deed, and no participation in the alleged fraud. *Taylor v. Moore*, 2 Rand. 563.

Where the children of a witness, and not his wife, are beneficiaries in a conveyance assailed by the grantor's creditors as voluntary, he is competent in the children's behalf. *Grayson v. George*, 85 Va. 908, 9 S. E. 13.

5. Exceptions and Objections.

See generally, the title EVIDENCE, vol. 5, p. 295.

"Had exceptions to these declarations been taken and the benefit thereof saved, some of them were not admissible against the defendant, Miller, because not made in his presence. *Robinson v. Pitzer*, 3 W. Va. 335; *Houston v. McCluney*, 8 W. Va. 135; *Crothers v. Crothers*, 40 W. Va. 169. But the orders entered in the cause do not show that any objection was made or exception taken at the hearing, and the rule is that except in the case of inadmissibility because of incompetency of the witness, objections of this kind, not made in the court below, are deemed to have been waived and will not be entertained on appeal. *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451, decided at the last term; *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 271, 11 S. E. 927; *Hill v. Proctor*, 10 W. Va. 59, 78. However, it would be absurd to allow such declarations any probative effect against one who never heard them, and unless the other evidence in the cause will support the finding and decree, it can not stand. Prior declarations of the grantor are admissible against him, but they do not prove notice to the grantee, unless heard by or communicated to him. *Bishoff v. Hartley*, 9 W. Va. 100. Subsequent declarations of the grantor are generally inadmissible. 14 Am. & Eng.

Ency. Law (2d Ed.) 495. Such declarations relating to possession inconsistent with the deed are admissible. 14 Am. & Eng. Ency. Pl. Law (2d Ed.) 497." *Colston v. Miller*, 55 W. Va. 490, 493, 47 S. E. 268.

J. INSTRUCTIONS.

See generally, the title INSTRUCTIONS.

In *Addington v. Etheridge*, 12 Gratt. 436, the court held, that when a deed appeared upon its face void as tending to defraud creditors, it was the duty of the lower court to so instruct the jury, saying: "The question whether the said deed was fraudulent per se or not, was one to be decided by the court on an inspection of said deed, and not proper to be submitted to the jury."

K. THE DECREE.

See generally, the titles JUDGMENTS AND DECREES; JUDICIAL SALES.

1. Convening Creditors.

See generally, the title CREDITORS' SUITS, vol. 3, p. 780.

In a suit to have an alleged fraudulent conveyance set aside, and to subject the property to the payment of the creditor's claim, it is not required by the statute or by the general law on the subject, that all of the creditors shall be convened. *Kimble v. Wotring*, 48 W. Va. 412, 424, 37 S. E. 606; *Core v. Cunningham*, 27 W. Va. 206; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *State v. Bowen*, 38 W. Va. 91, 18 S. E. 375; *Blubaugh v. Loomis*, 48 W. Va. 666, 37 S. E. 794. This rule differs from the rule where proceedings are brought for the purpose of enforcing the lien of a judgment upon real estate. See *Dent v. Pickens*, 50 W. Va. 382, 388, 40 S. E. 972.

"In a suit brought to have a conveyance of land declared void as to creditors, and to subject the land to the payment of the debts of such creditors, it is not required by the statute or the general law on the subject that all the creditors of the fraudulent

grantor or debtor should be convened and their debts reported, nor that it would be ascertained whether the rents would pay off the debts in five years before there can be a decree for the sale of such land." *Core v. Cunningham*, 27 W. Va. 206; *State v. Bowen*, 38 W. Va. 91, 18 S. E. 375; *Kimble v. Wotring*, 48 W. Va. 412, 424, 37 S. E. 606.

"Now, while it is true that the state has an additional mode of enforcing its judgments and claims against the real estate of its debtor, provided by statute, which is not conferred upon the private individual, to wit, by levying upon and selling the real estate of such debtor, when there is no question as to the ownership of such real estate, and the title is unobscured by any shadow of fraud, yet when fraud does intervene, and it becomes necessary to invoke the aid of a court of equity to clear away the apparent clouds upon the title, and subject the real estate of such debtor to the payment of its demand, is there anything in the statute which prevents the state, like any other creditor, from having the benefit of § 2, ch. 133, of the Code, which provides that a creditor, before obtaining a judgment or decree for his claim, may institute a suit to avoid a gift, conveyance, or transfer of, or charge upon, the estate of his debtor, which he might, after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover? The state in this case is a 'creditor,' and that would seem all that would be requisite to entitle it to the benefit of said section. In this case, however, the state appears to have obtained a judgment against the appellees, *Alderson Bowen*, and others before it instituted this suit in equity. Can we say that this fact placed the state in any different attitude with reference to the alleged fraudulent con-

veyance than it would have been in if it was merely the owner of the claim by reason of the default of Sheriff Wilkinson? Section 2, ch. 133, was intended to confer upon a creditor who had not obtained a judgment the same right as to instituting a suit to avoid a gift, conveyance, etc., which he might, after obtaining such judgment or decree. Therefore, the state, as a creditor, occupied no worse position as to maintaining a suit to avoid a gift, conveyance, etc., but precisely the same, after obtaining such judgment, as it did before; that is, as any other creditor. Now, while it is true that § 7, ch. 139, of the Code, provides the manner in which a judgment lien may be enforced against the real estate of a debtor, and provides for the disposition of the proceeds of the sale among the lienholders, this section is intended to apply when the title of the real estate sought to be subjected is in the debtor; when it is plain sailing, and no obstruction intervenes. When, however, the creditor is compelled to resort to the provisions of ch. 74 to remove the effects of a fraudulent conveyance, and to use a search light to discover the legal title, new and different rights are accorded to the successful plaintiff. It is not necessary that he should convene the creditors, and make distribution among them, as provided in § 7, ch. 139. The property, if subjected, is subjected as the property of the fraudulent grantee, and the conveyance is only held void as to the plaintiff's claim, it being considered valid and binding as between the parties. In a suit of this character the plaintiff calls upon no creditor to join him and assist in the prosecution of the suit. In unearthing the fraud, and subjecting the real estate to the payment of his claim, he strikes out alone and unaided, and is not compelled to call in anyone to share in the proceeds when captured. It is not required to be either alleged or ascertained that the rents,

issues, and profits of the land will not pay the debts in five years, before there can be a sale of such land. The fact that such suit may be maintained by a creditor under § 2, ch. 133, of the Code, before obtaining a judgment, shows conclusively that a judgment on which an execution has been issued with a return of nulla bona is not required, as a condition precedent to such proceeding, to set aside a fraudulent conveyance as to the creditor. When the plaintiff is successful in a suit of this character, he only uncovers enough of the property fraudulently conveyed to satisfy his demand, and to the portion of the land so discovered and subjected the law gives him the priority of lien. See *Clafin v. Foley*, 22 W. Va. 434. But no such right accrues to a creditor who files his bill under § 7, ch. 139, to enforce his judgment against his debtor's land. In the case of *Core v. Cunningham*, 27 W. Va. 206, 210, Snyder, J., in delivering the opinion of the court, draws the distinction between the proceeding to subject land under these utterly different statutes. He says: 'It is further contended for the appellants that the court should have referred the cause to a commissioner to ascertain the liens and priorities against the land, and to ascertain whether or not the rents and profits would pay the debts in five years. These contentions are evidently founded upon a misapprehension of the object of this suit. It is not simply to enforce a judgment lien against real estate. Its real purpose is to set aside, as to the plaintiff's debt, a fraudulent conveyance, and subject land in the hands of the fraudulent grantee to the payment of such debt. The deed, though ever so fraudulent as to the creditors of the grantor or the husband who paid the purchase money, is nevertheless valid and binding between the parties to the fraud.' Citing *Murdock v. Welles*, 9 W. Va. 552; *Duncan v. Custard*, 24 W. Va. 730. * * * The land should be regarded

and sold as hers, and not as the property of her husband. In cases of this character, it is not proper to convene the husband's creditors, nor to rent the land.' In the case of *Sweeny v. Grape Sugar Co.*, 30 W. Va. 443, 4 S. E. 431, this court held, that 'general creditors, who, by bill, answers, or petition, assail a deed of their debtors conveying land as fraudulent, and succeed, have a lien on such land for their respective debts from the filing of such bill, answer, or petition.' See also, *Clarke v. Figgins*, 31 W. Va. 156, 5 S. E. 643. Not only the object of the suit under these respective chapters of the Code, but the mode of procedure and the results, are so radically different that one can not be said to repeal the other by implication, or to take its place in affording a remedy." *State v. Bowen*, 38 W. Va. 91, 18 S. E. 375, 376.

Where a conveyance is held to be fraudulent on the bill of a single creditor of the grantor, and no other creditors have questioned it, and it does not appear that there are any others, it is error to order a convention of the creditors of the grantor. *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268.

2. Accounting and Report of Debts.

a. In General.

In a suit brought to have an alleged fraudulent conveyance set aside, and to subject the property to the payment of the creditor's claim, it is not required by statute, or by the general law on the subject, that all of the debts of creditors shall be reported. *Core v. Cunningham*, 27 W. Va. 206; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *State v. Bowen*, 38 W. Va. 91, 18 S. E. 375; *Blubaugh v. Loomis*, 48 W. Va. 666, 37 S. E. 794.

It is unnecessary to ascertain the liens existing upon the land before making a distribution of the proceeds of the sale of the land, and the party filing the bill and setting aside the conveyance is entitled to be first satisfied out of such proceeds, unless there

are prior liens. *State v. Bowen*, 38 W. Va. 91, 18 S. E. 375.

In a suit brought to set aside a fraudulent charge upon real estate when there are valid liens on the land, prior to that of the plaintiff, in such suit, and the money secured by them is due and payable, the court should ascertain the amounts and priorities of such liens, and decree the land to be sold to satisfy said liens as well as that of the plaintiff. *Dent v. Pickens*, 50 W. Va. 382, 40 S. E. 972.

b. Where Set-Off Claimed.

Where a creditor brings suit to set aside a fraudulent conveyance of land and to sell the same to pay the debt of such grantor, who claims that he is entitled to credits upon or to set-offs against such debt and wholly fails to prove that he is entitled to any such credit or set-off, it is unnecessary to refer such cause to a commissioner. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

c. To Ascertain Value of Land.

And if a grantor conveys a tract of land to a grantee with intent to defraud his creditors, of which the grantee has notice, and the grantee conveys the land to an innocent purchaser for value, and the first grantee receives this sum, which is proved by the evidence in the cause, and the court sets aside the deed from the first grantor to the first grantee, for fraud, and renders a personal decree for the amount with interest which the first grantee received for the land, it is no error. And there is no necessity for an account to see what the value of the land is, unless the appellant is dissatisfied with the value as fixed by the first grantee, as the first grantee is not prejudiced by being required to pay only what he received in fraud of the creditors of the first grantor. *Hinton v. Ellis*, 27 W. Va. 422.

d. Ascertainment of Rents and Profits.

(1) Virginia Rule.

Code of Virginia 1860, ch. 186, § 9,

requires, that the lien of a judgment may be enforced in equity, but forbids a decree of sale unless it appears that the rents and profits of the land subject to the lien will not satisfy the judgment in five years. Under this statute it was held in *Cronie v. Hart*, 18 Gratt. 739 (1868), that, before setting aside a deed as fraudulent towards creditors, the court should direct an inquiry as to whether plaintiff's debts could not be paid out of the rents and profits of the property conveyed in five years.

(2) West Virginia Rule.

In a suit brought to have an alleged fraudulent conveyance set aside, and to subject the property to the payment of the creditor's claim, it is not required by statute, or by the general law on this subject, that it should be ascertained whether the rents will pay off his debts in five years, or in a reasonable time, before there can be a decree of sale. *Core v. Cunningham*, 27 W. Va. 206; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *State v. Bowen*, 38 W. Va. 91, 18 S. E. 375.

"In the case before us it would probably take some four years' rent of this house and lot to pay the plaintiff's debt and the costs of this suit in the circuit court and in this court. The plaintiff has been delayed in the collection of his debt seven years by the fraudulent conduct of the defendants, and it would be unreasonable to subject him to further and unnecessary delay by renting out this house and lot, in order that the defendants might possibly derive some benefit from this mode of charging this property with the payment of the plaintiff's debt. This house and lot ought, therefore, to be sold to pay the plaintiff's debt, and costs in this court, and in the court below." *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780.

e. When General Relief Prayed.

If in a bill by creditors to set aside a deed of trust for payment of debts,

on the ground that it is fraudulent on its face, the bill does not ask for an account, but there is a prayer for general relief, and the deed is sustained as valid, the plaintiffs are entitled to an account. And in such case, the court below having dismissed the bill generally, and it not appearing that the plaintiffs asked for an account or that the court considered the question, the appellate court will affirm the decree sustaining the deed, and reverse it as to the account; but with costs to the appellee. *Marks v. Hill*, 15 Gratt. 400.

And in *Beall v. Silver*, 2 Rand. 401, a creditor obtained judgment against his debtor, without running interest, and his execution was obstructed by a fraudulent conveyance made by the debtor, of his property. Subsequently a suit in chancery was brought to remove the obstruction of the conveyance, and for relief generally. The court declared that it was proper for the chancellor to decree the interest, as well as to set aside the conveyance; the prayer for general relief being sufficient to cover the demand for interest.

In *Austin v. Winston*, 1 Hen. & M. 33. the court declared, that where a transaction between a debtor and certain of his creditors, is intended by them both to defraud the other creditors of the debtor, but the latter, under all the circumstances of the case, is not so culpable as the former, it would seem that a court of equity ought not, altogether, to refuse relief to the debtor, but should apportion the relief granted to the degree of criminality in both parties, so as, on the one hand, to avoid the encouragement of fraud, and on the other, to prevent extortion and oppression.

In *Beall v. Silver*, 2 Rand. 401, a creditor obtained judgment against his debtor, without running interest, and his execution was obstructed by a fraudulent conveyance made by the debtor, of his property. Subsequently a suit in chancery was brought to re-

move the obstruction of the conveyance, and for relief generally. The court declared that it was proper for the chancellor to decree the interest, as well as to set aside the conveyance; the prayer for general relief being sufficient to cover the demand for interest.

M. conveys land to H. in trust, to secure certain debts. After the deed is recorded, C. and D. recover judgments against M.; and then M. and H., the principal creditor in the trust deed, unite to sell and convey the land to G., and G. pays one-half cash, and gives his notes in one and two years for the balance of the purchase money; all of them having notice of the judgments. H. proceeds at once to pay off the debts secured by the deed, and pays the whole balance of the purchase money to M., before the notes of the purchaser are due. Held, though the bill seeks to set aside the deed for fraud, yet, as it makes a case entitling C. and D. to be paid out of the purchase money of the land, and asks for general relief, though the fraud is not proved, they may have the purchase money applied to the payment of their judgments. *Hale v. Horne*, 21 Gratt. 112.

3. Decree as to the Sufficiency of Property to Pay Debts.

Where a deed of trust to secure creditors has been assailed by an unsecured creditor, and one of the secured debts has been stricken out by the appellate court as fraudulent, that court will not, upon mere estimates of the value of the property conveyed, declare that it is not more than sufficient to pay the other secured creditors whose debts are not disputed. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

4. Sale and Distribution.

a. Propriety of Sale.

(1) General Consideration.

When, in a suit to set aside a deed of conveyance as fraudulent and void as to the plaintiff's debt, and to sell

the real estate therefor, the court ascertains and decrees that it is so fraudulent and void, it is error not to decree further, and set aside said deed and provide for the sale of the property conveyed to pay the debt. *Chrislip v. Teter*, 43 W. Va. 358, 27 S. E. 288; *Coleman v. Cocke*, 6 Rand. 618; *Cronie v. Hart*, 18 Gratt. 739.

And if the sale or conveyance is fraudulent, and gives unlawful preferences, then such sale or conveyance will be set aside, and a resale be made, so far as may be necessary to pay the honest claims against such insolvent fraudulent debtor. *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554.

Where a deed is proven to have been made on a secret trust in fraud of the grantor's creditor's it will be set aside; and the land subjected to the payment of the debts due the creditors. And a cosurety who has paid the debt by reason of the principal's insolvency, and has been subrogated to the lien of the judgment paid, may have the land conveyed subjected to the payment of his claim. *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848.

(2) When Trustee Is a Nonresident.

In a suit by judgment creditors against their debtors and others to set aside a deed of trust and to subject the land to the payment of their debts, it appeared that the trustee living out of the state, was not a party to the suit, and had not signed the deed; but it did not appear that he had accepted or acted under it. It was held, that the court might properly decree a sale of land, and appoint a commissioner to make the sale. *Barger v. Buckland*, 23 Gratt. 850.

(3) Land of Deceased Fraudulent Grantor—Exhaustion of Personal Estate.

See generally, the titles EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483; MARSHALING ASSETS AND SECURITIES.

Where a creditor institutes suit after

the death of the debtor to set aside a deed of land made by him as voluntary and fraudulent, the court should not set the deed aside, or subject the land to the payment of the debt, till it has ascertained whether the personal estate in the hands of the personal representative will pay all his debts, and if it will not, till it has applied to the payment of this debt so much of the personal estate as is properly applicable to its payment. *Boggs v. McCoy*, 15 W. Va. 344.

b. Determining Priorities.

It is a well-settled rule that where there are conflicting claims to priority out of the proceeds of land about to be sold to satisfy the lien upon it, the court in order to prevent the danger of sacrificing the property by discouraging creditors from bidding as they probably might if their right to satisfaction of their debts and the order in which they were to be paid out of the property, were previously ascertained, should declare the order of payment before it decrees the sale to be made. *Iaeger v. Bossieux*, 15 Gratt. 83, 103; *Buchanan v. Clark*, 10 Gratt. 164; *Bristol Iron, etc., Co. v. Caldwell*, 99 Va. 48, 27 S. E. 838; *Cole v. McRae*, 6 Rand. 644.

c. Sale of Realty Prior to Ascertaining Rights.

If there be several parties who claim to be paid their debts, and to be indemnified for securityship out of the debtor's land and chattels conveyed by deeds, and there be an adversary creditor by judgment, who claims to have the deeds set aside for fraud, and the property sold to pay his judgment debt, an interlocutory decree, which, without deciding on the validity of the deeds, or the extent to which, and in what order the several debts are chargeable on the property, yet directs that the lands conveyed shall be sold for cash and the proceeds to be paid in to bank to the credit of the cause, is premature and erroneous, because it

has a tendency to sacrifice the property by discouraging the creditors from bidding as they probably would, if their right to the satisfaction of their debts had been previously ascertained. *Cole v. McRae*, 6 Rand. 644.

d. Sale of Personalty Prior to Ascertaining Rights.

If there be several parties who claim to be paid their debts, and to be indemnified for securityship out of the debtor's land and chattels conveyed by deeds, and there be an adversary creditor by judgment, who claims to have deeds set aside for fraud, and the property sold to pay his judgment debts, an interlocutory decree, which, without deciding on the validity of the deeds, or the extent to which, and in what order the said several deeds are chargeable on the property, may direct that the personal property be sold for cash and the proceeds be paid in to the bank to the credit of the cause. Such a decree may be proper because it regards the sale of chattels, which are perishable, liable to be wasted, and no sacrifice can be apprehended, because they may be sold in detail. *Cole v. McRae*, 6 Rand. 644.

e. Sale of Property Other than That Conveyed.

And where a deed void as to creditors, is valid as between the parties, in a suit by the grantor's creditors to subject the lands to payment of their claims, other property of the grantor in the hands of parties to the suit will be so applied to the payment of the claims. *Fones v. Rice*, 9 Gratt. 568.

f. Amount of Land to Be Sold.

A Moiety Only of the Land Decreed to Be Sold.—If a judgment debtor has conveyed away lands fraudulently, and retained other lands, the court on setting aside the conveyance at the suit of a judgment creditor, should direct a sale of a moiety of the whole, embracing in the moiety decreed to be sold, the land not conveyed by the debtor, and taking only so much of the

land conveyed as will, with the land retained by the debtor, constitute a moiety of the aggregate of the whole. This was the rule, as declared in *McNew v. Smith*, 5 Gratt. 84 (1848), decided prior to the Virginia Code, 1849.

Upon setting aside a conveyance of real estate as fraudulent, at the suit of a judgment creditor, the court can decree the sale of only one moiety of the land to satisfy the judgment. *McNew v. Smith*, 5 Gratt. 84, 88; *Stileman v. Ashdown*, 2 Atk. R. 477; *Haleys v. Williams*, 1 Leigh 140; *McClung v. Beirne*, 10 Leigh 394; *Buchanan v. Clark*, 10 Gratt. 164, 177.

On a bill against fraudulent donees of a deceased person and his heir to subject the lands conveyed and those descended, the whole may be decreed to be sold to satisfy the plaintiff's debt. *Blow v. Maynard*, 2 Leigh 29.

g. Application of Proceeds.

Where a grantor executes successive deeds of the same property to secure different debts, none of them being given subject to those previously executed, if any of the deeds are subsequently declared void as in fraud of creditors, the proceeds of the property must be applied to the payment of the remaining valid incumbrances in the order of their priorities, before any claims of unsecured creditors of the grantor can be paid. *Lewis v. Caperton*, 8 Gratt. 148.

Surplus after Payment of Valid Debt Secured.—And though a trust deed is held to be valid in a suit by a judgment creditor to set it aside the creditor is entitled to the surplus after paying the debt secured. *Sipe v. Earman*, 26 Gratt. 563.

5. Receivership.

See ante, "Injunction and Receiver." VIII, B, 7.

If there be several parties who claim to be paid their debts, and to be indemnified for securityship out of the debtor's land and chattels conveyed by deeds, and there be an adversary cred-

itor by judgment, who claims to have the deeds set aside for fraud, and the property sold to pay his judgment debts, the lands should, in such case, be paid into the hands of a receiver, to be rented out, until the rights of the parties in respect to that subject, are determined, having due regard to the rights of the widow of the debtor. *Cole v. McRae*, 6 Rand. 644.

6. Personal Decree.

In a suit to subject lands to the payment of a lien and to set aside fraudulent conveyances, the report of sale having been made, and it being found that the sale will not produce sufficient money to pay the lien, expense of sale, and costs, a personal decree should be rendered against all the fraudulent grantors and grantees for any costs remaining after providing for the payment of the liens and expenses of sale. *Hinton v. Ellis*, 27 W. Va. 422.

Where the property is still in possession of the fraudulent purchaser, the creditor can not take a personal money decree for his debt, or the value of the property, against the purchaser, but must subject the property itself; however, if the fraudulent purchaser has sold the property to a bona fide purchaser, so that it can not be reached, the creditor may have a money decree against the fraudulent purchaser for the amount he received for the property, or if that be less than its actual value, then for such value; if the bona fide purchaser yet owes for the property, the money in his hands may be followed and subjected in his hands. *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. 553.

A creditor can not have a judgment for the recovery of money against the grantee of a debtor on mere proof that the conveyance was fraudulent. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46.

In a creditors' suit in chancery to avoid divers fraudulent conveyances

made by the common debtor to different colluding grantees, all or an intermediate number of whom are made parties, the plaintiffs may elect to proceed wholly against any one of such grantees. And where such grantee, against whom plaintiffs elect to proceed, has, in the meanwhile, aliened the property received by him, and a personal decree is entered against him for the full amount of the plaintiffs' claim (not exceeding the value of the debtor's interest in the property so received by him), such grantee is not entitled to a decree over against his codefendants for contribution. *Ellington v. Moore*, 4 Va. Law Reg. 608.

In *Greer v. Wright*, 6 Gratt. 154, a defendant, to evade the payment of an anticipated judgment, transferred to his brother two bonds, executed by two obligors, and also his interest in the real estate of his deceased father. Judgment was rendered against him, and he took the oath of an insolvent debtor and surrendered nothing. The plaintiff then filed a bill against the defendant and his brother, and one of the obligors and the sheriff, and obtained a decree setting aside the transfers. It was held that, in the first instance, it was erroneous to make a joint and personal decree against the defendant and his brother, but it should have been against the two obligors for the amount they respectively owed.

And if a grantor conveys a tract of land to a grantee with intent to defraud his creditors, of which the grantee has notice, and the grantee conveys the land to an innocent purchaser for value, and the first grantee receives this sum, which is proved by the evidence in the cause, and the court sets aside the deed from the first grantee, for fraud, and renders a personal decree for the amount with interest which the first grantee received for the land, it is no error. *Hinton v. Ellis*, 27 W. Va. 422.

And where a suit has been brought

to subject land to the payment of a lien, and to set aside a fraudulent conveyance, and the report of the sale has been made, and it is found that there will not be sufficient money produced by the sale to pay the lien, expense of sale and costs, there should be rendered a personal decree against all the fraudulent grantors and grantees, for whatever costs remain after providing for the payment of the liens and expenses of the sale. *Hinton v. Ellis*, 27 W. Va. 422.

There may be a money recovery against a fraudulent grantee of property who has sold such property to a bona fide purchaser and realized money therefrom in favor of the defrauded creditor. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46.

7. Final Decree.

Where a decree annuls a conveyance for fraud and directs a commissioner to ascertain the location and value of the lands and the liens thereon, it is not a final decree in the sense that an answer may not be filed thereafter. *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. 91; Va. Code, 1887, § 3275.

A suit was brought in Virginia to set aside a conveyance for fraud. The grantor and grantees denied fraud and explained the bona fides of the transaction. Depositions were taken. The circuit court decreed the conveyance fraudulent and null as to grantor's creditors. An appeal was taken to the district court of appeals, and the decree reversed and the cause remanded for an account of all dealings between the grantor and grantees before executing the deed, inspection of all grantee's mercantile books, and examination of themselves on oath before commissioners. The grantees notified plaintiffs when and where in the city of B (their home), before the commissioner of Virginia, they would submit their books for inspection and themselves for examination on oath. Then and there the books were inspected and the grantees cross-exam-

ined on oath by counsel for plaintiffs. The commissioner made copies of the books, and certified the copies and grantee's depositions to the circuit court. These were laid before a commissioner in Virginia. He refused to consider them, but made special statement. The circuit-court, inspecting his report, decreed that plaintiffs had failed to make out their charge of fraud, and dismissed their bill with costs. Held, the decree of the district court of appeals reversing the decree annulling the deed for fraud was final as far as it went. *Avis v. Lee*, 77 Va. 553.

8. Operation and Effect.

Where in a bill by a creditor against the trustee and executor of his debtor to have payment of his debt, and charging that the deed is fraudulent, and voluntary in part, the court makes a decree directing a commissioner, among other things, to take an account of debts of the testator, the statute of limitations ceases to run against creditors from the date of that decree. *Harvey v. Steptoe*, 17 Gratt. 289.

9. Opening and Setting Aside.

Setting Aside Decree at Same Term.

—In 1881, K. filed his bill against H. and wife, seeking to set aside, as fraudulent and void, a voluntary conveyance of certain lands from H. to his wife, and praying that the same may be sold to satisfy his judgment against H. On the ninth of December, 1881, the cause was heard upon the bill taken for confessed against H. and wife, and the court entered a decree annulling said conveyance, and directing a sale of the land conveyed to the wife to pay the judgment against H. On the twenty-third of December, 1881, and during the same term, the court, on motion of H. and wife, set aside the decree of the ninth of December, 1881, and allowed them to answer the bill. Held: (1), during the term of the court at which a decree is entered, it is completely under the

control of the court, and may be modified or annulled on motion, or at the suggestion of the court without motion; (2), the court did not err in setting aside the decree of the ninth of December, 1881, and allowing the defendants to answer the bill. *Kelty v. High*, 29 W. Va. 381, 1 S. E. 561.

10. Appellate Review.

See post, "Review," VIII, M.

L. NEW TRIAL.

See generally, the title NEW TRIALS.

If the jury find a sale to be bona fide and valid, the court ought not to set aside the verdict and award a new trial, unless the evidence is plainly insufficient to warrant the jury in concluding, that despite the fact that the vendor continued in possession of the property after the sale and the strong legal presumption thence arising, that the sale is not for a fair and valuable consideration, and that the vendor retained an interest in the property after the sale, and that such sale is fraudulent and void, the consideration is fair, and no interest in the property is retained by the vendor after the sale, and it is otherwise untainted with fraud. *Bindley v. Martin*, 28 W. Va. 773.

In another case the owner of a slave, residing in Tennessee, delivered a slave to his son-in-law, who was about to remove to Virginia, and took from him a deed, specifying that the slave was lent to his son-in-law who was to take good care of her and deliver her back to him when he should demand her; the owner told the subscribing witness, that the deed was taken to show that the slave was his property, in case she should be taken by his son-in-law's creditors while the slave remained in Tennessee, but that "he intended to give her to his son-in-law anyhow." The son-in-law removed with the slave to Virginia. In a contest between the owner and the son-in-law's mortgagees of the slave, who had possession, the jury found a ver-

dict for the owner, and the court refused to grant another trial; upon appeal it was held that a new trial was properly refused. *Mahon v. Johnston*, 7 Leigh 317.

M. REVIEW.

See generally, the title **APPEAL AND ERROR**, vol. 1, p. 418.

1. Jurisdiction.

That the land has been conveyed away by a deed alleged to be fraudulent, makes no difference as to the appellate jurisdiction. *Thompson v. Adams*, 82 Va. 672.

2. When Decree Appealable.

A decree in a suit brought to set aside a conveyance as fraudulent and subject the land therein conveyed to the payment of plaintiff's debt, which decrees that said conveyance is fraudulent as to the plaintiff's debt, ascertains the amount of said debt and orders the payment of the costs of suit, is an appealable decree, although it does not decree the sale of the land, but refers the cause to a commissioner to report whether or not the rents and profits of the land will pay the said debt and costs within five years. *Hoy v. Hughes*, 27 W. Va. 778.

3. Questions Reviewable.

See generally, the title **FORMER ADJUDICATION OR RES ADJUDICATA**, ante, p. 261.

Where a suit in equity is brought for the purpose of setting aside a fraudulent deed of trust on land, charged by will, probated before the time of the execution of such deed, with payment of a sum of money to the testator's estate, and the bill does not allege payment of the money so charged upon the land, and is dismissed at the hearing in the court below, and the decree is reversed on appeal, and the cause remanded, and no notice is taken in the opinion or decree in the appellate court, of the lien created by the will, the question of the satisfaction of such lien is not *res adjudicata*. *Dent v. Pickens*, 50 W. Va. 382, 40 S. E. 972.

Omission by Court to Make Such Direction That a Complete Decree Can Be Rendered—Cause for Reversal.

Where it appears, in a suit to set aside a bond and trust deed as fraudulent towards creditors, that they have been assigned, the failure of the court, before entering a decree on the merits, to direct the assignee to be made a party, so that a complete decree, binding on all persons interested, may be rendered, is cause for reversal on appeal, though no objection for want of parties was taken in the trial court. *Thornton v. Gaar*, 87 Va. 315, 12 S. E. 752.

Failure to File Copy of Execution and Judgment—No Ground for Reversal.—But in a suit in equity by a judgment creditor to set aside fraudulent conveyances of property by his debtor, where the judgment and execution are admitted by the pleadings, the failure to file a copy of them in the cause is not a ground of reversal of the decree of the court below setting aside the conveyances, especially if no objection is taken in that court to the failure to file them. *McNew v. Smith*, 5 Gratt. 84.

Decree Based on Depositions of Doubtful Character.—Where the decree sought to be reversed is based upon depositions, which are so conflicting and of such a doubtful and unsatisfactory character, that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusion to be deduced therefrom, the appellate court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the appellate court might have pronounced a different decree, if it had acted upon the cause in the first instance. *Smith v. Yoke*, 27 W. Va. 639.

Claim Set Up Enforceable.—When a bill in equity sets up a claim that is unenforceable, and the evidence offered in support does not prove a good cause of action, and the relief asked

has been decreed by the court below, the appellate court will, on appeal, reverse the decree and dismiss the bill, although no demurrer was interposed in the lower court. *Poling v. Williams*, 55 W. Va. 69, 70, 46 S. E. 704.

Deed Set Aside—Debt Due Grantee Charged.—If a court, by its decree, has cancelled and set aside a fraudulent deed and charged the lands thereby attempted to be conveyed with the amount of the debt due to the fraudulent grantee, such decree is erroneous and will be for that cause reversed. *Kanawha Val. Bank v. Wilson*, 25 W. Va. 242.

Examination and Accounting before Commissioner.—In a suit in Virginia to set aside a conveyance for fraud, the grantor and grantees denied fraud and explained the bona fides of the transaction. Depositions were taken. The circuit court decreed that the conveyance was fraudulent and null as to the grantor's creditors. An appeal was taken to the district court of appeals, the decree reversed and the cause remanded for an account of all dealings between the grantor and grantees before executing the deed; inspection of all grantees' mercantile books, and examination of themselves on oath before a commissioner. The grantees notified the plaintiffs when and where in the city of B (their home), before a commissioner of Virginia, they would submit their books for inspection and themselves for examination on oath. Then and there the books were inspected and the grantees cross-examined on oath by counsel for plaintiffs. The commissioner made copies of the books, and certified the copies and grantees' depositions to the circuit court. These were laid before the commissioner in Virginia. He refused to consider them, but made special statement. The circuit court, inspecting his report, decreed that plaintiffs had failed to make out their charge of fraud, and dismissed their bill with costs. Held, appellees might have ap-

pealed to the supreme court, but did not. *Avis v. Lee*, 77 Va. 553.

4. Presentation and Reservation in Lower Court of Grounds of Review.

Fraud.—Where it is not charged in the court below, that a conveyance is fraudulent, such charge can not, for the first time, be made in the appellate court. *Pracht v. Lange*, 81 Va. 711.

Excessive Judgment.—It is too late for a grantor in a fraudulent deed to urge in the appellate court that the judgment is excessive in a suit to annul that deed and subject the property to that judgment. *Wray v. Davenport*, 79 Va. 19.

Defendants Not Summoned to Answer Petition—Question Can Not Be Raised in Appellate Court.—And in a suit to set aside an alleged fraudulent conveyance, other creditors filed their petitions setting up their debts, asked to be made parties plaintiff, and prayed certain relief, but did not ask for process against defendants. An account was directed to ascertain the priority of the claims, of which defendants had full notice, and on the coming in of the commissioner's report the grantee filed exceptions. It was held, that the objection that the defendants were not summoned to answer the petitions could not be raised for the first time on appeal. *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1.

Failure to Allow Set-Offs.—Failure to allow set-offs is not cause for reversal of a decree at the instance of a party who did not ask for or rely upon a claim to them in the court below. *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268.

5. Parties Entitled to Allege Error.

In a suit to set aside a fraudulent conveyance from a husband to his wife, it was declared that depositions taken after notice given the wife may be read against her; but, when read against her husband also, the wife, who alone appeals from a decree setting

aside her deed, is not entitled to a reversal of the decree because of a want of notice to her husband of the taking of the depositions. *Silverman v. Greaser*, 27 W. Va. 550.

In a suit to set aside a fraudulent conveyance, the judgment debtor can not question the fraud on appeal, where the alienees do not appeal. *Price v. Thrash*, 30 Gratt. 515.

And where a suit has been brought to set aside a deed as fraudulent and subject the land to the payment of a judgment, which with interest is less than \$100, but the land is worth \$150, the judgment debtor, and grantor, is not entitled to appeal from a decree declaring the deed fraudulent, but the grantee, whose land is subjected, the value thereof being more than \$100, is entitled to an appeal. *Parker v. Valentine*, 27 W. Va. 677.

Different Creditors Uniting in Appeal.—Different creditors, parties to a suit attacking a conveyance as fraudulent, may unite in an appeal from a decree holding it valid to their prejudice. *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761.

Personal Representative.—An administrator with the will annexed of a decedent who is indebted at the time of his death, and who leaves nothing with which to satisfy the same except a tract of land which has been obtained from him by fraud, to set aside which fraudulent conveyance from him a suit had been instituted by such decedent, and determined adversely to him in the circuit court, has the right to prosecute an appeal from said decree, holding that a purchaser from said fraudulent grantee, indirectly, during the pendency of such litigation, was an innocent purchaser, and entitled to hold

the property. *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276.

N. COSTS AND ATTORNEYS' FEES.

See generally, the titles ATTORNEY AND CLIENT, vol. 2, p. 145; COSTS, vol. 3, p. 604.

In a suit to subject land to the payment of a judgment lien and to set aside deeds for fraud against the plaintiff, it is proper to decree that the costs of the suit shall be first paid out of the proceeds of sale of the land. *Hinton v. Ellis*, 27 W. Va. 422.

In a suit by certain creditors to set aside a deed of trust because they were postponed to other creditors of the insolvent grantor, where the trustee was interested to a certain extent in one of the preferred claims, and, together with others, defended the suit, on a decree for plaintiffs, the court properly refused to allow the trustee attorney's fees out of the fund. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507.

O. COLLATERAL IMPEACHMENT.

See generally, the titles EXECUTIONS, vol. 5, p. 416; JUDGMENTS AND DECREES.

Quære, whether an execution can legally be levied on property, the possession of which has passed from the debtor and remained in a third person, for more than five years, in pursuance of a deed said to be fraudulent, but regularly recorded, and importing on its face to be for valuable consideration, before such deed has been impeached and convicted of fraud by the decree of a court of competent jurisdiction. *Lawrence v. Swann*, 5 Munf. 332, 334.

FRAUDULENTLY.—In *Virginia Carolina Chemical Co. v. Carpenter*, 99 Va. 293, 38 S. E. 143, it is said: "To act in bad faith is to act fraudulently."

Fraudulent Preferences.

See the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 811; BANKRUPTCY AND INSOLVENCY, vol. 2, p. 237; FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 540.

As to composition with creditors, see the title COMPROMISE, vol. 3, p. 45.

Fraudulent Representations.

See the title FRAUD AND DECEIT, ante, p. 448.

Fraudulent Sales.

See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 540.

Freedom.

See the titles DECLARATIONS AND ADMISSIONS, vol. 4, p. 342; HEARSAY EVIDENCE; INDIANS; SALES.

Freedom of Speech and of the Press.

See the title CONSTITUTIONAL LAW, vol. 3, p. 207.

FREEHOLD—FREEHOLDER.—See the titles ESTATES, vol. 5, p. 160; GRAND JURY; JURY.

In *Turner v. Dawson*, 80 Va. 841, 844, it is said: "The person thus holding land by a free tenure, was, therefore, called a **freeholder**, because he might maintain his possession against his lord; and for this reason, *liberum tenementum* or **freeholder** was opposed to villenage. 1 Lomax Digest, 4. And the acquisition of an estate of **freehold** was attended with certain valuable rights and privileges. The **freeholder** became a member of the county court, one of the *pares curiæ* in the Court Baron, or Lord's Court, was entitled to be summoned on juries in the King's Court, and to vote at the election of a knight of the shire. So 'estates of **freehold**' are either estates of inheritance, or estates not of inheritance. **Freehold** estates of inheritance are divided into inheritances absolute or fee simple, and inheritances limited."

A **freehold** may be an equitable estate as well as a legal estate. Brannon, J., dissenting, in *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 779.

In *Helmondollar's Case*, 4 Gratt. 536, it was held, that one having the equitable interest in land, entitled to call for the legal title, was a **freeholder**.

In *Carter's Case*, 2 Va. Cas. 319, it was held, that a grantor, who had passed away the legal title by deed of trust, and had merely the equity of redemption, was a **freeholder**.

In *Cunningham's Case*, 6 Gratt. 695, a purchaser by oral contract, in possession, who had paid for the land, was held to be a **freeholder**.

In *Moore's Case*, 9 Leigh 639, the owner conveyed the land to a trustee to secure a debt, and then such owner conveyed to another person his equity of redemption, and put him in possession. It was held, that this person was a **freeholder**.

It has been held, that a person was a **freeholder** who was in possession under a contract of purchase; the deed not being delivered to him, but in the hands of another, as an escrow, to be delivered on payment of the purchase money,

which remained partially unpaid. *Burcher's Case*, 2 Rob. 826. See also, *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 779, Brannon, J., dissenting.

It seems that one who has contracted by articles under seal to sell his land, but has not yet conveyed it by deed, and therefore still holds the legal title, is a **freeholder** qualified to serve on a grand jury. *Com. v. Reynolds*, 4 Leigh 663.

FREEMAN.—See *Howell v. Netherland*, Jeff. 90, 93. And see the title **SLAVES**.

Free Negro.

See the title **SLAVES**.

FREEZING WEATHER AS ACT OF GOD.—See **ACT OF GOD**, vol. 1, p. 159.

Freight.

See the titles **CARRIERS**, vol. 2, p. 688; **SHIPS AND SHIPPING**.

FRESHETS.—See **ACT OF GOD**, vol. 1, p. 159, and references given. See also, the titles **EXPERT AND OPINION EVIDENCE**, vol. 5, p. 784; **WATERS AND WATERCOURSES**.

"It is argued that the damage came from an extraordinary **freshet**, and defendant is not liable, because that was the act of God. In *McGraw v. Baltimore, etc.*, R. Co., 18 W. Va. 361, 364, will be found this definition of the act of God: 'Such an accident as could not happen by the intervention of man—as, storms, lightning, and tempest; those losses that are occasioned by the violence of nature, by that kind of force of the elements which human ability could not have foreseen or prevented—such as lightning, tornadoes, sudden squalls of wind, an extraordinary convulsion of nature; a direct visitation of the elements, against which the aids of science and skill are of no avail; physical causes which are irresistible, which human foresight and prudence can not anticipate, nor human skill and diligence prevent—such as loss by lightning, storms, inundations, and earthquakes, and the unknown dangers to navigation which are suddenly produced by their violence—are the acts of God, or inevitable accidents.' But this case does not come up to the standard of that definition. Such **freshets** as this had often occurred, and were necessarily to be anticipated, and came in the usual order and course of nature in that section; and engineering and mechanical skill were at hand and adequate to meet such a **freshet**, and that, too, with a reasonable expenditure. It was simply a high rise, not an extraordinary one." *Taylor v. Baltimore, etc.*, R. Co., 33 W. Va. 39, 10 S. E. 29, 33. See also, *Friend v. Woods*, 6 Gratt. 189, 52 Am. Dec. 119.

FRIENDLY SUITS.—See the titles **AGREED CASE**, vol. 1, p. 283; **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 624.

A suit instituted to obtain a judicial construction of a last will and testament is a **friendly suit**. *Smythe v. Smythe*, 90 Va. 638, 19 S. E. 175.

A bill in chancery to appoint a new trustee in place of one deceased, with directions to execute the trusts created by the deed in conformity with the provisions thereof, and for general relief, is a **friendly suit**. *Nelson v. Jennings*, 2 Pat. & H. 379.

Friend of the Court.

See the title *AMICUS CURIAE*, vol. 1, p. 371.

Frightening Horses.

See the titles *ANIMALS*, vol. 1, p. 378; *CROSSINGS*, vol. 4, p. 131.

Frivolous Appeal.

See the titles *APPEAL AND ERROR*, vol. 1, p. 430; *DISMISSAL, DISCONTINUANCE AND NONSUIT*, vol. 4, p. 713.

Frivolous Pleadings.

See the title *PLEADING*.

FROM.—*From* is construed to include or exclude the day of the act, as best serves to carry out the intention of the legislature, subserve public policy, avoid forfeiture, and validate a proceeding, rather than annul the same. *State v. Mounts*, 36 W. Va. 179, 190, 14 S. E. 407. See the title *TIME*.

Fructus Industriales.

See the title *CROPS*, vol. 4, p. 94.

FUGITIVE PAPER.—See *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173, 175.

Fugitive Slave Law.

See the title *SLAVES*.

FULL.—A receipt for money which purports to be "in full, on account, to date," does not import an agreement or contract between the parties, and is open to explanation and contradiction by parol proof. *Dolan v. Frieberg*, 4 W. Va. 101. And see generally, the titles *PAROL EVIDENCE*; *RECEIPTS*.

Full Faith and Credit.

See the title *FOREIGN JUDGMENTS*, ante, p. 208.

Fully Administered.

See the title *EXECUTORS AND ADMINISTRATORS*, vol. 5, p. 712.

FULL TERM.—See *Gorrell v. Bier*, 15 W. Va. 311, 320, 321.

Funds and Deposits in Court.

See the titles *INTERPLEADER*; *PAYMENT INTO COURT*; *TENDER*.

Funeral Expenses.

See the title *EXECUTORS AND ADMINISTRATORS*, vol. 5, pp. 588, 591.

FURNACE.—In *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858, 860, it is said: "Now, what is meant by the words 'furnace plant?' Webster defines the word 'plant,' in a commercial point of view, as follows: 'The whole machinery and apparatus employed in carrying on a trade or mechanical business, also sometimes including real estate and whatever represents investment of capital in the means of carrying on a business, but not including material worked upon or finished products; as the plant of a foundry, a mill, or a railroad.' By the express terms and provisions of the lease, then, the lessees were to keep said furnace plant in proper and sufficient repair. The words 'furnace plant,' under the above definition we must regard as broad enough to cover the six salt water wells, and especially is this the case when the lease on its face describes the property leased as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same, etc."

FURNITURE.—The following articles were held not to be included in the term **furniture**, as used by a testator: "Two Stills and a Boiler, four stand tubs full of Cider, a set of Smith's Tools and some old Iron, a parcel of Brandy, Hogsheads and Casks, some Leather, a Gun and a few Books, and fifty head of fattening Hogs." *Kendall v. Kendall*, 5 Munf. 272, 274. See generally, the title **WILLS**.

Furniture Factory.

See the title **NUISANCES**.

FURTHER PROCEEDINGS.—See **PROCEEDINGS**.

As to remand for further proceedings, see the title **MANDATE AND PROCEEDINGS THEREON**.

Future-Acquired Property.

See references under **EXPECTANCY**, vol. 5, p. 774.

Future-Acquired Title.

See the title **ESTOPPEL**, vol. 5, pp. 215, 225.

Future Advances.

See the titles **CHATTEL MORTGAGES**, vol. 2, p. 809; **MORTGAGES**.

Futures.

See the titles **GAMBLING CONTRACTS**; **GAMING**; **ILLEGAL CONTRACTS**.

Gambling.

See the titles **GAMBLING CONTRACTS**; **GAMING**; **HORSE RACING**.

GAMBLING CONTRACTS.

I. Definition and Nature, 686.

II. Invalidity of Contracts Based on Gaming Consideration, 687.

A. Statutory Provisions, 687.

B. Provisions Construed and Applied in Particular Transactions, 687

C. Effect of Assignment, 688.

III. Equitable Relief against Gambling Contracts or Judgments Thereon, 689.

IV. Recovery Back of Gaming Losses, 691.

CROSS REFERENCES.

See the titles ADVANCEMENTS, vol. 1, p. 193; ANSWERS, vol. 1, p. 411; ASSIGNMENTS, vol. 1, pp. 770, 798; BILLS, NOTES AND CHECKS, vol. 2, p. 439; BONDS, vol. 2, p. 507; BROKERS, vol. 2, p. 628; CONTRACTS, vol. 3, p. 307; ELECTIONS, vol. 5, p. 1; EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483; FACTORS AND COMMISSION MERCHANTS, vol. 5, p. 810; GAMING; ILLEGAL CONTRACTS; INJUNCTIONS; JUDGMENTS AND DECREES; PAYMENT; RESCISSION, CANCELLATION AND REFORMATION.

As to contribution between members of a gambling partnership, see the title CONTRIBUTION AND EXONERATION, vol. 3, p. 482.

I. Definition and Nature.

Necessity for Mutuality of Risk.—

That is not a contract of wager by the terms of which all the profits or loss is to be on one of the parties. *Brown v. Speyers*, 20 Gratt. 296. See the title GAMING.

Contract for Sale of Gold.—Contracts for the sale and purchase of gold are not void as against public policy. *Brown v. Speyers*, 20 Gratt. 296.

"Another point relied upon in the argument is, that no sales and purchases of gold were in fact made; and the subject matter of such pretended purchases and sales had, at the time, no existence, actual or potential; and therefore, according to a well-established principle of the law of sales, the contract in relation thereto was void in law. In support of this position several cases were cited, in which it has been held, that if goods are sold, to be delivered at a future day, and the vendor neither has the goods at the time, nor has entered into any prior contract to

buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods he has contracted to deliver, he can not maintain an action on such contract. Whether this principle be sound or not, it is unnecessary now to decide. It certainly has been repudiated by great judges, and is not regarded as law, according to the current of modern authorities. See 2 *Parsons on Contract*, 543; *Hibblewhite v. McMorine*, 5 Exch. R. 462." *Brown v. Speyers*, 20 Gratt. 296, 309.

Speculation in Paper Money.—A. agreed, in consideration of £2,500 paper money, to be paid him by R. in the years 1780 and 1781, to pay the latter £2,500 specie in 1790. The contract was held obligatory. *Brachan v. Griffin*, 3 Call 434, cited and approved in *Boulware v. Newton*, 18 Gratt. 708, and *Hilb v. Peyton*, 21 Gratt. 386.

Speculations in Options or Margins.—In *Krake v. Alexander*, 86 Va. 206, 9 S. E. 991, the court held, that "whether speculations in options and margins be

unlawful in Virginia is a question which this court is not called on to consider in this cause."

II. Invalidity of Contracts Based on Gaming Consideration.

A. STATUTORY PROVISIONS.

By statute in Virginia every contract, conveyance or assurance, of which the consideration, or any part thereof, is money, property, or other things won or bet at any game, sport, pastime, or wager, or money lent or advanced at the time of any gaming, betting or wagering, to be used in being so bet or wagered (when the person lending or advancing it knows that it is to be so used), shall be void. Va. Code, 1849, p. 578, ch. 142, § 2; Va. Code, 1904, § 2836. *Krake v. Alexander*, 86 Va. 206, 9 S. E. 991.

Section 3435 of the West Virginia Code, 1899, contains identically the same provisions as to gaming contracts. *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163; *O'Connor v. Dills*, 43 W. Va. 54, 26 S. E. 354.

B. PROVISIONS CONSTRUED AND APPLIED IN PARTICULAR TRANSACTIONS.

Securities for Money Lost at Gaming.—Under the Virginia statute it is settled that all securities given for money won at play are absolutely void, even in the hands of third persons though they have paid a valuable consideration for them and had no notice of their being won at play. *Pettit v. Jennings*, 2 Rob. 676; *Woodson v. Barrett*, 2 Hen. & M. 80.

M. having won money of W. at cards, and J. having won the same sum of M., the bond of W., given at the request of M. to J. for that sum, is void by the act to prevent unlawful gaming. *Woodson v. Barrett*, 2 Hen. & M. 80.

Loans for Gaming Purposes.—Money lent to be bet upon a presidential election can not be recovered by suit. *Machir v. Moore*, 2 Gratt. 257.

Loan after Debt Incurred.—The loaning of money to pay a gaming debt not at the time thereof but after such debt has been incurred, is not forbidden by the statute against gaming, ch. 97, W. Va. Code, even though the lender has knowledge for what purpose the money is going to be used. *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163.

"The statute forbids the loaning of money at the time of any gaming to be used for the purposes thereof when the lender knows it to be so used but it does not forbid the loaning of money after such gaming and not at the time and place thereof to be used in the payment of debts thus contracted. In 14 Am. & Eng. Ency. Law 642, the law is stated to be: 'Where the loss is already incurred, any person other than the winner who advances money or other property to the loser to enable him to pay the loss may recover such advance in the absence of a special statute.' In the case of *Armstrong v. The National Exchange Bank*, 133 U. S. 434, it is held, that, 'Where losses have been made in an illegal transaction, person who lends money to the loser, with which to pay the debt, can recover the loan notwithstanding his knowledge of the fact that the money was to be so used.' Both under the statute and decisions the lender who has no knowledge that his money is going to be used for gaming purposes or to pay a gaming debt has the undisputed right to recover the same, nor is the note given for such loan either void or voidable." *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163.

In *Krake v. Alexander*, 86 Va. 206, 9 S. E. 991, there was judgment against surety on note for money borrowed to be used as margins on grain and pork options. Surety obtained money to pay judgment, securing lender by trust deed on land. Lender was not shown to have had any connection with or knowledge of the options. On creditor's bill to take an account of liens on surety's land, it was held, that the trust

deed to lender was not void as against the other creditors as being based on a gaming consideration. In this case it was held, that it would be no more unlawful to lend money to a man to be used in paying an old obligation which he could resist under § 2836 of the Virginia Code, than it would be to lend him money to pay an old debt barred by time.

Effect of Devise of Realty Charged with Payment of Gaming Debt.—A father having undertaken by written agreement as surety for the payment of a gaming debt of his son; and afterwards, by his will (reciting that he had so become surety) having devised to his son certain real estate, charged with the payment of that debt, such charge is not a condition precedent, binding the son or his representatives to pay it; but he and they shall hold the estate discharged thereof. *Carter v. Cutting*, 5 Munf. 223.

Payment of Gaming Debt Not Allowed as Credit to Executor.—An executor ought not to be allowed a credit for paying a debt of his testator, appearing on the face of the written instrument given to secure it, to have been for money won at unlawful gaming. *Carter v. Cutting*, 5 Munf. 223. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

Direction of Testator to Pay Just Debt Not Authority for Payment of Gambling Debt.—The direction of a testator that all his just debts be paid out of the sale of certain lands, does not authorize the payment of a gaming debt of his out of the proceeds of such sales. *Carter v. Cutting*, 5 Munf. 223.

Payment of Son's Gaming Debt by Father Considered as an Advancement.—See the title ADVANCEMENTS, vol. 1, p. 193.

C. EFFECT OF ASSIGNMENT.

In General.—As a general rule the assignee of a bond given for a gaming consideration stands in no better situa-

tion than the obligee would have done, unless induced to purchase by assurances of payment from the obligor. *Buckner v. Smith*, 1 Wash. 296; *Woodson v. Barrett*, 2 Hen. & M. 80, 88; *Dade v. Madison*, 5 Leigh 401; *Pettit v. Jennings*, 2 Rob. 676; *Steptoe v. Pollard*, 30 Gratt. 689; *Raynolds v. Carter*, 12 Leigh 172; *Hoomes v. Smock*, 1 Wash. 389; *Nicholson v. Hancock*, 4 Hen. & M. 495; *Skipwith v. Strother*, 3 Rand. 214, 216; *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163.

It is otherwise, however, both at law and in equity, if the assignee be induced by assurances of payment from the obligor to become the purchaser of the bond. *Buckner v. Smith*, 1 Wash. 296. And see cases cited in preceding paragraph.

Generally, as to the effect of assignment, see the title ASSIGNMENTS, vol. 1, p. 770.

"It has been rightly contended by the counsel for the appellee that all bonds given for a gaming consideration are void as between the parties, and it is equally true that the assignee can not stand in a better situation than the obligee, unless there be some particular circumstances in his favor, independent of the mere assignment. But if an innocent man shall be induced by the obligor to become a purchaser of such a bond, it is a deceit upon him and he ought not to be subject to the same equity to which the obligor was entitled against the obligee." *Hoomes v. Smock*, 1 Wash. 389.

"These cases are on the theory that the contract is void and nonnegotiable in whatever hands found, innocent or guilty, unless the obligor has given new vitality thereto by inducing the purchaser to take it on promise of payment. Then it becomes a new promise between the obligor and purchaser and is relieved from the inhibition of the statute." *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163.

A note or check payable to the winner in a gaming transaction is void and no suit can be maintained thereon even by an innocent holder for value unless the maker has induced the purchase thereof by promising payment. In such case the maker is estopped as against such innocent holder from setting up the gaming consideration for such note or check. *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163.

The alleged loser in a game of poker gave the winner a check for \$500 payable to an innocent merchant firm. The firm refused to accept it, until the loser promised payment thereof on maturity; such check is not void under § 1, ch. 97, W. Va. Code, as it represents a debt between the firm and loser with which the winner has nothing to do. *Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163.

Answer of Assignor Not Evidence against Assignee.—The general rule that the answer of one defendant in chancery is not evidence against his codefendant applies in the case of the answer of an assignor of a bond alleged to have been given on a gaming consideration. The part of the bond being on such consideration can not be established against a defendant who is the assignee, by the answer of his codefendant, the obligor and assignor. *Pettit v. Jennings*, 2 Rob. 676; *Hoomes v. Smock*, 1 Wash. 389; *Dade v. Madison*, 5 Leigh 401. See the titles ANSWERS, vol. 1, p. 411; ASSIGNMENTS, vol. 1, p. 798.

III. Equitable Relief against Gambling Contracts or Judgments Thereon.

In General.—A court of equity has an original and independent jurisdiction to relieve, not only against securities for gaming debts, by ordering them to be surrendered (although the party might avoid them at law by pleading the statute), but against judgments for such debts, and this merely for the rea-

son that they are gaming debts. *Skipwith v. Strother*, 3 Rand. 214; *Woodson v. Barrett*, 2 Hen. & M. 80; *Shields v. McClung*, 6 W. Va. 79, 91.

"These decisions are 'placed on the ground of the original vice of the transaction.' 'It is said, that the bond being absolutely void in its creation, could be made valid by no subsequent transaction, immediately growing out of it, and that the circulation of these gaming bonds is an evil no less to be discountenanced than the giving of them; and that no means are more likely to prevent the giving of them, than to put an effectual stop to their circulation.' See the opinion of Judge Tucker in the case cited in 3 Randolph, page 216. Thus it is clear that the jurisdiction exercised in such case by courts of equity is taken from public policy in discouragement of gaming, because of the vice of the transaction, and upon the principle that the bond 'being absolutely void in its creation' can not 'be made valid' by any 'subsequent transaction, immediately growing out of it.' Equity jurisdiction in such case, is exercised for peculiar reasons, and is special, and an exception to the general rule governing courts of equity, as to granting relief to judgments at law." *Shields v. McClung*, 6 W. Va. 79.

In *Goolsby v. St. John*, 25 Gratt. 146, it is said: "In a case of concurrent jurisdiction a party may elect between his legal and equitable remedies. But having once made his election he is bound by it. A gaming consideration, however, forms an exception to the general rule, requiring a defendant at law to avail himself there of a good legal defense to the action. He is not bound to defend himself at law on account of such consideration, but may suffer judgment to go against him at law, and then obtain relief by bill in equity; or he may apply for such relief before judgment is obtained, or even action brought against him at law."

In an action at law on a promise founded on a gaming consideration, if the defendant is surprised at the trial, and there is a verdict and judgment against him, he may come into equity for relief, though he made no effort to obtain a new trial in the common-law court. *White v. Washington*, 5 Gratt. 645. In this case it was queried if such defendant may not come into equity for a discovery, and if the discovery is made, whether he may not have relief, though there was no surprise on the trial at law.

"A gaming security or consideration, however, forms an exception to the general rule requiring a defendant at law to avail himself there of a good legal defense to the action. Our act of 1748 (1 Rev. Code, ch. 147, p. 561, taken from the English statute of 9 Anne, ch. 14), not only renders the gaming transaction unlawful, but expressly avoids all promises, contracts, judgments and other securities for money won at play; and its policy is to extirpate an immoral and pernicious practice, injurious not only to parties and their families, but to the public weal. It therefore behooves courts of equity, as well as courts of law, to suppress the enforcement of such promises, contracts and securities. A party injured may, at his election, defend himself at law, but he is not bound to avail himself of that opportunity, nor to wait till a verdict is had, nor till an action is brought against him in the legal forum. He may suffer judgment to go against him at law, and restrain proceedings upon it by a bill in equity; or, before or after action brought, file his bill in equity to compel the surrender of any security founded on such unlawful and void consideration, and the refunding of whatever payments may have been made upon it. 1 Story's Eq., § 302; *Woodroffe v. Farnham*, 2 Vern. R. 291; *Rawden v. Shadwell*, Amb. R. 269; *Fleetwood v. Janzen*, 2 Atk. R. 467; *Newman v. Franes*, 3 Anst. R. 519; *Andrews v. Berry*, 3

Anst. R. 634; *Woodson v. Barrett*, 2 Hen. & M. 80; *Skipwith v. Strother*, 3 Rand. 214. A judgment itself, when recovered without defense, is, within the true meaning of the statute, nothing more than a security, though there has been no agreement that it shall operate as such, or be obtained or suffered for that purpose. If this were not so, it would be easy to evade the provisions of the statute, inasmuch as in most cases it would be difficult to prove that there was such an agreement or understanding; and besides, the mischief is equally great, whether there was or not." *White v. Washington*, 5 Gratt. 645.

"It must be admitted, however, that in an action founded upon a gaming promise or security, if the defendant elects to make his defense at law, and upon a full and fair trial of the question in that forum, a verdict is rendered against him, he can not be permitted to renew the controversy, upon adverse testimony, in a court of equity; for if this were allowed, it would, in effect, be an appeal from the verdict of a jury. And yet, notwithstanding such election, if the defendant has been surprised at law, by reason of some fraud, misfortune or accident, which has prevented him from having a full and fair trial before the jury, he may still resort for redress to a court of equity. Nor will he be precluded from doing so by its appearing that he had an adequate opportunity of obtaining a new trial by application to the court of law. The case of a gaming promise or security is an exception to the general rule on the subject, that rule being derived from the obligation of the party, in most cases, to avail himself of his opportunity to defend himself at law; whereas, in the case of a gaming promise or security, he is under no such obligation. And as he may at first waive all defense at law, and seek relief in equity, so when he has been prevented by surprise from making his defense available at law, he is not

bound to pursue it further in that forum; but may resort to a court of equity, which had from the beginning a complete and more searching jurisdiction of the controversy, and which treats all judgments founded on a gaming consideration, where there has been no defense at law, or where there has not been, from adventitious circumstances, a full and fair trial of the question at law, as mere securities." *White v. Washington*, 5 Gratt. 645.

Generally, as to equitable relief against judgments, see the titles INJUNCTIONS; JUDGMENTS AND DECREES.

Direction of Issue to Ascertain Consideration of Debt.—On a bill filed to enjoin a judgment on the ground that the debt on which it was founded was for money won at cards, it being doubtful on the evidence, whether such was the consideration; or if it was, whether the plaintiff in the judgment, who was a transferee of the debt, had not been induced to take the transfer, of the debt under the belief, induced by the concealment or misrepresentation of the debtor, that the consideration of same debt was good and lawful; the court should continue the injunction, and direct an issue to ascertain the facts. *Nelson v. Armstrong*, 5 Gratt. 354.

Extent of Relief Where Bond Partly on Valid Consideration.—Where it is proved that part of a bond is on gaming consideration, and other part on lawful consideration, a court of equity will relieve against the part which is vicious and sustain that which is good, the obligor being plaintiff in equity. *Skipwith v. Strother*, 3 Rand. 214.

IV. Recovery Back of Gaming Losses.

Right to Person.—By ch. 97 of the West Virginia Code, 1899, § 2, it is

provided that if any person shall lose to another, within twenty-four hours, ten dollars or more, or property of that value, and shall pay or deliver the same, such loser may recover it back from the winner by suit in court, or before a justice, according to the amount of value, brought within three months after such payment or delivery; it may be so recovered from the winner, notwithstanding the payment or delivery was to his endorsee, assignee, or transferee. *O'Connor v. Dills*, 43 W. Va. 54, 26 S. E. 354; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, 432.

The provision in Virginia is the same with the exception of the amount lost, it being fixed at seven dollars or more and the provision that the recovery is to be by suit or warrant. Va. Code, 1904, §§ 2837, 2838.

By ch. 97 of the West Virginia Code, 1899, § 3, it is further provided that the loser may file a bill in equity, against the winner, who shall answer the same, and upon discovery and repayment of the money or property so won, or its value, such winner shall be discharged from any forfeiture or punishment which he may have incurred for winning the same. To the same effect is § 2838 of the Virginia Code, 1904.

Description of Cause of Action in Summons.—The words "damages for a wrong" are, in substance, according to their legal definition, equivalent to the words "money due on contract;" the former phrase being broader than and including the latter according to ordinary legal phraseology and meaning. Where a person sues to recover money lost at gambling, stolen, or for which indebitatus assumpsit would lie at common law, either phrase is sufficient in the summons to describe the cause of action. *O'Connor v. Dills*, 43 W. Va. 54, 26 S. E. 354.

Gambling Houses.

See the title GAMING.

GAME AND GAME LAWS.

CROSS REFERENCES.

See the titles ANIMALS, vol. 1, p. 373; OYSTERS.

Borders of Public Waters Reserved as a Common for Hunting and Fowling.—It is true that all the beds of the bays, rivers, and creeks, and the shores of the sea within the jurisdiction of the commonwealth, and not conveyed by special grant or compact according to law, are the property of the commonwealth, and may be used by all the people of the state as a common for the purposes of fowling, subject to reservations and restrictions imposed. *McCandlish v. Com.*, 76 Va. 1002.

The court is of opinion that the object of the act of 1780 of the Virginia legislature, was, by a liberal construction, to reserve the right of fowling and hunting as a common right to the people of the state, as an aquatic right on the public waters, which embraced the shores and the lands adjacent to them, so far as necessary for the enjoyment of those rights, and to that extent excepted them from location and grant by land office treasury warrant. *Garrison v. Hall*, 75 Va. 150.

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I. Two Forms of Gaming.

"Looking * * * to the history of our gaming laws as well as to the statute itself, let us see what is a proper construction of § 1, of chapter 151, of our Code. The games prohibited by this chapter—and indeed all unlawful gaming—may be divided into two classes. To the first class belong the games wherein the chances are equal. To the second class belong the games wherein the chances are unequal, all other things being equal, the unequal chances being in favor of the keeper or exhibitor of the game. The games falling under the second class are enumerated in the statute as 'A, B, C, E O, and keno tables and faro banks, and tables of like kind.' State v. Gaughan, 55 W. Va. 692, 48 S. E. 210; Com. v. Wyatt, 6 Rand. 694.

II. Gaming at Common Law.

Mere gaming is not, at common law, an offense, but only by statute; but keeping a gaming house is a public nuisance by common law. 14 Am. & Eng. Ency. L. (2d Ed.) 666; 1 Wood on Nuisance, § 45. Woods v. Cottrell, 55

W. Va. 476, 47 S. E. 275; Com. v. Richards, 1 Va. Cas. 133. See also, Com. v. Shelton, 8 Gratt. 592; Com. v. Pegram, 1 Leigh 569; State v. Godfrey, 54 W. Va. 54, 46 S. E. 185.

III. General Nature of Statutes Prohibiting Gaming.

First Statute in Virginia—Transcript from What.—The first statute in Virginia relating to gaming was passed in February, 1727. 4 Hen. Stat. 214. This statute was mainly a transcript of 9 Anne, ch. 14. Com. v. Shelton, 8 Gratt. 592.

"It may not be amiss to observe, that although our statute is generally supposed to be a transcript from the statute of 9 of Anne against gaming, yet there is a material difference between them, in the insertion of the word contracts, in our law, which was omitted in the statute of Anne. It was upon the omission of that word in the statute, that the judgment in Robinson v. Bland, 2 Burr 1077, proceeded." Woodson v. Barrett, 2 Hen. & M. 80.

Object of Statute—To Prevent Gaming from Becoming a Nuisance.—The

provision of our statute against gaming contained in Code, W. Va., § 4, ch. 151, is intended to prevent gaming from becoming an annoyance or a nuisance to the public, and not specially to suppress gambling as a vice per se. *State v. Brast*, 31 W. Va. 380, 7 S. E. 11.

For the Benefit of the Public.—The legislature has manifested the most anxious solicitude to suppress gaming; and, as was said by the Chancellor in *Fleetwood v. Jansen*, 2 Atk. 467: "The enforcing of the gaming act, is of great consequence to the public, and not confined to the interest of the private persons." *Skipwith v. Strother*, 3 Rand. 214.

What Games within the Statute.—Manner of Playing.—"I am clearly of opinion that the legislature intended to forbid certain kinds of gaming, among which are faro banks and keno tables, and all other games like them. It makes no difference, in my judgment, whether these games are played with or without a table, on a table or under it; or rather it may be affirmed that anything on or by means of which such games are played, is a table within the meaning of this statute. We must look to the game itself and not the name by which it is called, or the instruments with which, nor the thing in or on which it is played, to determine whether or not the game is unlawful." *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210. See post, "Particular Games Prohibited," VI.

"Our legislature has not deemed it necessary to prohibit all forms of gaming. Many games may be played in private places provided the betting does not exceed \$20, and other games out of regard for the sentiments of some people to whom such games are offensive, may not be played in public places. *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210.

Chapter 151 of the Code fully covers and includes gaming and gaming devices, so far as the legislature deemed it expedient to legislate upon the sub-

ject. It specifically defines what shall be offenses thereunder, and fixes fines and penalties for violation thereof. *Morley v. Godfrey*, 54 W. Va. 54, 46 S. E. 185.

IV. The Wager.

A. NECESSITY FOR A WAGER.

Generally.—As a general rule there must be a bet or wager of money or something of value upon the result of a game or event, in order to constitute gaming. *Lescallett v. Com.*, 89 Va. 878, 17 S. E. 546.

Playing Cards in Tavern.—Playing at cards in a tavern is unlawful gaming whether the party bets or not. *Com. v. Terry*, 2 Va. Cas. 77.

B. WHAT CONSTITUTES A WAGER — MUTUALITY OF RISK.

M. sold to S. a wagon to be paid for by S., who was a candidate for an office, if the latter should be elected to said office at the next ensuing election, and S. gave his check with this understanding, the wagon not to be paid for if S. should not be elected. Held, that this was a wager within the meaning of Va. Code, 1860, ch. 198, § 10. *Robertson, J.*, delivering the opinion of the court, said: "It is true, that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss, but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but can not lose, and the other may lose but can not gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss. * * * One person alone can not be guilty of the offense of betting. There must be always at least two parties engaged in it. It is a joint act; and when the

chance of gain and the chance of loss are created, it matters not how those chances are distributed between the parties there exists all that is necessary to constitute a bet." *Shumate v. Com.*, 15 Gratt. 653. See the title ELECTIONS, vol. 5, p. 1.

Bet.—A bet is a wager between two or more persons. It involves a concurrence of wills—that is, there must be an offer to bet, made on one side, and accepted on the other. When the offer is accepted, and not before, the betting becomes complete. *Lescallett v. Com.*, 89 Va. 878, 17 S. E. 546.

Game of Unequal Chances.—The distinctive feature in the character of the games called A. B. C. and E. O. and faro bank, is that the chances of the game are unequal and in favor of the exhibitor of the games or tables. If other games resemble these standard games in this distinctive feature, they come within the terms of the 17th section of the gaming act, 1 Rev. Va. Code, ch. 148, § 17 (See Va. Code, 1887, § 3815), and are liable to the same penalties. *Com. v. Wyatt*, 6 Rand. 694. See also, *Huff v. Com.*, 14 Gratt. 648.

C. HOW MADE.

A bet like any other contract may be made by telegraph. *Lescallett v. Com.*, 89 Va. 878, 17 S. E. 546.

D. AMOUNT STAKED.

Where a prize exceeding \$20 in value is won at a raffle by two or more individuals in partnership, but the share of the gain won by each is less than \$20, they are not punishable under the gaming act. *Com. v. Garland*, 5 Rand. 652.

Taking a chance in a raffle at \$20, or any smaller sum where the property raffled for exceeds \$20 in value, and the raffling takes place in a private house, does not bring the person within the operation of the gaming act. *Com. v. Garland*, 5 Rand. 652.

But a person who takes a chance for an article exceeding \$20 in value, and wins the article, is liable under the

gaming act. *Com. v. Garland*, 5 Rand. 652.

E. PARTICIPATION IN WAGER.

Renting Room to Gamblers.—A person who keeps tables on which the game of poker or draw poker is played, but who is only interested in the game for compensation for the use of the tables, house and gas, is not guilty under the statute, Va. Code, 1873, ch. 194, § 1, of being concerned in interest in the keeping of a table of the like kind with faro, keno, etc. *Nuckolls v. Com.*, 32 Gratt. 884.

F. THE CONTRACT OF WAGER—WHERE MADE.

Where an offer to bet is telegraphed by a person in one city to a person in another and the latter accepts by telegraph, the betting is done in the city where accepted. *Lescallett v. Com.*, 89 Va. 878, 17 S. E. 546.

"A bet, like an ordinary contract, may be made by telegraph, and, when an offer to bet is accepted by telegraph, the acceptance, as in the case of a contract, takes effect when the message of acceptance is delivered to the telegraph company for transmission, and not when it is received by the other party. If, therefore, an offer to bet is telegraphed by a person in this city to another in New York, and the latter accepts by telegraph, the betting is done, not in Richmond, but in New York, because the offer, being accepted there, takes effect there." *Lescallett v. Com.*, 89 Va. 878, 17 S. E. 546.

And hence a person who keeps a house wherein he posts the names of horses running on a race track in another state, and who telegraphs orders of customers to bet money thereon, which bets are accepted at the track, does not violate acts, 1891-92, p. 626, § 1, making it an offense to keep any house for the purpose of "betting therein," since the betting is done at the race track. *Lescallett v. Com.*, 89 Va. 878, 17 S. E. 546. See also, *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930, 2

Va. Law Reg. 82. See the title HORSE RACING.

G. WHEN COMPLETE.

A bet is a wager between two or more persons. It involves a concurrence of wills—that is, there must be an offer to bet, made on one side, and accepted on the other. When the offer is accepted, and not before, the betting becomes complete. *Lescallett v. Com.*, 89 Va. 878, 17 S. E. 546.

V. Gaming in Particular Places.

A. IN GENERAL.

It is unlawful to bet at any game at a public place. *Neal v. Com.*, 22 Gratt. 917.

B. PARTICULAR INSTANCES.

Barn.—On a day when many persons were assembled at a tavern for the purpose of mustering, a party engaged in gaming in a barn 200 yards distant from the tavern house and in a separate enclosure, though on the same plantation, the barn being 60 or 70 yards in the rear of another barn in which spirits were sold by the tavern keeper. Held, that the first-mentioned barn was a public place, within the meaning of the act to prevent unlawful gaming. *Farmer v. Com.*, 8 Leigh 741.

Bedroom in Hotel.—Playing poker in a room in a hotel with the door locked is not a violation of the statute prohibiting gaming at a hotel or other public place. *State v. Brast*, 31 W. Va. 380, 7 S. E. 11.

Church.—A church may be a public place while the people are assembled there for religious worship or other purpose or while so assembling or afterwards dispersing, yet at all other times it may be a strictly private place. *Bishop v. Com.*, 13 Gratt. 785.

Licensed Eating House.—A licensed eating house in a town is a public place within the meaning of Va. Code, 1860, ch. 198, § 4, prohibiting gaming. *Neal v. Com.*, 22 Gratt. 917.

Disused Jail House.—An old house formerly used as a jail, located on the

public square attached to a courthouse, and accessible to all citizens, is a public place within the meaning of the gaming act, though no public business of any kind is now transacted therein. *Walker v. Com.*, 2 Va. Cas. 515.

Secluded Outdoor Place.—Persons engaged in gaming in a place concealed by bushes and briars, on land owned by a county for supporting its poor, are not liable to indictment for gaming in a public place. *Com. v. Vandine*, 6 Gratt. 689.

A field between a river and an old highway, which is a suitable place for racing and is occasionally so used with the tacit permission of the owner, is a race field within the meaning of the statute forbidding gaming at a race field. *Com. v. Wilson*, 9 Leigh 648.

Storehouse after Business Hours.—If the playing is at a storehouse in the nighttime, after the business of the day is at an end, and the doors closed, the storehouse is not, prima facie, a public house, though it is so when it is open to the public in the daytime. *Windsor v. Com.*, 4 Leigh 680.

A storehouse in a village, late at night, after persons cease to come to the store to purchase goods, and the door is locked, is not a public place, within the meaning of the statute against gaming. *Com. v. Feazle*, 8 Gratt. 585.

Tavern.—Playing cards in a tavern is unlawful gaming, whether the party bets or not. *Com. v. Terry*, 2 Va. Cas. 77.

"According to the statute, gaming at a hotel or tavern is an offense without any proof or evidence that it is a public place. All that is necessary, in such case, is to prove that the gaming was done at a hotel or tavern, and the offense is established. But it is very different in the case of an indictment for gaming at a public place. In such case it devolves upon the prosecution to prove not only the place, but that it was a public place. Unless the gaming is done at a hotel or tavern or at

a public place, the act does not constitute an offense under the provision of the statute; and, unless it is proved that the gaming here charged was done at a public place, then, under this indictment, the defendant is not shown to be guilty of the offense charged, and can not be convicted." *State v. Brast*, 31 W. Va. 380, 7 S. E. 11.

Room in Tavern Lot Not under Control of Landlord.—A room, in an out-building within the enclosure of a tavern lot, which at one time had been used in connection with the tavern, the room over which being still so used, having been rented by a third party and held, used and controlled by him, independently of the proprietor of the tavern, though the occupier boards at the tavern and the servants of the same attend to the room, is not a part of the ordinary, nor is it a public place, in the sense of Va. Code, 1849, ch. 198, § 4, p. 743, imposing a fine for gaming "at any ordinary, race field, or other public place." *Purcell v. Com.*, 14 Gratt. 679.

Building Disconnected from Tavern.—To make a separate house an appurtenance of a tavern, within the meaning of the statute prohibiting gaming within a tavern or any building appurtenant thereto, such house must be used in connection with the tavern for the accommodation of guests. *Com. v. Sanders*, 5 Leigh 751.

The lessee and occupier of a tavern was also the occupier, under the same lease, of a storehouse, which, however, was not within the curtilage of the tavern, nor used in any way with the tavern. Held, that the storehouse was not a part or appurtenance of the tavern, within the meaning of the statute against unlawful gaming. 1 Rev. Va. Code, ch. 147, § 16; *Com. v. Sanders*, 5 Leigh 751.

VI. Particular Games Prohibited.

See ante, "General Nature of Statutes Prohibiting Gaming," III.

Bagatelle.—The game of bagatelle is

within the meaning of Va. Code, 1860, ch. 198, § 4, p. 806 (Va. Code, 1887, § 3818), making it unlawful for any person to bet at any game except bowls, etc., at any ordinary, race field or other public place. *Neal v. Com.*, 22 Gratt. 917.

But to play at the game of bagatelle at a licensed bagatelle table, is to play at a licensed game, and is lawful under the Code, ch. 198, § 4, though such game be played at a public place. *Neal v. Com.*, 22 Gratt. 917.

Faro.—Faro is a game, and it is played with cards; and it is not one of the class of excepted games, "bowls," etc., etc. See 1 Rev. Va. Code, p. 563, § 5; sess. acts, 1848, p. 114, § 5. *Gibbony v. Com.*, 14 Gratt. 582.

Haphazard.—The distinctive feature in the character of the games called A. B. C. and E. O. and faro bank is that the chances of the games are unequal and in favor of the exhibitor of the games or tables. If other games resemble these standard games in this distinctive feature, they come within the terms of the 17th section of the gaming act, 1 Rev. Va. Code, ch. 148, § 17 (see Va. Code, 1887, § 3815), and are liable to the same penalties. Under this construction, the exhibitor of a gaming table called haphazard, alias blindhazard, alias snickup, etc., is liable to the same punishment as the exhibitor of a faro bank. *Com. v. Wyatt*, 6 Rand. 694. See also, *Huff v. Com.*, 14 Gratt. 648.

Betting on One's Own Game.—"It is argued by plaintiff in error, by counsel, that § 4, Va. Code, ch. 198, does not prohibit betting on one's game, but on the sides of others who play. We think this construction is wrong, and that § 4, in prohibiting a person from betting on the sides of those who play, includes the case of a person betting on his own game." *Neal v. Com.*, 22 Gratt. 917.

Poker.—The game of poker, or draw poker, is not a game of the like kind with faro, keno, etc., and does not come

within the meaning of the statute. *Va. Code*, 1873, ch. 194, § 1, p. 1212. *Nuckolls v. Com.*, 32 Gratt. 884.

Slot Machine.—Upon the trial of an indictment under § 1, ch. 151, *W. Va. Code*, for unlawfully keeping and exhibiting a gambling device commonly called a "slot machine," it is not error to instruct the jury that "if the jury shall believe from the evidence beyond a reasonable doubt, that the slot machine described in the indictment is a gaming table, and that the said machine is so constructed that it offers unequal chances to the player and exhibitor, and that the unequal chances are in favor of the exhibitor, of said machine, then the said slot machine is a gaming table of like kind and character to A, B, C and E O, table, faro bank and keno table." *State v. Gaughan*, 55 *W. Va.* 692, 48 *S. E.* 210.

"The slot machine is essentially a banking game. When the player wins, if it happens that he does win, the money is paid from the machine, the bank fund, the deposits of the previous and less fortunate players. It is played by the machine or the exhibitor on the one side, and any and all players who chose to play on the other side and the chances to win are equal with the greater number of chances in favor of the machine or exhibitors." *State v. Gaughan*, 55 *W. Va.* 692, 48 *S. E.* 210.

VII. Prosecution.

A. JURISDICTION.

State of Virginia.—The state of Virginia has authority, by statute, to forbid its citizens to bet on horse racing in another state, and this right is not affected by the fact that the money is to be placed in a third state. The act forbidden is the wager, and over it, and the actors in it, the state has complete jurisdiction. It is immaterial where the race takes place. *Lacey v. Palmer*, 93 *Va.* 159, 24 *S. E.* 930, 2 *Va. Law Reg.* 82. See the title HORSE RACING.

Jurisdiction of a Justice of the Peace.

—No one can question that a justice has jurisdiction to issue a warrant to begin a prosecution for keeping gaming tables under *W. Va. Code*, 1899, ch. 151, § 1. *Woods v. Cottrell*, 55 *W. Va.* 476, 47 *S. E.* 275.

Writ of Prohibition.—A justice who issues a warrant to arrest a party for keeping a slot machine as a gaming table, and to seize the same, and who on hearing requires the accused to give recognizance to appear before the criminal or circuit court to answer the charge, and orders the constable to turn over to the clerk of such court the slot machine to abide its order, is acting within his jurisdiction, and a writ of prohibition will not lie against him and the constable to restrain them from executing such order, nor against such clerk to prohibit his retaining the machine until such court act upon it. *Woods v. Cottrell*, 55 *W. Va.* 476, 47 *S. E.* 275.

B. APPEARANCE BY ATTORNEY.

A defendant, presented for unlawful gaming, may appear and plead by attorney without making his personal appearance. *Com. v. Lewis*, 1 *Va. Cas.* 334.

C. TRIAL BY JURY.

A defendant presented for unlawful gaming is entitled to a trial by jury. *Com. v. Horton*, 1 *Va. Cas.* 335; *Com. v. McGuire*, 1 *Va. Cas.* 119.

D. INDICTMENT, INFORMATION AND PRESENTMENT.

1. Necessity of Information.

Judgment by Default.—A tavern keeper who is presented for suffering faro and loo to be played at his house may be tried on the presentment alone, without any information; and, if he refuses to answer to the presentment, judgment by default may be rendered against him. *Com. v. Maddox*, 2 *Va. Cas.* 19. See generally, the title INDICEMENTS, INFORMATIONS AND PRESENTMENTS.

The act of 1879 imposed the penalty of \$150 on tavern keepers who allowed the game of faro to be played in their houses. Held, that the forfeiture could not be recovered for the use of the commonwealth by information. *Com. v. Richards*, 1 Va. Cas. 133.

2. Charging Several Offenses in One Indictment.

Where an indictment for gaming under Va. Code, 1873, ch. 194, § 1, pursued the language of the statute except that it used the word "and" in place of "or" thus charging the accused with all the games mentioned in said statute, it was held to charge but one offense, and to be supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and that on conviction there would be but one fine and one term of imprisonment. *Leath v. Com.*, 32 Gratt. 873.

On an indictment under the gaming act, several offenses may be charged against different persons, viz., one for exhibiting a faro bank, another for playing at faro, and a third for suffering faro to be played at his house. *Com. v. McGuire*, 1 Va. Cas. 119, 121.

3. Particularity of Description Required.

a. The Place.

House of Public Resort.—An indictment which charges that unlawful gaming is carried on at a house of public resort is good under the gaming act. *Wortham v. Com.*, 5 Rand. 669.

Within Jurisdiction of Court—Richmond.—An indictment for gaming, under Va. Code, 1873, ch. 194, § 1, is sufficient if it alleges that the game was kept in Richmond and within the jurisdiction of the court. *Leath v. Com.*, 32 Gratt. 873.

House of Entertainment.—An indictment charging the defendant with unlawful gaming at the house of J. M., the same being "a house of entertainment," is sufficient. *Linkous v. Com.*, 9 Leigh 608.

Grocery Store.—A presentment "for

unlawfully playing cards at the grocery of D. and C." is defective in substance, for not alleging the grocery to be a public place, or a place of public resort. *Roberts v. Com.*, 10 Leigh 686.

Public Place at Time of Playing.

A presentment for playing at cards must charge that the place at which the playing occurred was a public place at the time of such playing, where the name of the place does not of itself import that it was at all times a public place. *Bishop v. Com.*, 13 Gratt. 785.

A presentment for gaming charged the defendant with playing at an unlawful game "at the house of R. L. in the county of P. W." Held, that the presentment was fatally defective in not charging that the house where, etc., was an ordinary or public place. *Hord v. Com.*, 4 Leigh 674.

An indictment which charges that the defendant "did at and in a certain room in the hotel of Lahew Nutter, near the town of Spencer, in said county, said room then and there being a public place and a place of public resort, bet and play, at a certain game played with cards which said game is commonly called and known as the game of draw poker," etc., is good as an indictment for playing at a public place, but is not good as an indictment for playing at a hotel or tavern. *State v. Kyer*, 55 W. Va. 46, 46 S. E. 694.

"This is a good indictment for playing cards at a public place, but it is not a good indictment for playing at a hotel or tavern, as the words 'in the hotel of Lahew Nutter' are merely descriptive of the place, and not of the essence of the offense. As used they may mean a private boarding house or other building designated as the 'Hotel of Lahew Nutter.' The indictment does not charge the offense as committed at a hotel, known as the hotel of Lahew Nutter, but it charges the offense as committed in a certain room, it being a public place and a place of

public resort." *State v. Kyer*, 55 W. Va. 46, 46 S. E. 694.

Hence, "if the prosecutor fails to show that the room was a public place or a place of public resort, he can not have such indictment held good as charging the unlawful gaming to have been done at a hotel or tavern." *State v. Kyer*, 55 W. Va. 46, 46 S. E. 694.

At or Near Public Place.—The very place of the playing should be alleged to be a public place. A presentment for playing cards "at or near" a public place is not sufficient. *Bishop v. Com.*, 13 Gratt. 785.

Booth—Variance.—On a presentment for gaming, the defendant was charged with the offense committed at the booth of Price Skinner; the proof was of gaming at the booth of Clarke, the said Skinner having no right, interest, or agency in the booth; this proof is insufficient to support the charge. *Butts' Case*, 2 Va. Cas. 18.

b. The Game or Device.

Game of Unequal Chance.—An indictment, under Va. Code, 1849, ch. 198, § 1, must charge the playing of one of the games specified, or it must show by averment that the gaming charged is of like kind as those specified, that is, that the chances of the game are unequal, all other things being equal. *Huff v. Com.*, 14 Gratt. 648.

Where Device Not Specifically Named in Statute.—Where the offense charged is for keeping and exhibiting a game not enumerated, there must be some averment in the indictment showing it to be one of the unequal games belonging to the same class with the enumerated games. *Huff v. Com.*, 14 Gratt. 648.

Following Language of Statute—Statutory Name.—Where the offense charged is the exhibition of any of the gaming tables enumerated in the statute against gaming, it is sufficient to mention the same by name without further description. *Huff v. Com.*, 14 Gratt. 648.

Keeping Gaming Table—Needless Allegations.—It is not necessary that the indictment should charge that the games or tables were kept or exhibited for gain. It is sufficient that it follows the language of the statute, and further charges that the accused did unlawfully keep and exhibit, etc. *Leath v. Com.*, 32 Gratt. 873.

Variance—Cards—Faro.—An indictment for "unlawfully playing at cards" at a public place may be sustained by proof that the party bet at faro at the time and place stated in the indictment. *Gibbony v. Com.*, 14 Gratt. 582.

All Games in Statute—Proof of One.—An indictment under the statute, Va. Code, 1873, ch. 194, § 1, for gaming, pursues the language of the statute, except that it uses the word "and" in place of "or," thus charging the accused with exhibiting all the games mentioned in said statute. This is correct. It charges but one offense, and is supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and on conviction there would be one fine, and on one term of imprisonment. *Leath v. Com.*, 32 Gratt. 873.

Must Prove That Defendant Played at One of the Games Specified in Indictment.—An indictment for gaming charged the defendant with unlawful playing with cards, to wit, at the game of all fours, of loo and of whist, at a public place to wit, at the storehouse of G. H. & Co. Held, that to convict the defendant, it must be proved that he played at some one of the games specified in the indictment. *Windsor v. Com.*, 4 Leigh 680.

c. Parties with Whom Game Played.

Person with Whom the Gambling Was Done Must Be Named.—The person with whom the bet was made must be stated. *Bish. St. Cr.*, § 944; *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740; *State v. Snider*, 34 W. Va. 83, 11 S. E. 742.

But where an indictment was against

two defendants jointly, and alleged that they "did unlawfully wager and bet \$50 in money" on election for presidential electors, yet did not allege that they bet with another person, and name that person; nor did it say that they bet with each other, nevertheless the court held, that in common speech and understanding, when we say that A and B bet on an election and other things we mean that they bet with each other, the one against the other, and that the plain import of the charge in the indictment was that they bet with each other; that it would be very technical to overrule the indictment on this ground. *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740.

Variance.—An indictment against a tavern keeper for suffering the game of loo to be played in his tavern by certain persons named will be supported by proof of his having suffered that game to be played therein, though by other persons than those named in the indictment. *Com. v. Price*, 8 Leigh 757.

4. Sufficiency of Presentment.

Appearance on Record.—It is not necessary to the validity of a presentment by a grand jury that it should appear on the record in extenso. A record reciting that it is "a presentment for unlawful gaming" against the defendant is sufficient. *Com. v. Tiernan*, 4 Gratt. 545.

Time and Place Not Stated.—Upon a presentment for unlawful gaming at cards at a particular place within six months next proceeding, process is issued summoning the defendant to answer a presentment for unlawful gaming at cards, generally, without specifying place or time. Held, such process is good and sufficient. *Word v. Com.*, 3 Leigh 743.

Duplicity.—A presentment for unlawful gaming by playing at cards and betting on the sides and hands of those that then and there did play is not objectionable for duplicity. *Com. v. Tiernan*, 4 Gratt. 545.

5. Plea of Misnomer.

A misnomer can not be pleaded to a presentment, indictment, or information, for unlawful gaming, under our statutes. *Com. v. Adkinson*, 2 Va. Cas. 513. But see general statute curing misnomers, Code, 1904, § 3999.

6. Effect of Confessing Judgment.

If a defendant confess judgment on a presentment for gaming for the fine and costs, although the presentment might have been defective on a special demurrer, yet that judgment ought not to be reversed on a writ of error. *Com. v. Offner*, 2 Va. Cas. 17.

7. Presentment—How Quashed.

A presentment for gaming not setting out any offense against the statute, may be quashed on motion. *Huff v. Com.*, 14 Gratt. 648.

8. Objection to Form of Indictment under Statute.

Under Va. Code, 1887, § 4011, which provides that no exception shall be allowed for any defect or want of form in any indictment under the gaming act, objections that the record did not set forth the appointment and oath of the foreman of the grand jury, and that the names of the grand jurors and witnesses on whose information the indictment was found were not written at the foot of the indictment, were properly overruled. *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

E. EVIDENCE.

For a case in which the evidence was held insufficient to sustain a conviction for unlawful gaming, see *Leath v. Com.*, 32 Gratt. 873.

VIII. Witnesses.

Expert Witness Need Not Be Professional Gambler.—A witness who has played "keno" twice, and has seen it played two or three times, is competent to tell what he knows of the manner of playing the game, although he says he is not an expert. *Nuckolls v. Com.*, 32 Gratt. 884.

Self Incrimination.—In a prosecution

for unlawful gaming, a witness is not justified in refusing to testify before the grand jury on the ground that his answer will tend to criminate and disgrace him; for the statute, acts, 1877-78, ch. 10, p. 51 (Va. Code, 1887, §§ 3899, 3901), gives full protection to a witness in such case. *Kendrick v. Com.*, 78 Va. 490. See note in 2 Va. Law Reg. 314. See also, Va. Code, 1904, § 3999.

Statute Protecting Witnesses in Gaming Cases Not Applicable to Lotteries.—The statute, Va. Code, 1873, ch. 195, § 20; Va. Code, 1887, § 3899, which provides that a witness giving evidence in a prosecution, for unlawful gaming shall never be proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution, does not apply to a prosecution for managing and conducting a lottery; and a witness can not be required to testify in such a case if he will thereby criminate himself. *Temple v. Com.*, 75 Va. 892. See the title LOTTERIES.

"It is true that in common parlance the word lottery may mean a game. But the legislature has plainly drawn a distinction between lotteries and unlawful gaming. Both are offenses against the law, and both are offenses against public policy. But they are separated in different sections of the Criminal Code, and the punishment prescribed for these offenses is different. In the enumeration of unlawful games, lotteries are left out. And to show conclusively that the legislature made this distinction between unlawful gaming and lotteries, it is only necessary to refer to the 22d section of chapter 9, which provides that 'all laws for suppressing gaming, lotteries, and unchartered banks, and the circulation of bank notes for less than five dollars shall be construed as remedial.'"

* * * Therefore, it is plain that the section above quoted, which affords indemnity to a witness who testifies in a case of unlawful gaming, does not

apply to a prosecution under the statute which prohibits the setting up, promoting, and managing a lottery." *Christian, J., in Temple v. Com.*, 75 Va. 892. See the title LOTTERIES.

IX. Construction of Gaming Laws.

Remedial.—The laws against gaming are to be construed as remedial laws. *Pitman v. Com.*, 2 Rob. 800. See also, *Com. v. Garland*, 5 Rand. 652.

Va. Code, 1849, ch. 198, § 10 (see Va. Code, 1887, § 3824), relating to betting on elections, is to be construed as a remedial, not as a penal statute, pursuant to § 20 of the same chapter, which enacts that rule of construction. *Shumate v. Com.*, 15 Gratt. 653.

The act of assembly, passed 11th of February, 1825, entitled, "an act to prevent the sale of foreign lottery tickets within this commonwealth," does not come within the operation of the 29th section of the gaming law, and is, therefore, not to be interpreted as if it were a remedial law, but like other penal laws. *Com. v. Chubb*, 5 Rand. 715.

X. Sentence and Punishment.

See the title SENTENCE AND PUNISHMENT.

The act of 1879 imposed the penalty of \$150 on tavern keepers who allowed the game of faro to be played in their houses. *Com. v. Richards*, 1 Va. Cas. 133.

Constitutionality of Act Inflicting Stripes for Gambling.—The act of February, 1823, which directs that the person convicted of gambling may be imprisoned for a time, not less than one, nor more than six months, and may receive stripes, at the discretion of the court, to be inflicted at one time, or at different terms, provided the same do not exceed thirty-nine at any one time is not unconstitutional. The discretion therein delegated is a sound discretion, and if the judge

abuses the power conferred, making it subserve motives of oppression, or his own vindictive passions, he is liable to be impeached. This discretion conferred on the judges of the superior courts, is of the same character with the discretion exercised by the common-law courts in imposing fines and imprisonments. *Com. v. Wyatt*, 6 Rand. 694.

Revocation of License.—Upon the conviction of a tavern keeper on an indictment for permitting unlawful gaming in his tavern, judgment can not be rendered for revocation of defendant's license acquired since the commission of the offense. *Com. v. Price*, 8 Leigh 757.

Necessity of License.—If a party indicted for suffering an unlawful game to be played at his tavern, was keeper of the tavern at the time of such playing, his having a license at the time is not necessary to his conviction. *Com. v. Price*, 8 Leigh 757.

XI. Retrospective Effect of the Gaming Laws.

The statute of March 26, 1842, enacting "that in all recoveries hereafter had for violations of the gaming laws, the fee recovered shall be ten dollars for the commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum at present provided," had no application whatever to offenses committed before its passage, but such offenses remained liable to prosecution and punishment under the pre-existing law, in the same manner as if the said stat-

ute had never been passed. *Pitman v. Com.*, 2 Rob. 800.

The statute passed in the session of assembly of 1827, 1828, prescribing a new punishment for an offense committed after May 1, 1828, did not repeal former statutes, defining the offense and prescribing other punishment for the same, as to such offense committed before May 1, 1828. *Com. v. Pegram*, 1 Leigh 569.

XII. Power of Municipal Corporations to Prohibit.

See the title MUNICIPAL CORPORATIONS.

Unless the charter of a city, town or village confers upon it authority so to do, the council therefor has no right or power to pass an ordinance to regulate or prohibit gaming or gaming devices, or to prescribe and enforce penalties for a violation of such ordinance. Held, that the ordinance passed by the council of the town of Bramwell on the 6th day of July, 1903, is unauthorized and void. *Morley v. Godfrey*, 54 W. Va. 54, 46 S. E. 185.

XIII. Seizure of Gaming Tables—Power to Burn.

When gaming tables are seized under a warrant from a justice under W. Va. Code, 1899, ch. 151, § 1, the justice can not order them to be burnt. That can be done only upon conviction of their owner upon the charge of keeping them, in a criminal or circuit court, and under its order. *Woods v. Cottrell*, 55 W. Va. 476, 47 S. E. 275.

Gaol and Gaol Limit Bonds.

See the title PRISONS AND PRISONERS.

Garnishment.

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GAS.

- I. Grant of Exclusive Franchise—Validity, 704.**
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CROSS REFERENCES.

See the title MINES AND MINERALS.

I. Grant of Exclusive Franchise—Validity.

Where the charter of a municipal corporation merely authorizes it to "contract and be contracted with," and declares that "generally shall have all the rights, franchises, capacities and powers appertaining to the corporations in this commonwealth" and that such corporation "shall have power to lay off streets, walks, or alleys, alter or improve and light the same, and have them kept in good order" a grant to a private corporation of the exclusive right to use the streets, alleys and public grounds of such corporation for the purpose of laying pipes for the conveyance of gas, for the use of said city and its inhabitants for thirty years is ultra vires and void, so far as it attempts to confer such exclusive right, it not appearing that any other city or town of the commonwealth possessed such power. Even if such exclusive privilege of lighting with gas were valid, it would not deprive the city of the power to contract with an electric light company for lighting the city with electric lights. Parkersburg Gas Co.

v. Parkersburg, 30 W. Va. 435, 4 S. E. 650.

II. Construction of Franchise—Purchase of Plant by City.

The seventeenth section of an act of the general assembly of Virginia passed the 18th day of March, 1850, and entitled "An act to incorporate the Wheeling Gas Company" provided "that said company shall have the sole and exclusive privilege of using the streets, alleys and public grounds of said city (meaning the city of Wheeling) for the purpose of lighting said city with gas for the full term and period of thirty years from the time said company shall commence the distribution and supply of gas, of which time notice shall be given by said company to be entered amongst the records of said city, the assent of the council of said city being first had and obtained as hereinafter provided: Provided always, that upon the expiration of the twenty years from the commencement of said exclusive privilege hereby granted, and within six months thereafter, the said city of Wheeling

shall have the right, at the discretion of the council thereof and of which notice shall be given in writing to the said company, to purchase the said lots or grounds, works, apparatus, fixtures and property of said company, at the price and upon the terms to be agreed between the council of said city and the directors of said company, or to be fixed, ascertained and determined in the following manner: By the award in writing, of three persons to be chosen, the first by the directors of said company, the second by the council of said city, and the third by the two thus chosen. The said arbitrators, in making up their award, and ascertaining the said value, shall have regard alone to the then actual value, in money, of the lots or grounds, buildings, apparatus, works and fixtures of said company, and shall not consider the value of the franchises of the said charter, or the dividends or profits accruing to the stockholders. Upon complying with the terms of the award thus made, the said company shall, by proper deeds or other instruments in writing, convey and assure to said city of Wheeling, the said lots or grounds, building apparatus, works, fixtures and property, together with this charter, to be thereafter held, used and enjoyed by the said city for the benefit of the inhabitants thereof. Upon said purchase being made as aforesaid, this charter, together with all the franchises, rights and privileges granted or intended to be granted under it, shall be vested in the said city of Wheeling for the common benefit of the inhabitants thereof. And if, upon the expiration of said term of twenty years, the said city of Wheeling shall not make the said purchase in the mode and upon the terms prescribed by this section, the said city shall have the right to make the said purchase upon the expiration of any and every five years upon the same terms and in the same mode, at least six months' notice of such inten-

tion being given in writing to said company by said city, and all contracts or other acts of said company which shall be made, entered into or attempted for the purpose of lessening, impairing or reducing the value of said lot of grounds, apparatus, pipes or fixtures, rights, franchises and privileges, made in anticipation of the said purchase, shall be utterly null and void." It was held, that the council of the city of Wheeling was given by said seventeenth section, in their discretion, the absolute right to purchase said gas works, etc., together with all the franchises, etc., after the expiration of the twenty years aforesaid, and that the purchase should be made at the price and upon the terms to be agreed upon between said council and the directors of the plaintiff company, or by an award in writing, fixing the price and terms of the purchase, to be made by the arbitrators. That, in the event said council elected to make the purchase, and the said council and the plaintiff company's directors should not agree upon the price and terms of the purchase, such price and terms should be fixed, at all events by an award of the arbitrators, hence it should not be necessary to the validity of the award that more than a majority of the arbitrators should agree to and sign the same, they all acting jointly, especially as the charter granted by such act was subject to the provision of § 17, ch. 13, W. Va. Code, providing that "words purporting to give a joint authority to three or more persons, confer such authority upon a majority of them and not upon a less number," and the court being further of the opinion that such authority was given for a public purpose, and hence a majority could act. *Gas Co. v. Wheeling*, 8 W. Va. 320.

The purchase and possession of the gas works should be had by the city upon its complying with the terms of the award so made, or in good faith offering to do so by a legal tender, of

the price in money, specified, or the equivalent of a legal tender at or within the time prescribed by the award. *Gas Co. v. Wheeling*, 8 W. Va. 320.

Concurrence of All Three Arbitrators—Necessity.—An award made and signed by two only of the three arbitrators chosen in accordance with the provisions of said act, is valid, all three of the arbitrators having acted together, though one of said arbitrators dissented and indorsed his dissent thereon with his signature. *Gas Co. v. Wheeling*, 8 W. Va. 320.

Compliance with Award — Sufficiency.—Said award having been made on the 29th day of May, 1871, and delivered to the parties, a tender of the amount fixed by the award, by the city to the president, secretary and treasurer of the plaintiff company, at its office, at a seasonable hour of the day, was a sufficient legal tender, such money being afterwards deposited in a convenient bank subject to the plaintiff's order, of which its president and secretary had notice. The city of Wheeling thereby became the vendee of the plaintiff of the property in the award mentioned, and having acquired peaceable possession thereof, in an action of ejectment brought by the gas company to recover possession of said property, the city of Wheeling is such a purchaser of the property as is contemplated by § 20, ch. 90, W. Va. Code, and is entitled to the benefit of said section in bar of plaintiff's right to recover in such action. *Gas Co. v. Wheeling*, 8 W. Va. 320.

III. Liability of City for Damage Resulting from Grading of Streets.

A municipal corporation has the right to change, alter and improve the grade of its streets, and if, in the prosecution of such work of lowering the grade of one of its streets, the pipes of a gas company are exposed, and re-

moved as nuisances by the city authorities, the city is not liable for the resulting damage, nor can such action be enjoined by the gas company, though the gas company had acquired the right from the city to use its streets for such purposes and its pipes were laid under the instructions of the city engineer. The gas company takes such privilege subject to the right of the city to grade and improve its streets, granted to it by the legislature. *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665.

IV. Power of Eminent Domain.

Supplying an incorporated city or town and its inhabitants with natural gas for the purpose of heating and illumination, by a corporation organized under the general laws of the state, and occupying the streets and alleys of the city or town for the purpose by means of the location therein of its pipes, connections, boxes, valves and other fixtures, under an ordinance of the city or town, is a public use for which such company may take private property, in the manner prescribed by § 42 of the Code of West Virginia upon which to locate its pipe line. *Charleston Nat. Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

V. Duty to Furnish Gas.

Such company is bound to furnish gas to every inhabitant of such city or town, who applies therefor and complies with the regulations prescribed by the ordinance of the town or fixed by contract between the council and the company. *Charleston Nat. Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

VI. Injuries Resulting from Escaping Gas—Liability.

A. GENERALLY.

A person or corporation engaged in furnishing natural gas to stoves, heaters, pipes, etc., for purposes of domestic light, heat and fuel, in a dwelling

house, is bound to exercise such care, skill and diligence in all its operations as is called for by the delicacy, difficulty and dangerousness of the nature of the business, that injury to others may not be caused thereby; that is to say, if the delicacy, difficulty and danger are extraordinarily great, extraordinary skill and diligence are required. If the defendant, so furnishing such gas, negligently and carelessly suffer and permit a greater amount of pressure of said gas to be furnished, than is reasonably proper for said purpose, by reason whereof, the house or building being so furnished is consumed or injured by fire, resulting from such negligence, the defendant is liable in damages for such loss. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 32 S. E. 327.

If such defendant suffer and permit its regulators or other appliances to be and remain for an unreasonable time in such condition that they do not control the amount and pressure of gas so furnished, so that more than a safe and proper amount of gas is so furnished, the defendant is guilty of negligence, and liable in damages for injuries proximately caused by such negligence. If such injury is the natural consequence of such negligence, and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence must be regarded as the proximate or direct cause of the injury, in the absence of intervening negligence. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 32 S. E. 327.

So if a city negligently allow gas to escape from its mains, and injury results without contributory negligence, it is liable. *Richmond v. Gay*, 103 Va. 320, 49 S. E. 482.

Intervening Cause.—The fact that the gas reached the house of the intestate through an abandoned sewer, not a city sewer, and thence through a private connecting pipe, and not di-

rectly from the city mains, does not excuse the defendant. *Richmond v. Gay*, 103 Va. 320, 49 S. E. 482.

B. PRESUMPTION OF NEGLIGENCE FROM INJURY.

But the mere fact that a building so furnished with gas was set on fire from the gas is not sufficient to justify the inference that an increased pressure of gas caused the fire. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 32 S. E. 327.

C. CONTRIBUTORY NEGLIGENCE.

Allowing Fixtures to Get Out of Repair.—If the evidence shows that the pipes, valves, fittings and appliances placed on the plaintiff's premises for the purpose of conducting said gas from the defendant's line to said house, were not in good order and repair and were, at the time of the fire, unsafe for the use and consumption of said gas, and the plaintiff's tenant had knowledge thereof, and by reason thereof, the said gas escaped, or the quantity thereof being burned was increased and caused the destruction of said house; the plaintiff can not recover. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 32 S. E. 327.

Knowledge That Pressure Was Dangerously High.—In an action for injury caused by an explosion of natural gas, knowledge by the plaintiff prior to the explosion that the pressure of gas in defendant's lines was uneven and variable so as to render it dangerous to use the same for lighting and heating, will bar a recovery for damage caused by fire arising from such cause. But the mere knowledge that such pressure is uneven and variable, will not render it contributory negligence to leave the gas burning during the plaintiff's absence from home. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 32 S. E. 327.

Knowingly Allowing Gas to Escape.—If a tenant open a service pipe and

knowingly permit the same to remain open and the gas to escape therefrom into or under the property occupied by him, and then carelessly ignite the same, his landlord can not recover from the gas company the damages occasioned by the resulting explosion, although such gas company was guilty of negligence in not having cut the gas off from such service pipe. *Creel v. Charleston Natural Gas Co.*, 51 W. Va. 129, 41 S. E. 174.

Knowledge That Gas Was Escaping into House.—Where the evidence shows that gas had been escaping into other parts of the house, and the city authorities had made some efforts to remedy the trouble, but without success, and the plaintiff's intestate was aware of these facts, and the dangerous nature of such gas, where it appears that no gas was escaping into the room occupied by such intestate up to midnight, whether under such circumstances, she was guilty of contributory negligence in remaining in the house, or not, taking other precautions for her safety was a question for the jury and not a matter of law. *Richmond v. Gay*, 103 Va. 320, 49 S. E. 482.

Existence or Condition of Abandoned Sewer.—The existence or condition of an abandoned sewer, through which gas reached the house of the intestate and thence through a private connection pipe, and not directly from the city's mains, does not constitute contributory negligence in the intestate, she being in no way responsible therefor. *Richmond v. Gay*, 103 Va. 320, 49 S. E. 482.

D. SUFFICIENCY OF DECLARATION.

Where a declaration in an action against a city for causing the death of the plaintiff's intestate by asphyxiation, in one count states that the gas escaped from the main on Franklin Street on which the house in which the asphyxiation occurred was situated, and in the second count alleged that it es-

caped from a main on another nearby street, another count merely charging the negligent escape of gas without designating the street is not demurrable because it does not allege with sufficient certainty what particular mains of the city, the defendant had failed to examine for the purpose of ascertaining whether such mains were in an improper and unsafe condition, where such count, though general, states sufficient facts to enable the court to say that if the facts stated were proved, the plaintiff was entitled to recover, the plaintiff being unable to know with certainty from what mains the gas escaped, and such fact being peculiarly within the knowledge of the defendant. *Richmond v. Gay*, 103 Va. 320, 49 S. E. 482.

E. EVIDENCE.

Acts and Declarations of Defendant's Employees While Working for Plaintiff.—The acts and declarations of one of defendant's employees while working for the plaintiff, repairing the service line and gas fittings in plaintiff's house, are inadmissible. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 32 S. E. 327.

Usual Pressure Employed by Gas Companies.—So it is not competent to show by a witness the bare fact of what pressure the gauge of another gas company usually indicated, unless accompanied by scientific explanations or expert testimony showing its relevancy. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 32 S. E. 327.

Expert Evidence.—But the testimony of an expert in the handling and control of natural gas is admissible to show what is considered a dangerous pressure on a service line to a dwelling house. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 32 S. E. 327.

Pressure in Neighboring Houses.—In an action for damages caused by an explosion of natural gas, testimony as to the force and pressure of the gas

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| <p>in neighboring houses, is admissible, there being no intervening regulator or hindrance to the force of the gas between the burned house and such neighboring houses. <i>Barrickman v. Marion Oil Co.</i>, 45 W. Va. 634, 32 S. E. 327.</p> | <p>Pressure Shown Shortly after Explosion.—So, also, evidence of the reading of the pressure by the register at the defendant's regulator an hour or two after the explosion is admissible. <i>Barrickman v. Marion Oil Co.</i>, 45 W. Va. 634, 32 S. E. 327.</p> |
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Gas Companies.

See the title GAS, ante, p. 704.

Gasoline.

See the title GAS, ante, p. 704.

Gates.

As to gates at railroad crossings, see the titles CROSSINGS, vol. 4, p. 130; JUDICIAL NOTICE. As to gates on highways, see the titles NUISANCES; PRIVATE WAYS; STREETS AND HIGHWAYS. As to tollgates, see the title TURNPIKES AND TOLLROADS.

GATHER.—By a devise of a tract of land in fee simple, together with all the crops thereon, whether gathered or growing at the time of the testator's death, not only the crops made the year the testator died, but those of the preceding year remaining on the land, and those brought thither, from other plantations, to be stored, will pass. The court said: "The expressions are broad and general, extending to all crops 'gathered or growing,' and correspond with the liberal provision intended by the testator. The construction of the chancellor would render almost nugatory that part of the will which gives the crop gathered; for, suppose the testator had died on the 1st of April; to what could the term gathered have applied, but to the crops of the preceding year?" *Carnagy v. Woodcock*, 2 Munf. 234, 239.

Genealogy.

See the title HEARSAY EVIDENCE.

GENERAL.—In Baltimore, etc., *R. Co. v. Supervisors*, 3 W. Va. 319, 332, it is said: "The definition of the word general found in Burrill's Law Dictionary is, 'that which comprehends all, the whole, as distinguished from special, which signifies something designed for a particular purpose.'"

General Agent.

See the titles AGENCY, vol. 1, p. 243; INSURANCE.

General Appearance.

See the title APPEARANCES, vol. 1, p. 667.

General Assignment.

See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 802.

GENERAL AVERAGE.

I. Jettison of Goods, 710.

- A. Deck Cargo, 710.
 - 1. In General, 710.
 - 2. Vessel Engaged in Coasting Trade, 710.
 - 3. Parol Evidence, 711.
- B. Conflict of Laws, 711.

II. Beaching Vessel to Avoid Damage, 711.

III. Jurisdiction in Equity, 711.

CROSS REFERENCES.

See the title SHIPS AND SHIPPING, and references there given.

I. Jettison of Goods.

A. DECK CARGO.

1. In General.

The general rule of the maritime law seems to be well settled, that goods stowed on deck and lost by jettison, are not entitled to general average and this is the rule in Virginia. *Doane v. Keating*, 12 Leigh 391, 404.

The Rule of the Rhodian Law—Adopted in Virginia.—"The rule of the Rhodian law, as found in Abbott on Shipping, is this: 'If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all.' But goods stored upon deck are excluded from this benefit. The French ordinance also excludes them. And so far as the matter has been acted upon in the courts of this county, the same rule has been adopted." *Doane v. Keating*, 12 Leigh 391, 400.

Reason for the General Rule.—"The true reason why contribution can not be claimed for goods shipped on deck, is given in a note to the case referred to: "The goods themselves increased the danger of the navigation, and are taken on board under an implied agreement that they shall be sacrificed if it be necessary to eject." It is a penalty imposed on the shipper, who thus puts to hazard the safety of the ship and the lives of the crew. And this is the reason given by Valin, Tom. 2, p.

203: "The reason why payment for effects on deck thrown overboard or damaged is refused by this article, is, that they serve only to embarrass the working of the ship; the presumption is, that they have been thrown overboard, before an absolute necessity for jettison, and solely because they hinder and obstruct the working." *Doane v. Keating*, 12 Leigh 391, 402.

2. Vessels Engaged in Coasting Trade.

And the general rule applies even where the vessel is employed in the coasting trade, constructed for the purpose of taking freight on deck. *Doane v. Keating*, 12 Leigh 391, 401.

Exception as to French Coasting Trade—Not Applicable in Virginia.

The exception which seems to prevail in some of the coasting trade of France, does not apply in this case. No such exception is admitted in respect to the coasting trade of England; and the cases before referred to show that it has not been admitted by the judicial decisions of other states of the union in respect to the coasting trade of the United States. The kind of lading and navigation, in which the exception is allowed in France, differs essentially from the lading and navigation of our coasting trade. In the former, no distinction is made in the freight, and the master, under the usage, has the discretion to put any part of the lading on deck which he thinks proper, with-

out special contract and without incurring any responsibility for so doing. Our coasting trade navigates hundreds of miles in the main ocean, and exposed to all sea risks. *Doane v. Keating*, 12 Leigh 391, 405.

3. Parol Evidence.

One ships goods from New York to Norfolk, to be stowed on deck; but the bill of lading is in the usual form, not mentioning that the shipment is of a deck load. In an action by the shipper against the shipowner for average, parol evidence that the goods were to be stowed on deck is admissible. *Doane v. Keating*, 12 Leigh 391.

"It is, however, objected, that the evidence to prove that the goods were shipped as a deck load, is inconsistent with or explanatory of, the bill of lading, and that such evidence is inadmissible. The evidence is not, in my opinion, inconsistent with the bill of lading. That neither affirms nor disaffirms that the goods were shipped as a deck load; and my impression is, that the utmost it can avail the shipper, is to cast on the shipowner the burden of proof, that the stowing of the goods on deck was

justifiable." *Doane v. Keating*, 12 Leigh 391.

B. CONFLICT OF LAWS.

By the maritime law, the loss by general average is to be adjusted at the place, and according to the law of the port of discharge. *Doane v. Keating*, 12 Leigh 391. See the title **CONFLICT OF LAWS**, vol. 3, p. 100.

II. Beaching Vessel to Avoid Damage.

And the same rules of contribution apply where the vessel is beached to avoid capture, and thereby injured, as when goods are thrown overboard from the deck in stress of weather. For example, if, in order to avoid capture by the enemy, the master, before he reaches the port of destination, strands the vessel; which is thereby lost, but the cargo saved, the cargo shall not contribute to repair the loss of the ship. *Eppes v. Tucker*, 4 Call 346.

III. Jurisdiction in Equity.

A bill in equity is the proper manner to recover a general average contribution. *Doane v. Keating*, 12 Leigh 391.

GENERAL CALL.—See **DESCRIPTIVE CALL**, vol. 4, p. 633. And see the title **PUBLIC LANDS**.

GENERAL CONTRACTOR.—See the title **INDEPENDENT CONTRACTORS**.

The term **general contractor**, as used in the act of July 11th, 1870, entitled "an act in relation to mechanics' liens," includes all persons furnishing materials for or doing work upon a building, under a contract made by such persons directly with the owner of the building. The court said: "It is plain that the term **general contractor** is not restricted to the contractor who undertakes to complete every part of the work, because the act in terms provides for the man who does no part of the work, but simply furnishes the material. He may be a **general contractor**, for he is one of the enumerated classes. Upon the face of the whole act it is plain that the words **general contractor** are used in contradistinction to the word **subcontractor**. This contradistinction runs through almost every section of the act. The **general contractor** is required to do certain things, and the **subcontractor** is required to do certain other things; the **general contractor** acquires certain rights in one way, and the **subcontractor** in another way. This view is made conclusive by the fact, that in the third and tenth sections the word **contractor** is used as synonymous with **general contractor**, showing that the word general has no specific import, but only is used

to make more palpable the distinction between the **contractor** and **subcontractor**. It is obvious, looking to the whole act, that a **general contractor**, in the meaning of the statute, is one who contracts directly with the owner of the property; and whether his contract be to construct a part of the whole of a building, if his contract made with the owner he is a **general contractor**, in the meaning of the act." *Merchants', etc., Bank v. Dashiell*, 25 Gratt. 616, 621. See also, the title **MECHANICS' LIENS**. And see *Boston, etc., R. Co. v. Chesapeake, etc., R. Co.*, 76 Va. 180; *Richmond v. Sitterding*, 101 Va. 354, 355, 43 S. E. 562; *Shackleford v. Beck*, 80 Va. 573, 576; *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965; *Cushwa v. Improvement, etc., Ass'n*, 45 W. Va. 490, 32 S. E. 259.

General Court.

See the title **COURTS**, vol. 3, p. 712.

General Customs.

See the title **USAGES AND CUSTOMS**.

General Demurrer.

See the title **DEMURRERS**, vol. 4, p. 461.

General Deposits.

See the title **BANKS AND BANKING**, vol. 2, p. 262.

General Issue.

See generally, the titles **CRIMINAL LAW**, vol. 4, p. 42; **PLEADING**. See also, the titles **ASSUMPSIT**, vol. 2, p. 46; **COVENANT, ACTION OF**, vol. 3, p. 738; **DEBT, THE ACTION OF**, vol. 4, p. 300; **DETINUE AND REPLEVIN**, vol. 4, pp. 643, 652; **EJECTMENT**, vol. 4, p. 898; **FORCIBLE ENTRY AND DETAINER**, ante, p. 181; **TRESPASS; TROVER AND CONVERSION**.

General Jurisdiction.

As to presumptions in favor of courts of general jurisdiction, see the titles **FOREIGN JUDGMENTS**, ante, p. 208; **JURISDICTION**.

GENERAL LAW.—In *Groves v. County Court*, 42 W. Va. 587, 26 S. E. 460, 463, it is said: "A general or public act is a universal rule that regards the whole community. * * * Special or private acts are rather exceptions than rules, being those which operate upon particular persons and private concerns." 1 Bl. Comm. 86."

In *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239, 240, it is said: "A statute relating to persons or things as a class is a **general law**; one relating to particular persons or things of a class is **special**." *Suth. St. Const.*, p. 149." See also, the titles **CONSTITUTIONAL LAW**, vol. 3, p. 169; **STATUTES**.

General Legacies or Bequests.

See the title **WILLS**.

General Manager.

See the titles DECLARATIONS AND ADMISSIONS, vol. 4, p. 340; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

GENERAL RECITAL.—In *Baxter v. Wade*, 39 W. Va. 281, 19 S. E. 404, 408, it is said: "There is, however, a marked distinction between **general recitals** in a deed and the **recital** of a particular fact. The former, as a general thing, does not conclude a party, while the latter works an estoppel." See the title ESTOPPEL, vol. 5, p. 191.

GENERAL REPLICATION.—A **general replication** is a general denial of the truth of the defendant's plea or answer. *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624, 626; *Simmons v. Simmons*, 33 Gratt. 451, 458. See also, *Van Bibber v. Berne*, 6 W. Va. 168, 180. And see the title PLEADING.

General Restraint of Trade.

See the title RESTRAINT OF TRADE.

General Verdict.

See the title VERDICT.

General Warranty.

See the titles COVENANTS, vol. 3, p. 741; WARRANTY.

Genuineness.

See the title EXECUTION AND PROOF OF DOCUMENTS, vol. 5, p. 403.

General and Specific Words.

See the titles CONTRACTS, vol. 3, p. 403; INTERPRETATION AND CONSTRUCTION.

Geographical Facts.

See the title JUDICIAL NOTICE.

GIFT OVER.—A condition in a will annexed to a bequest of personal estate, declaring the legacy forfeited if any attempt is made to set aside the will or to cause litigation over it, where there is no **gift over** upon breach of such condition, is merely in terrorem and inoperative. And a provision in a will that the legacy to the contesting legatee shall revert to the estate of the testator is not a **gift over** within the meaning of the rule. *Fifield v. Van Wyck*, 94 Va. 557, 27 S. E. 446. See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

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I. Definition and Classification.

Definition.—Grants or gifts of chattels personal are defined by Sir Wm. Blackstone to be "the act of transferring the right and possession of them; whereby one man renounces, and another man immediately acquires all title and interest therein, which may be done either in writing or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest, and most essential. A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately." Blackstone's Com. 2, Book 341. *Dickeschied v. Bank*, 28 W. Va. 340, 359.

Classification.—There are two kinds of gifts: First, gifts simply so called, gifts *inter vivos*; second, gifts *causa mortis*, or those made in apprehension of death. *Dickeschied v. Bank*, 28 W. Va. 340, 359; *Barker v. Barker*, 2 Gratt. 344. See also, *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

II. Inter Vivos.**A. DEFINITION.**

"Gifts *inter vivos*, or simple gifts, are such as one party makes to another without the expectation of approach-

ing death as the moving cause." *Dickeschied v. Bank*, 28 W. Va. 340, 359. In *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, it is said by Riley, J., "A gift is a contract without a consideration, and to be valid must be executed. A valid gift is therefore a contract executed." 1 Va. Law Reg. 871. See *Thomas v. Lewis*, 89 Va. 1, 86, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

Absolute Gift—Advancements.—An advancement is an absolute gift which the donor can not recall, but for which he may, in his will, abate *pro tanto*, the share of his estate devised or bequeathed in it to the donee. *Rowe v. Merchant*, 86 Va. 177, 187, 9 S. E. 995. See the title ADVANCEMENTS, vol. 1, p. 189.

B. SUBJECTS OF VALID GIFT.

Kinds of Property.—After reviewing the authorities, the court in *Henry v. Graves*, 16 Gratt. 244, said that, "It may be stated as the result of all the authorities, that a voluntary gift valid in law or equity, may be made of any property, real or personal, legal or equitable, in possession, reversion or remainder, vested or contingent, and including choses in action unless they be of such a nature as that an assignment of them would be a violation of

the law against maintenance and champerty." *Mayo v. Carrington*, 19 Gratt. 74, 123; *Thomas v. Lewis*, 89 Va. 1, 67, 15 S. E. 389. See *Seabright v. Seabright*, 28 W. Va. 412, 481; *Claytor v. Pierson*, 55 W. Va. 167. See post, "Subjects of Valid Gift," III, D.

Choses in Action.—It is well settled that choses in action may be the subject of valid gifts. Thus, gifts of promissory notes, bonds, mortgages, savings banks, books, certificates of the deposit, etc., have been upheld. The words "goods and chattels" in § 1 of chapter 71 of the West Virginia Code, include money and every other kind of personal property, which may be the subject of a gift inter vivos of causa mortis. *Dickeschied v. Bank*, 28 W. Va. 340, 368; 14 Am. & Eng. Ency. Law, 1028; *Claytor v. Pierson*, 55 W. Va. 167, 173, 46 S. E. 935.

"It is well settled by the modern authorities that choses in action not negotiable, and negotiable paper not endorsed, may be the subject of a gift, and that a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. The delivery, therefore, of a certificate of stock, unendorsed, by the donor to the donee, with intent to transfer title by way of gift, is effectual as an equitable assignment, although no legal title passes for want of an endorsement and transfer on the books of the bank. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848." *First Nat. Bank v. Holland*, 99 Va. 495, 501, 39 S. E. 126, 55 L. R. A. 155; 86 Am. St. Rep. 898, 7 Va. Law Reg. 204.

Bounty Money.—Bounty money paid to a child or minor for enlistment in the army or navy is a gift, not wages, by the government to the child and hence it belongs to the minor and not to his father or master. *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821, 833. See the titles BOUNTIES, vol. 2, p. 611; PARENT AND CHILD.

Bond.—A bond may be the subject of a valid gift inter vivos and hence the delivery of a bond with the intent to make a gift thereof, by one having a life estate therein, accompanied by a written instrument to that effect, though it is not under seal, is a valid gift of the donor's interest therein. *Dunbar v. Woodcock*, 10 Leigh 628.

C. DISTINGUISHED FROM TESTAMENT.

See post, "Distinguished from Gift Inter Vivos," III, B.

There is a well-recognized distinction between the rule affecting testamentary gifts, and gifts inter vivos; and it is now well settled by an unbroken current of authority—both English and American—that a will is not invalidated by the mere fact that it was written by the attorney, agent, physician, priest, or other confidential adviser of the testator, who is himself a beneficiary. *Montague v. Allen*, 78 Va. 592, 600. See the title WILLS.

Effective at Donor's Death—Gift Testamentary.—A delivery which confers on the donee power to control the fund, only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. *Sterling v. Wilkinson*, 83 Va. 797, 3 S. E. 533. In this case choses in action were deposited to be, in case of depositor's death, equally divided between his wife and children. Subsequently the depositor authorized the depository, in case of his death, to dispose of enough choses in action to secure himself against any loss he might suffer as depositor's indorser. The gift to wife and children was held invalid; but the choses in action were held liable to the debts of depository for which they had been assigned.

A gift by a donor to his children which contains the express provision that, "in case of his death," the fund was to be distributed between them, is testamentary in character, and hence

not good as a gift *inter vivos*. *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533.

D. DISTINGUISHED FROM LOAN.

Intention.—Whether a transaction is a gift or loan is always determined by the intention of the donor. This intention must be gathered from the facts and circumstances attending the transfer of the property. *Mahon v. Johnston*, 7 Leigh 317.

E. STATUTORY PROVISIONS STATED AND CONSTRUED.

No gift of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section. Va. Code, 1904, § 2414; W. Va. Code, 1899, ch. 71, § 1; *Thomas v. Lewis*, 89 Va. 1, 66, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *First Nat. Bank v. Holland*, 99 Va. 506, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898, 7 Va. Law Reg. 204; *Good v. Good*, 39 W. Va. 357, 19 S. E. 382, 384; *Blankenship v. Kanawha, etc., R. Co.*, 43 W. Va. 135, 27 S. E. 355; 3 Min. Inst. (2d Ed.) 90. See also, 1 Va. Law Reg. 871; 7 Va. Law Reg. 214. See post, "Donor and Donee Residing Together," II, F, 3, b, (6).

Object of Statute.—The principal object which the legislature had in view, in the passage of the law as it stood in the Code of 1849, was to protect the estate of decedents from the rapacity of unscrupulous attendants residing with and constantly surrounding them, and to prevent them from appropriating to their own use the slaves or other personal property belonging to the alleged donor; and just in proportion as his personal property was valuable, and of a character to be readily appropriated, so much the more was it necessary, that when claimed as a gift, the actual

possession of the property should be required to come to and remain in good faith, with the alleged donee. Where the donee resides with the donor, so many opportunities of unfair dealing may be found, and so many temptations to commit perjury may exist, the legislature determined to render the same impossible by declaring that no gift of goods and chattels should be valid, unless "actual possession shall have come to and remained with the donee or some person claiming under him." And if the donor and donee reside together at the time of the gift, possession at the place of their residence, shall not be deemed possession within the meaning of the statute. If the purpose of the statute was to protect the owner of personal property and his distributees against the unjust claims of unscrupulous attendants or relatives residing with him; and such persons while so residing with him could be permitted to obtain possession of his personal estate, and claim title thereto, as a gift made to, and held by them as the agent of some third party not residing with the donor, the statute would become wholly ineffectual, unless the possession of such agent, should also be held to be within the prohibition of the statute. The case under consideration affords perhaps the best illustration that can be presented, of the mischief intended to be presented by the statute. *Dickeschied v. Exchange Bank*, 28 W. Va. 340, 368.

The object of this section is not to prevent a minor from holding such personal property, as his father may deem just and proper to give to him, or allow him to hold, when not in fraud of creditors. *Blankenship v. Kanawha, etc., R. Co.*, 43 W. Va. 135, 27 S. E. 355.

History of Acts.—For history of the above acts, from 1757, referring only to slaves, to the present, see the great cases of *Thomas v. Lewis*, 89 Va. 1, 66, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848, and *First Nat. Bank v. Holland*, 99 Va. 495, 506, 39 S. E. 126,

55 L. R. A. 155, 86 Am. St. Rep. 898. See also, 3 Min. Inst. (2d Ed.) 90; *Dickeschied v. Bank*, 28 W. Va. 340.

No Gift.—The words “no gift” in this statute do not refer to gifts *mortis causa*, but are applicable only to gifts *inter vivos*. *Thomas v. Lewis*, 89 Va. 1, 65, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

Goods and Chattels.—The phrase “goods and chattels” in this section, mean visible, tangible, personal property, and hence choses in action are not included. *First Nat. Bank v. Holland*, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898. See also, *Kirkland v. Brune*, 31 Gratt. 126, 2 Va. Law Reg. 214. In the above case of *Bank v. Holland*, it was held, that bank stock being a chose in action was not included within the operation of the statute. See article in 7 Va. Law Reg. 214. See also, *Gordon v. Rixey*, 76 Va. 694, 703; *Daily v. Warren*, 80 Va. 512; *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529.

The words “goods and chattels” in § 1, of chapter 71 of the West Virginia Code, include money and every other kind of personal property, which may be the subject of a gift *inter vivos* or *causa mortis*. *Dickeschied v. Bank*, 28 W. Va. 340, 368; *Claytor v. Pierson*, 55 W. Va. 167, 173, 46 S. E. 935.

F. ESSENTIAL ELEMENTS.

1. In General.

To constitute a valid gift *inter vivos*, the donor must be divested of, and the donee invested with, the right of property in the subject of the gift; it must be absolute, irrevocable and without any reference to its taking effect at some future period. The donor must deliver the property, and part with all present and future dominion over it. *Dickeschied v. Bank*, 28 W. Va. 340, 359.

Completeness.—Such a gift to be valid must be complete and not executory; what is necessary to the completion of the gift, depends on the nature

of the subject and the circumstances of the case; and that it is always sufficient, though not always necessary, to the completion of a gift, at least between the parties, that the donor do every thing in his power, of which the nature of the case will admit of, to make it complete. *Mayo v. Carrington*, 19 Gratt. 74. See also, *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, 757, 1 Va. Law Reg. 871.

2. Certainty of Gift.

The subject of the gift must be certain and there must be the mutual consent and concurrent will of both parties. The gift of a chattel must not only be delivered to, but it must be accepted by the donee, for it is only when the gift is perfected by delivery and acceptance that it becomes irrevocable. 2 Kent. 440. *Dickeschied v. Bank*, 28 W. Va. 340, 371.

Both as to sales and gifts, there must be legal certainty in the contract, both with reference to the terms and in the description of the property. *Mathews v. Jarrett*, 20 W. Va. 415; *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297; *Griggsby v. Osborn*, 82 Va. 371. See also, *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382. See post, “Essential Elements,” III, E.

Illustration.—If a father give a son an undivided moiety of a specific tract of land, saying it is to be the west end of the tract, the gift is sufficiently certain and definite, as to the land given, to be enforced. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

3. Delivery.

a. In General.

In order to constitute a valid gift *inter vivos* there must be a delivery either actual or constructive of the subject matter given; in other words, the gift must be consummated. *Ewing v. Ewing*, 2 Leigh 337; *Dickeschied v. Bank*, 28 W. Va. 340; *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382; *Miller v. Neff*, 33 W. Va. 197, 10 S. E. 378; *Miller v. Jeffress*, 4 Gratt. 472; *Lee v*

Boak, 11 Gratt. 182, 185; Seabright v. Seabright, 28 W. Va. 412, 483; Barker v. Barker, 2 Gratt. 344, 347; Rowe v. Merchant, 86 Va. 177, 9 S. E. 995; Thomas v. Lewis, 89 Va. 1, 62, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; Spooner v. Hilbish, 92 Va. 333, 23 S. E. 751, 757, 1 Va. Law Reg. 871; Lewis v. Mason, 84 Va. 731, 10 S. E. 529; Elam v. Keen, 4 Leigh 333, 26 Am. Dec. 322; Morrison v. Grubb, 23 Gratt. 342.

"All gifts except by will must be attended by delivery of possession to make them valid. Until such delivery, they are inchoate and revocable; indeed, mere nullities." Moncure, J., in *Lee v. Boak*, 11 Gratt. 182, 185; *Spooner v. Hilbish*, 92 Va. 333, 341, 23 S. E. 751, 1 Va. Law Reg. 871.

Parol Gifts.—In *Ewing v. Ewing*, 2 Leigh 337, the alleged gift of a bond in question was invalid, because it was expressly proved, that the bond was never delivered or any written transfer made; the court declaring that a parol gift of chattels, without actual delivery, does not pass the title to the donee, and stating that the law is the same in such case, whether the gift be inter vivos or mortis causa. It was further stated by Green, J., in his opinion that, "if the subject of the gift be incapable of delivery, it can not be given by parol, but must be transferred by some writing and a delivery of that writing." See *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, 1 Va. Law Reg. 871; *Thomas v. Lewis*, 89 Va. 1, 62, 15 S. E. 389; *Rowe v. Merchant*, 86 Va. 177, 9 S. E. 995; *Barker v. Barker*, 2 Gratt. 344, 347.

Delivery is essential both at law and in equity to the validity of a parol gift of a chattel or chose in action, and it is the same whether it be a gift inter vivos or gift causa mortis, for without actual delivery the title does not pass. *Dickeschied v. Bank*, 28 W. Va. 340, 360.

Gift of Chattel.—"That no valid gift of a chattel can be made, without de-

livery of the thing given, or something equivalent to such delivery, is settled law." *Elam v. Keen*, 4 Leigh 333, 335, 26 Am. Dec. 322.

Want of Delivery—Declaration by Grantor.—That the donor's declaration that he has given the article in question will not perfect a gift, incomplete for want of delivery is well settled. Or to quote the apposite language of Judge Carr in *Ewing v. Ewing*, 2 Leigh 337: "If a host of witnesses had proved that the decedent declared he had given the bond in question it would have been of no avail without some proof of delivery." And equally without avail is the alleged subsequent recognition of the gift by the administrator. *Yancey v. Field*, 85 Va. 756, 759, 8 S. E. 721.

Intention.—A gift is to be executed by the actual delivery by the donor to the donee, or to some one for him, of the thing given, or by the delivery of the means of obtaining the subject of the gift, without further act of the donor, to enable the donee to reduce it to his own possession. "The intention to give must be accompanied by a delivery, and the delivery must be made with an intention to give." Otherwise, there is only an intention or promise to give which, being gratuitous, would be a mere nullity. Delivery of possession of the thing given, or of the means of obtaining it so as to make the disposal of it irrevocable, is indispensable to a valid gift. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, 1 Va. Law Reg. 871.

Finding of Court.—Where the court finds that an absolute gift of personal property was made by the donor, to the donee, it implies such a delivery as will constitute a valid gift. *Auglin v. Bottom*, 3 Gratt. 1.

b. What Constitutes Delivery.

(1) In General.

No absolute rule can be laid down as to what will constitute a sufficient delivery to support a gift in all cases, for in each case the character of the req-

quisite to sustain the transaction as a gift, will depend very largely upon the nature of the subject matter of the gift, and the situation and the circumstances of the parties. *Claytor v. Pierson*, 55 W. Va. 187, 173, 46 S. E. 935.

(2) Indorsement.

It is well established that where the chose in action is a bill, promissory note, or other written instruments, payable to order, no indorsement of the instrument is necessary, in order to constitute a delivery. *Claytor v. Pierson*, 55 W. Va. 187, 173, 46 S. E. 935; *Dunbar v. Woodcock*, 10 Leigh 628; *Elam v. Keen*, 4 Leigh 333, 26 Am. Dec. 322. See post, "Delivery of Equitable Title," II, F, 3, b, (5).

Unendorsed Certificate of Stock—Equitable Assignments.—The delivery of a certificate of stock, unendorsed, by the donor to the donee, with intent to transfer title by way of a gift, is effectual as an equitable assignment, although no legal title passes for want of an endorsement and transfer on the books of the company. *First Nat. Bank v. Holland*, 99 Va. 465, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898, 7 Va. Law Reg. 204; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Reg. 848. See the title ASSIGNMENTS, vol. 1, p. 745.

Gift of Chose in Action.—A delivery of a written assignment of a chose in action is all that is necessary to constitute a sufficient delivery of the chose in action and hence is sufficient to support a valid gift *inter vivos*. *Dunbar v. Woodcock*, 10 Leigh 628, 660.

Actual Delivery in Lifetime of Donor.—But in such case an actual delivery of the instrument must be made in the lifetime of the donor in order to constitute a perfect gift. *Rowe v. Merchant*, 86 Va. 177, 9 S. E. 995; *Yancey v. Field*, 85 Va. 756, 8 S. E. 721; *Seabright v. Seabright*, 28 W. Va. 412.

Delivery to Donee Personally.—But where the instrument is indorsed, as a

sufficient delivery, it is not necessary to deliver it to the donee personally; a delivery to a trustee or agent of the donee is sufficient. *Fleshman v. Hoylman*, 27 W. Va. 728.

(3) Constructive Delivery.

Lord Hardwicke, in *Ward v. Turner*, denies (as a general proposition) that a constructive or symbolical delivery is sufficient to render a gift valid. There are many things, of which actual manual tradition can not be made, either from their nature, or their situation at the time; it is not the intention of the law to take from the owner the power of giving these; it merely requires that he shall do what, under the circumstances, will in reason, be considered equivalent to an actual delivery. *Elam v. Keen*, 4 Leigh 333, 335, 26 Am. Dec. 322. See also, *Pleasants v. Pendleton*, 6 Rand. 473.

Attorney's Receipt.—In *Elam v. Keen*, 4 Leigh 333, the owner of a bond had placed it in the hands of an attorney for collection and held the attorney's receipt for it. Suit had been brought upon the bond and it had been filed among the papers of the cause. The owner made a gift of the bond and delivered the attorney's receipt to the donee. It was held, that the delivery of the receipt had the same effect as would the delivery of the bond, and the gift was upheld.

(4) Property in Possession of Donee.

A verbal gift, where the property is in possession of the donee at the time of the gift, is not a sufficient delivery of the property to constitute a valid gift. *Miller v. Jeffress*, 4 Gratt. 472. See *Anderson v. Thompson*, 11 Leigh 439.

Property in Possession of Donee as Agent.—If the property is at the time in the possession of the donee, as agent for the donor or otherwise, it is not necessary that the donee should surrender to the donor his actual possession, in order that the latter may redeliver the same to him in execution of the gift; but if the donor relinquishes all

dominion over the thing given, and recognizes the possession of the donee as being in his own right, and the latter accepts the gift, and retains the possession in virtue thereof, the gift is complete. *Miller v. Neff*, 33 W. Va. 197, 10 S. E. 378. In this case a gift inter vivos by an aunt to her nephew of certain money which was shortly before, and perhaps, at the time of the gift in the possession of the donee as the agent of his aunt, was a valid and complete gift.

(5) Delivery of Equitable Title.

A delivery which vests an equitable title only in the donee is all that is necessary to constitute a valid gift. *First Nat. Bank v. Holland*, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898, 7 Va. Law Reg. 211; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389. See ante, "Indorsement," II, F, 3, b, (2)

Gifts inter vivos are upheld if the note or bonds or choses in action are delivered to the donee so as to vest him with an equitable title to the fund they represent, and to divest the donor of all present control and dominion over it, absolutely and irrevocably; and a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms, will not suffice. *Sterling v. Wilkinson*, 83 Va. 791, 797, 3 S. E. 533. See *Thomas v. Lewis*, 89 Va. 1, 69, 1 S. E. 389; *Henry v. Graves*, 16 Gratt. 244, 251.

(6) Donor and Donee Residing Together.

See ante, Statutory Provisions Stated and Construed, II, E.

If the donor and donee reside together, possession or delivery at their common place of residence will not be sufficient to constitute a valid gift. Va. Code, 1904, § 2414; W. Va. Code, 1889, ch. 71, § 1. *First Nat. Bank v. Holland*, 99 Va. 495, 502, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898, 7 Va. Law Reg. 204; *Good v. Good*, 39

W. Va. 357, 19 S. E. 382, 384; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

Statute—Donor and Donee Residing Together—Choses in Action.

Our statute provides that no gift of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section. Va. Code, 1887, ch. 107, § 2414; Va. Code, 1904, § 2414. *Anglin v. Bottom*, 3 Gratt. 1. See *Anderson v. Thompson*, 11 Leigh 439. See W. Va. Code, 1899, ch. 71, § 1, p. 679. This statute does not apply to gifts of choses in action and the fact that the donor and donee resided together did not invalidate a gift of one hundred and twenty shares of bank stock, evidenced by a single certificate which was delivered to and retained in possession of the donee, who was the wife of, and lived with the donor. *First Nat. Bank v. Holland*, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898, 7 Va. Law Reg. 204.

Illustration.—R. and M. reside together. M. held bonds on R. which were barred by the statute of limitations. R. supposing M. to be in extremis, took and destroyed the bonds. M. recovering, R. acknowledged that he destroyed the bonds, and that they were unpaid, and stated their amounts. Held, there was no such delivery as constituted a gift. *Yancey v. Field*, 85 Va. 756, 86 S. E. 721; *Rowe v. Merchant*, 86 Va. 177, 9 S. E. 995.

Possession at Donor's Residence—West Virginia Rule.

—When the donee of personal property was under the age of twenty-one years and lived with his father, the donor, the possession by the donor of a gift is consistent with the donee's right, and is not even presump-

tive evidence of fraud. When no fraud is shown the voluntary relinquishment by the father to the son is a valid gift and good against subsequent creditors of the donor. *Blankenship v. Kanawha, etc., R. Co.*, 43 W. Va. 135, 27 S. E. 355; *Lowther v. Lowther*, 30 W. Va. 103, 104, 3 S. E. 42, 8 Am. & Eng. Ency. Law (1st Ed.), 1335. See *Charlton v. Gardner*, 11 Leigh 281. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 540.

W., 19 years of age, employed away from home, took a horse for wages, and took it home to his father, with whom he was living; and the father not only never claimed the horse, but recognized the son's right and title to it, and, two months after the son got the horse, the father traded him a mule for the horse, the father testifying that the horse was the property of the son, and that the father was not in debt, and was not sheltering the mule in the son's name, to escape payment of debt. Held, that the mule was the property of W., the son. Code W. Va. 1899, ch. 71, § 1. *Blankenship v. Kanawha, etc., R. Co.*, 43 W. Va. 135, 27 S. E. 355.

In *Lowther v. Lowther*, 30 W. Va. 103, 3 S. E. 42, it was held, that where a father gave his daughter, who continued to reside with him, a colt, of which she had possession only at their residence, and permitted her to trade or make sale of the property which he had given her, and invest said gift, or the proceeds of the sale thereof, in other personal property in her own name and for her use, such property became hers absolutely.

Agent.—If the agent of the donee, residing with the donor, be authorized to accept and receive the gift, so that actual delivery thereof to him is a delivery to such donee, and the gift is in fact so delivered to, his possession thereof at such place of residence will be sufficient to make it a valid gift. *Dickeschied v. Bank*, 28 W. Va. 340, 370.

Parol Gift of Slave—Want of Delivery.—A father delivered a slave to his infant son residing with him, and calls upon persons present to take notice that he gives that slave to the son, but says at the same time, that he claims an estate in the slave for his own life. Held, nothing passes to the son by such parol gift. *Anderson v. Thompson*, 11 Leigh 439. It was decided in *Shirley v. Long*, 6 Rand. 764, that a parol gift of a slave to a son by father, when they reside together, is void as between the donor and donee, for want of actual possession. See also, *Hunter v. Jones*, 6 Rand. 541; *Slaughter v. Tutt*, 12 Leigh 147; *Tutt v. Slaughter*, 5 Gratt. 364. See the title SLAVES.

Gift from a Father to Child—Possession by the Mother.—Where a slave is given to an infant, and left by the donor with the mother of such infant for his benefit (the father being dead), the possession by the mother is to be considered possession by the infant. *Mortimer v. Brumfield*, 3 Munf. 122. See *Braxton v. Gaines*, 4 Hen. & M. 151; *Charlton v. Gardner*, 11 Leigh 281.

(7) Delivery to Third Person.

If the subject of a gift be delivered by the donor to a third person with authority to deliver it to the donee, such third person is the agent of the donor for the purpose of delivering the gift, and until the actual delivery is made of such gift he may revoke the authority and take back the gift. Therefore, if the delivery does not take place during the donor's lifetime, the authority is revoked by his death, and the property does not pass but remains in the donor, and goes to his executor or administrator. *Dickeschied v. Bank*, 28 W. Va. 340, 341.

The assured in a life policy, intending to make a gift thereof to a third person, executes an assignment thereof in duplicate, and delivers one of the assignments to the insurance company for its protection, and not as agent of

the assignee, and fails to deliver either the policy or the assignment thereof to the assignee. This was held to be an incomplete gift and could not be enforced either at law or in equity. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, 1 Va. Law Reg. 871. See the title **ASSIGNMENTS**, vol. 1, p. 745.

Delivery to Agent.—But see *Dickeschied v. Bank*, 28 W. Va. 340, 370, where it was held, that if the agent of the donee, residing with the donor, be authorized to accept and receive the gift, so that actual delivery thereof to him is a delivery to such donee, and his possession of the alleged gift is only at the place of residence of the donor, his possession thereof at such place of residence will be insufficient to make it a valid gift. See ante, "Donor and Donee Residing Together," II, F, 3, b, (6).

4. Time of Taking Effect.

a. In General.

It is essential to a gift that it goes into effect at once and completely. If it regards the future it is but a promise; and being a promise without consideration, it can not be enforced, and has no legal validity. *Hogue v. Bierne*, 4 W. Va. 658; *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382; *Barker v. Barker*, 2 Gratt. 344, 347.

A gift to be valid must be executed, or, in other words, it must take effect immediately. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751; 1 Va. Law Reg. 871. See also, *Thomas v. Lewis*, 89 Va. 1, 80, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Dickeschied v. Bank*, 28 W. Va. 340.

Gift by Deed.—A gift by deed is good between the parties, if it goes into effect at once, with delivery, for the delivery of the deed answers the place of the delivery of the property, when the property is capable of actual delivery. *Hogue v. Bierne*, 4 W. Va. 658. See the title **DEEDS**, vol. 4, p. 364.

b. Agreements to Give—In Future.

Gifts inter vivos have no reference to

the future and go into immediate and absolute effect. To constitute such a gift the donor must be divested of, and the donee invested with the right of property in the subject of the gift; it must be absolute, irrevocable, and without any reference to its taking effect at some future period. The donor must deliver the property and part with all present and future dominion over it. *Dickeschied v. Bank*, 28 W. Va. 340, 341. If such gifts are of any effect at all, that effect must be immediate and absolute. *Barker v. Barker*, 2 Gratt. 344, 347.

Illustration.—Hence, where a donor, by deed of gift, attested by two witnesses and duly recorded, to take effect after his own and his wife's death, gave to his son a negro woman slave, the woman afterwards, in the lifetime of the donor, had children. Held, the children born before the period at which the donee was to have the mother, do not pass to the donee. *Patterson v. Franklin*, 7 Leigh 590. See *Poindexter v. Davis*, 6 Gratt. 481, 502.

Conveyance in Futuro—Absolute—

Power to Reappoint.—But a conveyance by a husband, by which he parts absolutely with an interest in personal property, though it is not to take effect until his death, and though he retains the power to sell and reinvest or account, and also the power to reappoint among specified objects, is a valid gift, and effective to bar the wife of her distributive share therein. *Gentry v. Bailey*, 6 Gratt. 594; *Lightfoot v. Colgin*, 5 Munf. 42.

c. Gift to Take Effect after Donor's Death.

See ante, "Distinguished from Testament," II, C.

A gift of property to take effect after the death of the donor, the donor in the meantime retaining all dominion and control over the property, can not be sustained as a valid gift inter vivos. *Anderson v. Thompson*, 11 Leigh 439, 458; *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533; *Dickeschied v. Bank*, 28

tive evidence of fraud. When no fraud is shown the voluntary relinquishment by the father to the son is a valid gift and good against subsequent creditors of the donor. *Blankenship v. Kanawha*, etc., R. Co., 43 W. Va. 135, 27 S. E. 355; *Lowther v. Lowther*, 30 W. Va. 103, 104, 3 S. E. 42, 8 Am. & Eng. Ency. Law (1st Ed.), 1335. See *Charlton v. Gardner*, 11 Leigh 281. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 540.

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The assured in a life policy, intending to make a gift thereof to a third person, executes an assignment thereof in duplicate, and delivers one of the assignments to the insurance company for its protection, and not as agent of

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Illustration.—Hence, where a donor, by deed of gift, attested by two witnesses and duly recorded, to take effect after his own and his wife's death, gave to his son a negro woman slave, the woman afterwards, in the lifetime of the donor, had children. Held, the children born before the period at which the donee was to have the mother, do not pass to the donee. *Patterson v. Franklin*, 7 Leigh 590. See *Poindexter v. Davis*, 6 Gratt. 481, 502.

Conveyance in Futuro—Absolute—

Power to Reappoint.—But a conveyance by a husband, by which he parts absolutely with an interest in personal property, though it is not to take effect until his death, and though he retains the power to sell and reinvest or account, and also the power to reappoint among specified objects, is a valid gift, and effective to bar the wife of her distributive share therein. *Gentry v. Bailey*, 6 Gratt. 594; *Lightfoot v. Colgin*, 5 Munf. 42.

c. Gift to Take Effect after Donor's Death.

See ante, "Distinguished from Testament," II, C.

A gift of property to take effect after the death of the donor, the donor in the meantime retaining all dominion and control over the property, can not be sustained as a valid gift inter vivos. *Anderson v. Thompson*, 11 Leigh 439, 458; *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533; *Dickeschied v. Bank*, 28

W. Va. 340; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482.

An instrument transferring property intended to operate only after the death of its maker is testamentary in character, and can not operate as an instrument inter vivos. *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482.

5. Acceptance.

The gift of a chattel must not only be delivered to, but it must be accepted by, the donee, for it is only when the gift is perfected by delivery and acceptance that it becomes irrevocable. *Dickeschied v. Bank*, 28 W. Va. 340, 371, citing 2 Kent 440.

G. REVOCATION.

Where Gift Fully Executed.—A gift inter vivos, when it is fully executed, can not be revoked; that is, where nothing is to be done in order to invest the title in the donee. *Brown v. Handley*, 7 Leigh 119. *Fleshman v. Hoyleman*, 27 W. Va. 728; *Vaughn v. Moore*, 89 Va. 925, 17 S. E. 326; *Dickeschied v. Bank*, 28 W. Va. 340, 371. See ante, "Delivery to Third Person," II, F, 3, b, (7).

Where Essential Element Lacking.—

But where some essential element is lacking—as, in this case, delivery—the donor has a locus penitential, and hence in such case until the essential element is executed the donor has the absolute power to revoke the gift. *Applebury v. Anthony*, 1 Wash. 287; *Henry v. Graves*, 16 Gratt. 244, 251; *Elam v. Keen*, 4 Leigh 333, 26 Am. Dec. 322.

Delivery to Third Party, with Authority to Deliver to Donee.—Where the property is delivered to the third person for the donee, with authority to deliver it to the donee, the third person is the agent of the donor, and hence if the third party does not deliver the property to the donee in the lifetime of the donor, the agency is revoked by the donor's death, and hence there can be no delivery thereafter. *Dickeschied v. Bank*, 28 W. Va. 340.

H. ACTIONS.

Trover.—"By the common law, trover will not lie until the property is changed; and the decisions have settled, that a gift without delivery or some equivalent does not change the property. As long as the donor may retract the gift, the donee can have no action concerning it." *Elam v. Keen*, 4 Leigh 333, 337, 26 Am. Dec. 322.

I. EVIDENCE.

1. Weight of Evidence.

In General.—The evidence to establish a gift must preponderate, on the side of the party attempting to establish the gift; and must be clear, explicit convincing of every element necessary to constitute a valid gift. *Brock v. Brock*, 92 Va. 173, 23 S. E. 224.

Parol Gifts.—In *Brown v. Handley*, 7 Leigh 119, it was said that though parol gifts of slaves, accompanied by possession, are valid, yet the evidence of such gifts should be clear and entirely satisfactory before they can be established, for as the gifts are without value received, it is but reasonable that the party who is to be deprived of his property without an equivalent should be clearly proved to have parted with it. This can never be done where the evidence to establish the gifts is altogether equivocal, and such is always the case with mere evidence of possession in a transaction between a father and his child. *Mahon v. Johnston*, 7 Leigh 317, 319; *Scott v. Jones*, 76 Va. 233, 235; *Martin v. Smith*, 25 W. Va. 579; *Kean v. Welch*, 1 Gratt. 403; *Collins v. Lofftus*, 10 Leigh 5, 10. See also, *Beasley v. Owen*, 3 Hen. & M. 449. See post, "Weight of Evidence," III, H, 1.

Alleged Gift of Slave—Possession—Evidence.—In trover against administrator of plaintiff's father, plaintiff claimed title to slaves under a parol gift from his father, and possession under the alleged gift; there was no direct proof of the gift, but only proof of such a temporary possession held by

the plaintiff, as might as well be referred to a loan as to a gift from the father, and, under the circumstances, more probably referrible to a loan than to a gift. Held, this proof was insufficient to maintain the title. *Slaughter v. Tutt*, 12 Leigh 147; *Tutt v. Slaughter*, 5 Gratt. 364.

Possession.—The mere possession of the subject of the alleged gift, unaccompanied by proof of its delivery by the donor to the donee, is insufficient to establish it, as a gift either inter vivos or causa mortis. *Dickeschied v. Bank*, 28 W. Va. 340, 360.

Inferred from Circumstances.—Judge Campbell says, in *Hansbrough v. Thom*, 3 Leigh 147, 155, "Sales and gifts need not be positively proved, but they may be inferred from circumstances." Approved in *Miller v. Neff*, 33 W. Va. 197, 10 S. E. 378, 381.

Proof of Delivery.—In the case of *Seabright v. Seabright*, 28 W. Va. 412, 483, in which the question was whether notes, amounting in value to \$22,000 had been given by Louis Seabright shortly before his death to his two half brothers. Green, J., in delivering the opinion of the court, says: "The delivery of the possession to the donee to perfect a gift inter vivos is necessary; but the courts require less stringent proof of delivery to establish such gifts than to establish gifts causa mortis, as there is usually less opportunity to set up a fraudulent pretense of a gift inter vivos than of a gift causa mortis."

Subsequent Conduct of the Donor.—It was said, in *Miller v. Neff*, 33 W. Va. 197, 10 S. E. 378, 381: "In respect to gifts inter vivos, the subsequent conduct of the donor is often most potent evidence of the complete execution of the gift, which necessarily includes the transfer or delivery of it."

Conveyance on Condition—Reconveyance Sought.—The plaintiff, a young man twenty-one years of age, was leading a wild life and wasting his estate,

when he conveyed what remained to his sister, without consideration, as he claimed, at her request, to save his property, and on her agreement to reconvey the property to him when requested. Several witnesses testified to declarations made by plaintiff and his sister to this effect. The sister claimed that the conveyance was absolute, and intended as a gift. The evidence was held sufficient to justify a reconveyance of the property to the plaintiff. *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978.

Gift from Father to Child—Evidence Necessary to Sustain.—The evidence to sustain an alleged parol gift by a father to his daughter on her marriage, should be clear and cogent. *Collins v. Lofftus*, 10 Leigh 5; *Brown v. Handley*, 7 Leigh 119; *Mahon v. Johnston*, 7 Leigh 317, 319. See the title PARENT AND CHILD.

A contract for conveyance of land, between a father and child, from the nature of the relation, requires to be proved by much stronger evidence than might suffice between strangers. The evidence in such cases should be direct, positive, express and unambiguous, and its terms clearly defined. *Lorentz v. Lorentz*, 14 W. Va. 761; *Rowton v. Rowton*, 1 Hen. & M. 92. See also, *Jones v. Obenchain*, 10 Gratt. 259.

The possession by a son of land belonging to his father, even when accompanied by valuable improvements, will not be treated as sufficient evidence of a gift because the relation between the parties prevents the inference which would otherwise arise from the fact, and removes all necessity of accounting for the possession by the supposition of an existing contract. *Holsberry v. Harris* (Va.), 49 S. E. 404. See the title PARENT AND CHILD.

Evidence of Gift—Insufficient.—In *detinue* for a slave, the plaintiff proved that the defendant (whose wife was entitled to the slave in question, as part of her dower of the estate of a former husband) had given said slave

to the plaintiff's wife when a feme sole, upon condition that her brothers (in whom the revisionary interest was) would join in a deed conveying to her the absolute title; that they promised and agreed to execute such deed, but never did, and one of them afterwards refused to do so; upon a demurrer, this evidence was adjudged insufficient to entitle the plaintiff to recover. *Fitzhugh v. Beale*, 4 Munf. 186.

2. Admissibility of Evidence.

Testimony of Defendant.—In the case of *Brock v. Brock*, 92 Va. 173, 23 S. E. 224, an action of detinue was brought by the administrator of a deceased widow to recover a certain bond for \$2,000 which was claimed by her son as a gift from the deceased. Where the issue was, whether the bond was delivered by way of advancement, the testimony of the defendant was held admissible to prove similar advancements of the parent to the other children; and a gift of the bond was established. See post, "Admissibility of Evidence," III, H, 2.

Under § 23, ch. 130, W. Va. Code, a donee is incompetent as a witness to prove the delivery to himself of a gift by the donor, the latter being dead when the testimony is offered. *Lee v. Patton*, 50 W. Va. 20, 40 S. E. 353. See the title WITNESSES.

Variance between Admissions and Proof.—If a defendant, in his answer, admit that a slave which he claims as a gift, was always in the possession, and under the control of the donor, with whom the donee lived, proof that the donee had the possession, is inadmissible, since it varies from the admissions of the defendant. *Shirley v. Long*, 6 Rand. 764.

3. Burden of Proof—Presumption.

Possession.—Whether the donee claims title to the chattel, as a gift *inter vivos causa mortis*, the burden of proof rests upon him to establish every fact and circumstance necessary to show the validity of the gift, "of which the

delivery of possession is the strongest and the most essential." *Dickeschied v. Bank*, 28 W. Va. 340, 361; *Thomas v. Lewis*, 89 Va. 1, 14, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. See post, "Burden of Proof—Presumption," III, H, 3.

"Every person claiming title by gift, necessarily admits that up to the time when the gift was alleged to have been made, the chattel was the property of the donor. And as the law does not presume that the owner has voluntarily parted with his property without any valuable consideration, the gift itself, and the delivery thereof must be proved by the party claiming under it." *Dickeschied v. Bank*, 28 W. Va. 340, 361; *Thomas v. Lewis*, 89 Va. 1, 14, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

Delivery of Slaves by Father to Daughter's Husband.—A father possessed of an ample fortune having sent certain of his slaves, immediately after the marriage of one of his daughters, to her husband, in whose possession they remained, without interruption or claim, until his death, which happened two years and four months afterwards; it will be presumed (no proof of fraud appearing), that such slaves, being no more than a reasonable provision for the daughter at the time, were a gift in consideration of the marriage; and the right of the representatives of the husband is good against the creditor of the father. *Moore v. Dawney*, 3 Hen. & M. 127. See *Fitzhugh v. Anderson*, 2 Hen. & M. 289. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 540.

Loan.—In *Fitzhugh v. Anderson*, 2 Hen. & M. 289, before our statute of frauds, a father having loaned without any deed or writing, a slave to his son who had retained the uninterrupted possession thereof for many years, used the property as his own and acquired credit on the strength of his possession; in a controversy between a vol-

untary claimant under the father, and fair purchasers from the son, it was held, that in such case a gift of the slave would be presumed, and the circumstances that the father, afterwards, by his last will and testament, bequeathed the slaves to the son for life, remainder to his children made no difference in the case. See *Cross v. Cross*, 9 Leigh 245.

Possession by Daughter—Presumption or Loan.—Where a slave of the father is in the possession of the daughter, and the evidence of a gift is very equivocal, the presumption is rather in favor of a loan than a gift. *Cross v. Cross*, 9 Leigh 245; *Scott v. Jones*, 76 Va. 233.

Presumption against a Gift—Evidence Required to Sustain.—The presumption is strongly against the idea of a gift by a creditor to his debtor of his debt, especially where the amount is large and the creditor is a widow in need of money; and the debtor, on the other hand, is a prosperous business man. To establish a gift in such case the evidence must be very clear and satisfactory. *Wells v. Ayers*, 84 Va. 241, 346, 5 S. E. 21. See *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382, 388. The omission to endorse or assign notes, claimed as a gift, is a strong presumption against the gift. *Fox v. Jones*, 1 W. Va. 205, 211. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, ante, p. 540.

Certificate of Court—Presumption as to Continued Possession.—When upon overruling a motion for a new trial, the court below certifies that the donor made an absolute gift of slaves to the donee, this is not sufficient to authorize the appellate court to infer the actual and continued possession of the slaves by the donee, or those claiming under him, which is essential to his title. Such a certificate as to other personal property, would imply such a delivery as constituted a valid gift. *Anglin v. Bottom*, 3 Gratt. 1.

Gift from Father to Child—Presump-

tion of Advancement.—A gift from father to child, unexplained, in the lifetime of a father is only a presumption of an advancement, and makes only a prima facie case, which legal presumption may be rebutted by evidence. *Watkins v. Young*, 31 Gratt. 84. See the titles **ADVANCEMENTS**, vol. 1, p. 189; **PARENT AND CHILD**.

Intention.—Whether a gift by a father in his lifetime to a child is an absolute gift or an advancement depends upon the intention of the father; and his statements or declarations made at the time of the gift, or subsequently, are competent evidence to show what was his intention in making the gift. *Watkins v. Young*, 31 Gratt. 84. See the titles **ADVANCEMENTS**, vol. 1, p. 189; **PARENT AND CHILD**.

Wife's Money Invested in Land—Title in the Husband.—Where the wife allows her husband to invest her money in land and have the deed made to himself and afterwards treats the land as his own with absolute control over it, the gift of the money will be presumed from such facts. *McGinnis v. Curry*, 13 W. Va. 29. See the title **HUSBAND AND WIFE**.

Gift Claimed by Executor—Burden of Proof.—Where an executor claims a sum of money advanced to him by his testator in his lifetime, as a gift, and not a loan, the burden is on him to establish the gift by adequate proof, and the executor's own oath and slight circumstances are insufficient evidence. *Ruth v. Owens*, 2 Rand. 507; *Lewis v. Mason*, 84 Va. 738, 10 S. E. 529. See *William & Mary College v. Powell*, 12 Gratt. 372; *Lewis v. Caperton*, 8 Gratt. 148; *Price v. Thrash*, 30 Gratt. 515, 523. See also, *Beckwith v. Butler*, 1 Wash. 224, in which case the facts were that the appellant, who was heir at law and executor of his father, swore in his answer, that the father, in his lifetime, gave him a certain bond, the amount of which formed the great bulk of the personal estate sought to be distributed; and it was held that the answer

of the appellant in chancery was not evidence in his favor, as to affirmative facts, in opposition to the plaintiff's demands. See *White v. Campbell*, 80 Va. 180. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

Presumption of Title from Possession.—The law is thus stated in *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382, 388, quoting the following language from *Coutant v. Schuyler*, 1 Paige 316: "It is clear that if I own a chattel, not a chose in action, to-day, and next week it is found in another's possession, the law does not presume a legal transfer of the title to the possessor, but as against me, if title be claimed, he must prove it. Why should any different rule prevail as to a promissory note?" "But if any presumption of title or of payment prevail by mere possession, it is only where the possession is free from suspicion." The learned judge saying: "We concur in the good sense of these observations, for we think nothing would be more injurious to the administration of the law than to permit the mere fact of possession of property, shown to have belonged to a deceased person a few days before his death, by relatives or persons residing in the same family and having access thereto, to be satisfactory or even prima facie evidence of title."

Presumption of Payment.—Where plaintiff's father was indebted to him at the time he placed a certain sum of money in a bank to plaintiff's credit, it will be presumed, in the absence of clear and convincing evidence, that the deposit was intended as a payment on the debt, and not as a gift. *Watts v. Watts* (Va.), 51 S. E. 359.

III. Mortis Causa.

See ante, "Statutory Provisions Stated and Construed," II, E.

A. DEFINITION.

A gift causa mortis is a gift of personal property made by a party in the

expectation of death, then imminent, and upon the essential condition, that the property shall belong fully to the donee in case the donor dies as anticipated leaving the donee surviving him, and the gift is not in the meantime revoked, but not otherwise. *Dickeschied v. Bank*, 28 W. Va. 340, 360; *Yancey v. Field*, 85 Va. 756, 759, 8 S. E. 721; *Claytor v. Pierson*, 55 W. Va. 167, 46 S. E. 935; *Thomas v. Lewis*, 89 Va. 1, 68, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

A donatio causa mortis is a gift of personal property made by a party in contemplation of the supposed approach of death subject to the following implied conditions subsequently attached by law, the occurring of any one of which will operate a defeasance of such gift: 1st, if the contemplated danger of death passes by without the donor dying; 2d, if the donor should think proper to revoke the gift before his death; or 3d, if the donee should die before the donor. *Seabright v. Seabright*, 28 W. Va. 412, 470.

"Woodward, judge, in *Michener v. Dale*, 23 Pa. St. 59 defines it thus: 'Donatio causa mortis is a gift of a chattel made by a person in his last illness or in periculo mortis, subject to the implied conditions that if the donor recover, or the donee die first, the gift shall be void.' This latter definition does not seem to be entirely accurate, for it omits one condition always attached to subject gifts, and that is, 'if the donor in his lifetime do not revoke the gift,' which all the authorities admit may be done. There must be a delivery of the property to the donee, or to some other person for his use. The donor must part with all dominion over it; so that no further act of him or of his personal representative is necessary to vest the title perfectly in the donee; to belong to him presently, as his own property, in case the owner should die of his present illness, or from the impending peril, during the lifetime of the donee, and without max-

ing any change in relation to the gift." *Dickeschied v. Bank*, 28 W. Va. 340, 360.

Blackstone says that a *donatio mortis causa* takes place "when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another, the possession of any personal goods * * * to keep in case of his decease." *Claytor v. Pierson*, 55 W. Va. 167, 46 S. E. 935.

B. DISTINGUISHED FROM GIFT INTER VIVOS.

See ante, "Statutory Provisions Stated and Construed," II, E.

Gifts Inter Vivos and Gifts Mortis Causa—Distinguished.—The peculiar gift "*mortis causa*" is always designated by its special, technical name, and is never understood or intended to be embraced by the word "gift" merely. "A gift *mortis causa* is a very different thing from a gift *inter vivos* in many essential particulars, and the term 'no gift' in Va. Code, 1887, § 2415, does not refer to or embrace gifts *mortis causa*." Hence, the fact that the parties live together does not affect the validity of a gift *mortis causa*. *Thomas v. Lewis*, 89 Va. 1, 66, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Durham v. Dunkly*, 6 Rand. 135; *Dickeschied v. Bank*, 28 W. Va. 340.

C. NATURE IN GENERAL.

The statement below is taken from the argument of Judge Burks, counsel for the appellee in *Thomas v. Lewis*, 89 Va. 1, 62, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848, and seems to be a correct statement of the law. The title to the property must vest in the donee at the time of the gift. If it is not to vest at all until the death of the donor, it is said to be testamentary, and therefore ineffectual. But the title does not vest absolutely. If it does, it is not a gift *mortis causa*, but *inter vivos*. It vests conditionally only; that is, it is defeasable by subsequent events. The donor may revoke the gift at his will and pleasure

at any time during his life; and it will be defeated by operation of law if he escapes the peril which is the cause of the gift, or survives the donee. If, however, it is neither revoked nor defeated in the manner indicated, it becomes absolute at the donor's death, and not till then. Until the donor's death, the donee has but an inchoate, imperfect, defeasible interest. Approved by the court in *First Nat. Bank v. Holland*, 99 Va. 495, 39 S. E. 126, 53 L. R. A. 155, 86 Am. St. Rep. 898; 7 Va. Law Reg. 204.

Because of the opening which this mode of transfer affords to fraud, the law watches it with jealousy, and does not permit it, with its attendant uncertainties, to take the place of wills. Therefore, any gift which does not take complete effect by the transfer to, and acceptance by the donee of the possession and title of the donor, in the lifetime of the latter, is testamentary in its character, and good only if made by will. *Yancey v. Field*, 85 Va. 756, 760, 8 S. E. 721; *Thomas v. Lewis*, 89 Va. 1, 21, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Seabright v. Seabright*, 28 W. Va. 412, 486.

Evidence.—In cases of alleged gifts *mortis causa* the evidence should be carefully scrutinized, the proof clear and convincing, and the judgment of the court fully satisfied. *Smith v. Smith*, 92 Va. 696, 24 S. E. 280. See post, "Evidence," III, H.

D. SUBJECTS OF VALID GIFT.

See ante, "Subjects of Valid Gift," II, B.

Property—Right to Dispose of by Gift—Extent.—By the law of Virginia a person may make a dying disposition of all his personal property, *donatio mortis causa*; and there is no limit as to the extent of the gift, whether the whole or part—*inter vivos* or *mortis causa*. Such limitation can only be expressed by legislation; and the courts are invested with no such function. The Roman or civil law of donations *mor-*

tis causa did recognize the limitation; but the common law does not limit the amount—absolute or comparative—of the personal estate which may thus be disposed of. *Seabright v. Seabright*, 28 W. Va. 412, 486; *Thomas v. Lewis*, 89 Va. 1, 67, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. Every species of personal property in its largest sense, capable of delivery, actual or constructive, may be the subject of a valid gift mortis causa including money, bank notes, stocks, bonds, notes, due bills, certificates of deposit, and any other written evidence of debt. *Thomas v. Lewis*, 89 Va. 1, 67, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. This statement of the law is also applicable to gifts inter vivos. *Henry v. Graves*, 16 Gratt. 244, 254.

Bonds.—A bond may be the subject of a donatio mortis causa, whether it be the bond of a stranger or of the donee. *Lee v. Boak*, 11 Gratt. 182; *Henry v. Graves*, 16 Gratt. 254; *Thomas v. Lewis*, 89 Va. 1, 67, 15 S. E. 389; *First Nat. Bank v. Holland*, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898, 7 Va. Law Reg. 204; *Ewing v. Ewing*, 2 Leigh 337.

Negotiable Paper.—Negotiable paper payable to order is the subject of a valid gift, causa mortis, whether it be endorsed or not. *Clayton v. Pierson*, 55 W. Va. 167, 46 S. E. 935.

Entire Personal Estate—Evidence Required.—The fact that a gift constitutes the principal part or whole of the donor's personal property, can not be held by the courts, necessarily to prevent such gift from taking effect. Such limitation of the extent of a gift whether inter vivos or causa mortis can be brought about at this late day only by legislation. But, where a gift either inter vivos or causa mortis of almost the whole of the donor's personal estate is attempted to be set up, the courts may very properly require the most clear and satisfactory proof of the delivery of the property as a

gift inter vivos or causa mortis, but they can go no further. *Seabright v. Seabright*, 28 W. Va. 412, 481; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. See post, "Evidence," III, H.

Gift of Debt by Creditor to His Debtor.—A valid gift causa mortis can be made by a creditor to his debtor, by way of forgiveness or extinguishment of the debt. See *Lee v. Boak*, 11 Gratt. 182, where the donor held certain bonds of his nephew and shortly before his death delivered them to his nephew to be destroyed, declaring his purpose to discharge his nephew from their payment. Held, a valid gift mortis causa.

National Bank Pass Book—Money on Deposit.—Where a person under apprehension of death as imminent delivers to the donee a national bank pass book, it is effectual to make a valid gift causa mortis of the book itself, but is insufficient to pass title to money on deposit in a bank. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. See also, *Dickeschied v. Bank*, 28 W. Va. 341. See post, "Constructive Delivery," III, E, 2, c.

E. ESSENTIAL ELEMENTS.

1. In General.

"Briefly stated, the essential attributes of a gift causa mortis are: (1) It must be of personal property; (2) the gift must be made in the last illness of the donor, while under the apprehension of death as imminent, and subject to the implied condition that if the donor recover of the illness, or if the donee die first, the gift shall be void; and (3) possession of the property given must be delivered at the time of the gift to the donee, or to some one for him, and the gift must be accepted by the donee." *Johnson v. Colley*, 101 Va. 414, 416, 44 S. E. 721, 99 Am. St. Rep. 884. See also, argument in *Thomas v. Lewis*, 89 Va. 1, 5 S. E. 389, 18 L. R. A. 170, 37 Am.

St. Rep. 848. See ante, "Essential Elements," II, F; "Definition," III, A.

In *Dickeschied v. Bank*, 28 W. Va. 340, this court defined and established the essential elements of a valid gift, *causa mortis*; and held, that the donor should make the gift in contemplation of death, either in his last illness, or while he is in other imminent peril; that his death should result from such illness, or peril; that the donor must part with all dominion over the subject of the gift, so that no further act by him, or the personal representative, will be necessary to vest the title perfectly in the donee, in order that it may belong to him presently, as his own property, in case the owner should die of his present illness, or from the impending peril, without making any change in relation to the gift; and leaving the donee surviving him. *Claytor v. Pierson*, 55 W. Va. 167, 46 S. E. 935.

Illustration.—W. D. C. being ill, and in the expectation of death, gave and delivered to J. E. C., his brother, a paper in the words and figures following, to wit: "Sewell, W. Va., Aug. 26th, 1899. \$1100.00. Eleven hundred dollars. Received of William Claytor for safe keeping. L. C. Claytor." William Claytor mentioned in the receipt being said W. D. C. At the time of the gift and delivery of the receipt, the donor said to the donee that he had a present for him (donee); that donor took the receipt from his trunk, and said to donee, "Here, I will give you this; here is a note, I have for \$1100.00. I make you a present of this; take it; and go and draw the money on it;" that donor further told donee, not to let anybody else have it, his (donor's) wife, or anybody else; that he did not want his wife to have it; that he was going to the hospital and the way the disease worked on him, he didn't think that he would get well, and further said, "I will give it (the receipt) to you before I go, so you will be sure to have it;" that the donor was then the

owner of said money, which was at the time in the care and keeping of L. C. C.; that donor was on that day taken to the hospital, where he died one month thereafter as a result of his said illness; that two days before his death, at the hospital, donor asked another brother, did Ed. (meaning donee) have the note (meaning the receipt) which he gave him, and being told that Ed. had the receipt, donor then said to tell him (Ed.) to be sure and keep it; to go and get the money on it, that donee kept possession of said receipt continuously until after the death of donor; and that donor died without making any change in relation to the gift, and leaving donee surviving him. Held, that the acts and declarations of the donor constitute a valid gift of said money *causa mortis*. *Claytor v. Pierson*, 55 W. Va. 167, 46 S. E. 935.

"The facts in the case show all the elements of a valid gift *causa mortis*. The gift was made by the donor in the peril and contemplation of death; it was of personal property, such as, under the law, may be the subject of a gift *causa mortis*; possession of the receipt by the donee was taken at the time of the gift; and the donor died of his then illness in a month thereafter without making any change in the relation to the gift. It was accepted by the donee, at the time it was made; and it became absolute at the donor's death. Donor did not want his wife to have his money for the reason stated by him, and, doubtless, for the other reasons disclosed by the record. He did want his brother, J. E. Claytor, to have it because, as he said, 'he always thought more of him than the rest.' Therefore, applying the law to the facts, we hold that the plaintiff was and is entitled to the money specified in said receipt, at and from the time of W. D. Claytor's death." *Claytor v. Pierson*, 55 W. Va. 167, 46 S. E. 935.

A total exclusion of the power or means of resuming possession by the

donor is not necessary to a valid gift causa mortis. *Thomas v. Lewis*, 89 Va. 1, 68, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

2. Delivery.

a. In General.

In order to constitute a gift causa mortis there must be a delivery either actual or constructive of the subject matter given. *Yancey v. Field*, 85 Va. 756, 761, 8 S. E. 721; *Miller v. Jeffress*, 4 Gratt. 472; *Dickeschied v. Bank*, 28 W. Va. 340, 362; *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653; *Miller v. Neff*, 33 W. Va. 197, 10 S. E. 378; *Seabright v. Seabright*, 28 W. Va. 412; *Ewing v. Ewing*, 2 Leigh 337; *Lee v. Boak*, 11 Gratt. 182; *Jones v. Irvin*, 4 Va. Law Reg. 525. See ante, "In General," II, F, 3, b, (1).

Delivery is essential to a valid gift either inter vivos or mortis causa; it may be either actual, by manual tradition of the subject of the gift, or constructive, by delivery of the means of obtaining possession. *Thomas v. Lewis*, 89 Va. 1, 62, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Elam v. Keen*, 4 Leigh 333, 26 Am. Dec. 322; *Lee v. Boak*, 11 Gratt. 182; *Ewing v. Ewing*, 2 Leigh 337. See also, *Barker v. Barker*, 2 Gratt. 344, 347; 3 Min. Inst. (2d Ed.) 601, 606.

"All gifts, except by will, must be attended by delivery of possession to make them valid. Until such delivery they are inchoate and revocable; indeed, mere nullities. The donation in this case, as found by the jury, was a donatio mortis causa. But there is no difference in this respect between donatio mortis causa and inter vivos. The same kind of delivery of possession which is necessary to make good the one, is necessary to make good the other." *Lee v. Boak*, 11 Gratt. 182, 185.

Hence, a mere verbal declaration of a gift, unaccompanied by any act or circumstance clearly showing a surrender and acceptance of dominion over the article, under no circum-

stances constitutes a valid gift. *Yancey v. Field*, 85 Va. 756, 761, 8 S. E. 721; *Miller v. Jeffress*, 4 Gratt. 472; *Dickeschied v. Bank*, 28 W. Va. 340, 362; *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653.

Delivery Essential to Valid Gift—What Constitutes—Possession.

— It must be an actual delivery of the thing itself, or of the means of getting the possession and enjoyment of the thing; or if the thing be in action, of the instrument by using which the chose is to be reduced into possession. It is not the possession of the donee, but the delivery to him by the donor, that is material. An after-acquired possession, or a previous and continuing possession of the donee, though by the authority of the donor, is insufficient. *Miller v. Jeffress*, 4 Gratt. 472; *Dickeschied v. Bank*, 28 W. Va. 340, 362. Judge Green, in *Ewing v. Ewing*, 2 Leigh 337, in his opinion, said that, "If the subject of the gift be incapable of delivery, it can not be given by parol, but must be transferred by some writing and a delivery of that writing."

The Term Delivery.—"This term 'delivery' is not to be taken in such a narrow sense as to import that the chattel or property is to go literally into the hands of the recipient and to be carried away. There are many articles which might be made the subjects of a donation mortis causa, in which a manual delivery of that kind might be inconvenient or impracticable. We have no doubt that a trunk, with its contents, might be effectually given and delivered in such a case by a delivery of the key." *Thomas v. Lewis*, 89 Va. 1, 67, 15 S. E. 389, 13 L. R. A. 170, 37 Am. St. Rep. 848.

b. Surrender of Complete Control.

The donor must necessarily part with and surrender all dominion over the subject matter, and have no further act for him or his personal representative to perform in order to vest the title. *Dickeschied v. Bank*, 28 W. Va. 340.

c. Constructive Delivery.

Constructive delivery is always sufficient when actual, manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or other depository may be sufficiently delivered by delivery of the key of the receptacle; not that the key or the writing is a symbol of delivery, symbolical delivery being always insufficient, but because it is the way of coming at the possession, or to make use of the thing. *Thomas v. Lewis*, 89 Va. 1, 62, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Elam v. Keen*, 4 Leigh 333; *Lee v. Boak*, 11 Gratt. 182; *Ewing v. Ewing*, 2 Leigh 337. See *Barker v. Barker*, 2 Gratt. 344, 347; 3 Min. Inst. (2d Ed.) 601, 606. See ante, "Constructive Delivery," II, F, 3, b, (3).

Letter to Third Person—Testamentary.—A letter addressed to A directing him to send certain trunks according to his directions to parties named, who resided away from the place, although written in contemplation of death, which immediately followed, can not be sustained as a valid gift mortis causa, there being no delivery either actual or constructive of the articles named. The letter was held to be testamentary in character and effective as a will. *Jones v. Irvin* (Va.), 4 Va. Law Reg. 525; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Yancey v. Field*, 85 Va. 756, 8 S. E. 721, 8 Am. & Eng. Ency. Law 1350-51; *McBride v. McBride*, 26 Gratt. 476, 481. See also, *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986; *French v. French*, 14 W. Va. 458, 473; *Perkins v. Jones*, 84 Va. 358, 4 S. E. 833; *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843; 3 Min. Inst. (4th Ed.) 605. See the title WILLS.

Intention.—If the delivery is constructive, it must be made for the express purpose of consummating the gift; a previous and continuous possession by the donee will not suffice. *Yancey v. Field*, 85 Va. 756, 8 S. E.

721; *Miller v. Jeffress*, 4 Gratt. 472; *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 353; *Dickeschied v. Bank*, 28 W. Va. 340.

National Bank Pass Book.—In a gift mortis causa where a national bank pass book was included, displaying the balance to the donor's credit, it was held insufficient to pass title to the deposit. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

Delivery of Keys.—Delivery of the key to the receptacle, in which the article given is kept, with the intent to deliver and pass title to the property therein, is sufficient as a constructive delivery. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170; *Elam v. Keen*, 4 Leigh 333, 26 Am. Dec. 322.

"In *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 348, 18 L. R. A. 170, the gift under consideration was accomplished by the delivery to Bettie Lewis of the keys to a safety deposit box which was in a vault in the Planters' Bank. An inspection of the record shows that among the contents of the safety deposit box were certain stocks, some of which had been bought by Thomas and not indorsed by him and others stood in his name; and none of them had been endorsed or transferred on the back to the donee, Bettie Lewis. The court held, that all the stocks in the box had been sufficiently delivered by the delivery of the keys to the box containing the certificates. It would seem that, if the delivery of the keys to a box containing unendorsed certificates of stock, was sufficient to constitute a transfer of the equitable title to the stock represented by those certificates, a fortiori the delivery of the certificates themselves would have been deemed a sufficient delivery to vest title in the donee." *First Nat. Bank v. Holland*, 99 Va. 495, 502, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898, 7 Va. Law Reg. 204.

Duplicate Keys.—And the fact that the donee had duplicate keys for the depositories wherein his valuables were kept, and that he had placed one set with a friend as a precaution will not invalidate a gift causa mortis made by the delivery of the other set. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

d. At the Time of Gift.

In *Dickeschied v. Bank*, 28 W. Va. 341, it is also held, "that delivery at the time of making the gift, is essential to a perfect gift causa mortis. It is not the possession of the donee, but the delivery to him by the donor, that is material. *Claytor v. Pierson*, 55 W. Va. 167, 172, 46 S. E. 935. See also, *Miller v. Jeffress*, 4 Gratt. 472; *Ewing v. Ewing*, 2 Leigh 337.

The mere possession of the chattel, unaccompanied by proof of its delivery by the donor to the donee, is insufficient to establish a gift inter vivos or causa mortis; it is not the possession of the donee but the delivery to him by the donor which is material in a donatio causa mortis. *Dickeschied v. Bank*, 28 W. Va. 340, 362; *Miller v. Jeffress*, 4 Gratt. 472; *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653. See *Ruth v. Owens*, 2 Rand. 507.

3. In Contemplation of Death.

It is essential to a valid gift causa mortis that it be made under apprehension of death from some then existing disease or other peril. *Dickeschied v. Bank*, 28 W. Va. 340. See also, *Barker v. Barker*, 2 Gratt. 344; *Martin v. Smith*, 25 W. Va. 579.

Donatio mortis causa must be made by the donor in peril of death, that is, with relation to his disease by illness affecting him at the time of the gift. *Barker v. Barker*, 2 Gratt. 344, 347.

Hence a parol gift of a slave to take effect upon the death of the donor, who is not then sick, is void. *Barker v. Barker*, 2 Gratt. 344.

4. Acceptance.

There must be an acceptance by the

donee of the property given as well as delivery by the donor, but where the gift is beneficial to the donee acceptance will be presumed. *Yancey v. Field*, 85 Va. 756, 8 S. E. 721.

Acceptance as Trustee.—Where one in view of impending dissolution clearly and intelligently manifests an intention to make a present gift of personal property to another, and, in consummation of his intention, makes such a delivery to a third person for the use of the intended donee as he is then capable of making, considering the character and situation of the property, the person to whom the delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not as agent of the donor. *Johnson v. Colley*, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884.

F. REVOCATION.

A donation causa mortis may be revoked at any time during the life of the donor. *Johnson v. Colley*, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884.

"The title to every gift causa mortis must vest in the donee at the time of the gift. It vests, however, subject to certain conditions subsequent. The donor may revoke the gift during his life, or it will be defeated by operation of law if the donor should recover from the illness which induced the gift, or should survive the donee. If it is not revoked or defeated by operation of law, it becomes absolute at the donor's death, but not until then. 3 Minor's Inst., p. 606." *Johnson v. Colley*, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884. See also, *Yancey v. Field*, 85 Va. 756, 8 S. E. 721.

A gift causa mortis may be defeated by the donor recovering or escaping the impending peril. *Johnson v. Colley*, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

G. EXPRESSIONS OF DONOR.

In *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170, it was held, that the words "in case of my death it is yours" or like words, accompanying the delivery, do not of themselves make a testamentary disposition, but merely express the condition which the law attaches to every gift *causa mortis*, i. e., a condition subsequent. See *Seabright v. Seabright*, 28 W. Va. 412, 478.

Where the other essentials of a valid gift *causa mortis* exist, the gift will not be defeated because accompanied by the words "If I die, or anything happens to me." This is but the expression of the condition which the law attaches to every gift *causa mortis*. *Johnson v. Colley*, 101 Va. 414, 44 S. E. 721.

H. EVIDENCE.

See ante, "Weight of Evidence," II, I, 1; "Nature in General," III, C.

1. Weight of Evidence.

Evidence to Establish—Amount Required.—In a suit to establish a gift *causa mortis* of the entire personal estate of the donor, consisting of money and choses in action valued at \$200,000, it appeared that the donor was an unmarried man, seventy years old, and the donee his illegitimate daughter, thirty-five years old, whose mother had been the donor's slave; that the donor had educated the donee liberally, built a dwelling house for her, and resided there with her and her husband until his death, refusing all other ministrations than hers during his last illness. He had none other than collateral relations, and these he had said should not share in the estate. He displayed great affection for the donee, and frequently declared his intention to provide for her. The only person who testified to the fact of the gift was a companion of the donee provided by the donor. This she did minutely, and was cross-examined at great length without effect. Her testimony was cor-

roborated by that of others, and contradicted by none, and the facts testified to by her showed a valid gift *causa mortis*. The donee had mentioned the fact of the gift before the donor's death to his business agent. Held, that a decree establishing the gift should not be disturbed. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

Number of Witnesses.—The testimony of one credible competent witness is sufficient to establish a gift *causa mortis*. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

Sufficiency of.—In cases of alleged gifts *causa mortis* there is so much room for fraud and mistake that the evidence should be carefully scrutinized, the proof clear and convincing and the judgment of the court fully satisfied. *Smith v. Smith*, 92 Va. 696, 24 S. E. 280.

In *Smith v. Smith*, 92 Va. 696, 24 S. E. 280, 2 Va. Law Reg. 40, the evidence to support a gift *causa mortis* of choses in action consisted of the testimony of the donee and a third person, who was also to be benefited by the gift. The decedent had lived for years with the donee, and had expressed his intention of leaving to him his property. Before decedent's death, which occurred in the donee's house, he was delirious portions of the time, and suffered great pain. The donee testified that decedent directed him to close the door between his room and another in which a number of persons were sitting, and then made the gift to him and the other witness, who were the only persons present. There was evidence of statements and conduct on the part of the donee inconsistent with his testimony. Held, that a decree denying the validity of the gift would not be disturbed on appeal.

2. Admissibility of Evidence.

See ante, "Admissibility of Evidence," II, I, 2.

Declaration of Donee—Concerning Circumstances of Gift.—Declarations of the donee and her companion as to the circumstances of the gift made on the previous night were admitted as evidence in the donee's behalf as parts of the *res gestæ* and in rebuttal, in *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

The donee in *Seabright v. Seabright*, 28 W. Va. 412, 469, was held incompetent to prove as against the plaintiff, the widow and distributee, the delivery to him as a gift of certain notes and bonds by the deceased donor, this being a personal transaction between the interested witness and such donor.

Admission of Plaintiff.—The admission by the claimant of a gift *mortis causa*, that the bonds in question were the property of the decedent several days before his death, can not be taken to be an admission of the allegation of the bill that they were the property of the decedent at his death, because it is accompanied with the declaration of the defendant, that they were afterwards, in the lifetime of the decedent, delivered to him as a gift. And it matters not whether it was a gift *causa mortis* or *inter vivos*. *Morrison v. Grubb*, 23 Gratt. 342, 350.

Parol Evidence—Circumstances to Establish Gift.—Though a bond or note be delivered to a person, and the donor signs an endorsement on it in these words, "For value received I assign all my right to title and interest in this bond or note to donee," naming him; yet such gift may be shown by the surrounding circumstances to have been a gift *causa mortis* and not a gift *inter vivos*. *Seabright v. Seabright*, 28 W. Va. 412.

3. Burden of Proof—Presumption.

See *ante*, "Burden of Proof—Presumption," II, 1, 3.

General Rule.—Where the donee claims title to a chattel as a gift *causa mortis*, the burden of proof rests upon

him to establish every fact and circumstance necessary to show the validity of the gift, and delivery of possession is the strongest and most essential feature. *Miller v. Jeffress*, 4 Gratt. 472; *Thomas v. Lewis*, 89 Va. 1, 14, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529. See *Yancey v. Field*, 85 Va. 756, 8 S. E. 721; *Claytor v. Pierson*, 55 W. Va. 167, 172, 46 S. E. 935. See also, *Seabright v. Seabright*, 28 W. Va. 470; *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653; *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 238. *Nemo donare facile presumitur* is a maxim of the law applicable to the case, and where a gift *causa mortis* is alleged, the presumption being against it, clear proof on the part of the claimant is required. And the same is true in case of gift *inter vivos*. *Dickeschied v. Bank*, 28 W. Va. 340, 361.

Where a party claims title to personal property as a gift, either *inter vivos*, or *causa mortis*, the burden of proof, in whatever form the issue may be presented, rests upon him to establish the validity of the gift, of which the delivery of the possession is the strongest and most material. *Claytor v. Pierson*, 55 W. Va. 167, 172, 46 S. E. 935.

Compared with Gift *Inter Vivos*.

The burden of proving a gift of personal property by a decedent is much heavier on the claimant, when the alleged gift is a gift *causa mortis* than when the gift is one *inter vivos*. When the gift claimed is a gift *causa mortis*, it must be proven by strong and clear evidence. *Seabright v. Seabright*, 28 W. Va. 412, 415.

Possession as Evidence—Burden on the Plaintiff.—Possession of bonds by the claimant of them, as a gift *mortis causa*, without the imputation of any fraud or unfairness in their procurement is *prima facie* evidence of his right to the bonds. And the defendant having such possession of them

under the claim of ownership (it is not material that it should be by donatio mortis causa, if it is inter vivos), which possession he is proved to have had before the death of the decedent, the burden is upon the plaintiff to prove his allegation that they were the property of the decedent at his death. *Morrison v. Grubb*, 23 Gratt. 342, 350.

Circumstances of Gift—Presumption.

—Where a gift is made in the donor's last illness a few days or weeks before his death, though nothing was said by the donor to indicate that he was contemplating that such illness might prove fatal, it will nevertheless be presumed to be a gift causa mortis instead of inter vivos. *Seabright v. Seabright*, 28 W. Va. 412, 474.

I. EQUITABLE JURISDICTION.

Discovery.—Equity has jurisdiction to compel disclosure by a person having possession of choses in action, which he claims as a gift causa mortis from an intestate, so as to enable the administrator to recover the same. *Smith v. Smith*, 92 Va. 696, 24 S. E. 280.

Where equity assumes jurisdiction to order the disclosure as to an alleged gift, it will retain jurisdiction to determine its validity. *Smith v. Smith*, 92 Va. 696, 24 S. E. 280.

Parties.—And the distributees of the decedent are not necessary parties to such an action. *Smith v. Smith*, 92 Va. 696, 24 S. E. 280.

GIVE.—See LOAN.

The word **give** in a will held to imply an absolute bequest. *Parker v. Wasley*, 9 Gratt. 477, 482.

In *Shermer v. Richardson*, Wythe 159, 160, it is said: "In a testament technical language is dispensed with, and may be supplied by the testator's intention; for if a man devise lands to one, to **give**, in this case, a fee simple doth pass by the intent of the deviser. Coke's Institutes, 1 vol., fol. 9, b., and more than a myriad of other examples to the same purpose may be quoted. A devise then to one to **give**, is equivalent to a devise to one and to his heirs."

Leave and Give.—In *Carr v. Effinger*, 78 Va. 197, 203, it is said: "The words 'leave' and **give**, especially when used in a will without qualifying or restraining words, are interchangeable terms and mean one and the same thing."

Glebe Lands.

See the title RELIGIOUS SOCIETIES.

Gold.

See the titles GAMBLING CONTRACTS, ante, p. 686; PAYMENT.

Good Behavior.

See the title BREACH OF THE PEACE, vol. 2, p. 615.

GOOD CAUSE.—See the titles APPEAL AND ERROR, vol. 1, p. 656; PUBLIC OFFICERS. And see *Hartigan v. Board of Regents*, 49 W. Va. 14, 55, 38 S. E. 698.

Good Consideration.

See the title DEEDS, vol. 4, p. 391.

GOODS.—See the titles **FRAUDS, STATUTE OF**, ante, p. 516; **MORTGAGES AND DEEDS OF TRUST; WILLS.**

An indictment which charges that the defendant "unlawfully did sell music not manufactured by the seller within the state without having a license therefor according to law," is good, it sufficiently appearing that music is a species of goods, wares and merchandise. *Com. v. Nax*, 13 Gratt. 789.

By a bequest of "all my household goods and furniture, except my plate and watch," every thing about the houses, that had been usually held and enjoyed therewith, and that would tend to the comfort and accommodation of the household, will pass. *Carnagy v. Woodcock*, 2 Munf. 234.

Chose in Action.—The words goods and chattels as used in the recording acts do not include a chose in action. *Tingle v. Fisher*, 20 W. Va. 497, 498; *Gregg v. Sloan*, 6 Va. L. J. 607; *Bank v. Gettinger*, 3 W. Va. 309, 317; *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529; *First Nat. Bank v. Holland*, 99 Va. 495, 39 S. E. 126; *Kirkland v. Brune*, 31 Gratt. 136.

In *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234, 236, it is said: "The words goods and chattels in § 5, ch. 74, Code, requiring deeds of trusts of goods and chattels to be recorded, does not apply to choses in action, but only to visible, tangible, movable personal property."

Bank Notes.—In *Com. v. Swinney*, 1 Va. Cas. 146, 148, it is said: "The statute requires that the person who shall be punished under it, shall have gotten into his possession the money, or goods of another; whereas, the defendant is charged with having gotten possession of a note of the bank of Virginia, which is neither the money or goods of the said George Wythe, because having been delivered under a check not drawn by him, the bank hath no right to charge it to his account; neither is it the money, or goods of the bank; but simply the promissory note of the bank for the future payment of money, and as to all legal purposes, merely on a footing with the promissory note of an individual."

Money.—The words goods and chattels as used in § 1, ch. 71, of the Code of 1868, include money and every other kind of personal property which may be the subject of a gift inter vivos or causa mortis. *Dickeschied v. Exchange Bank*, 28 W. Va. 340, 341; *Claytor v. Pierson*, 55 W. Va. 173, 46 S. E. 935. See also, the title **GIFTS**, ante, p. 714.

Goods at Regular Prices.—In *Minnick v. Williams*, 77 Va. 758, 760, it is said: "The action of debt only lies for money. On an obligation to pay or deliver any other article, covenant is the proper remedy; and the recovery is, of a compensation in damages; goods at regular prices can not be considered as money."

Goods in Trust.—See *Lucas v. Insurance Co.*, 23 W. Va. 258, 270. And see the title **TRUSTS AND TRUSTEES**.

Lands.—In *Wyatt v. Sadler*, 1 Munf. 537, 548, it is said: "In the case before us, I have no doubt but the intention of the testator was to pass a fee to both his sons. First, because in the introductory part of the will he uses this expression; 'and as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth;' and immediately proceeds to dispose of his lands, in the first clause of his will; manifesting thereby his idea that the words worldly goods, comprehended all his worldly possessions, and were tantamount to the words all his worldly estate; and it seems agreed on all hands, that, had he used the word estate, instead of goods, a fee would have passed to his son William (see *Davies v. Miller*, 1 Call 127, and *Watson v. Powell*, 3 Call 306); and, to my mind, the latter was as expressive of his intention as the former would have

been. We frequently find men, who are unacquainted with the technical terms of the law, using the word **goods**, to signify estate."

Tobacco.—Tobacco, the growth of the state, in the condition in which it is ordinarily prepared for market by the grower, is not **goods**, wares and merchandise, within the meaning of the act of 1822-3, ch. 3, and a commission merchant in Richmond is not obliged to obtain a merchant's license to justify him in selling the same. *Mitchell v. Com.*, 1 Leigh 572.

Goods Sold and Delivered.

See the title ASSUMPSIT, vol. 2, p. 8.

Good Title.

See the titles SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

Good Will.

See the titles PARTNERSHIP; RESTRAINT OF TRADE.

GOVERNMENT.—See the titles CONFEDERATE STATES, vol. 3, p. 55; STATE; UNITED STATES.

In *Norfolk v. Chamberlain*, 89 Va. 196, 226, 16 S. E. 730, it is said: "The distinction between the **government** and the legislative department of the **government** is palpable. The **government** proper consists of three co-ordinate departments—the executive, legislative, and judicial—and these are the creatures of and derive their powers from the constitution of the state, which is the chart of **government**—the solemn expression of the sovereign will of the people."

GOVERNOR.

I. Definition, 739.

II. Election, 739.

III. Term of Office, 740

IV. Salary, 740.

V. Powers and Duties, 740.

VI. Subject to Mandamus, 741.

CROSS REFERENCES.

See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; ELECTIONS, vol. 3, p. 1; JUSTICE OF THE PEACE; MANDAMUS; PARDON; PUBLIC OFFICERS; STATE; STATUTES; WARRANTS.

I. Definition.

Meaning of Term as Used in Statutes.—The words "the governor" are equivalent to "the executive of the state," or "the person having the executive power." W. Va. Code, ch. 13, § 17 (6), p. 133; Va. Code, ch. 2, § 5 (2).

II. Election.

See the title ELECTIONS, vol. 5, p. 1.

Governor.—"The members of the legislature and the governor are elected by the people, and are presumed to be both intelligent and pa-

triotic. Before entering upon the discharge of their duties, they take an oath to support the constitution of the state and of the United States; and it is not to be presumed that they would unite in passing and approving an act without being well satisfied that it is constitutional." The Richmond Mayoralty Case, 19 Gratt. 673.

Lieutenant Governor.—By art. 5, § 8, of the Const., a lieutenant governor shall be elected at the same time, and for the same term as the governor, and his qualification and the manner of his election in all respects shall be the same. *Ex parte Lawhorne*, 18 Gratt. 85.

III. Term of Office.

When Term Commences.—"Our constitution provides that the terms of all officers, except the executive officers, shall commence on January 1st, but, in order that the governor and other executive officers may not be called upon to exercise the duties of their respective offices until any contest in respect thereto may be determined, the constitution wisely postpones the commencement of their terms until March 4th." *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26.

Holds Over until Successors Elected.—The governor elected for the next preceding term has the right and is under duty, by virtue of § 6, art. 4, of the constitution, to continue to discharge the duties of his office until a successor shall be declared elected. *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31.

The 22d section of article 6 of the constitution of Virginia applies to all state officers; and the governor, whose term has expired, holds over until his successor is qualified. *Ex parte Lawhorne*, 18 Gratt. 85. See also, *The Richmond Mayoralty Case*, 19 Gratt. 673.

"In regard to the performance of the duties of all officers, including the governor, after their terms of service

have expired, and until their successors are qualified, ample provision is made by the twenty-second section of the sixth article of the constitution." *Ex parte Lawhorne*, 18 Gratt. 85.

The provisions of the constitution limiting the term of office of governor to four years, and making him ineligible to re-election, do not prevent him from continuing to discharge the duties of his office after his term, under § 6, art. 4, of the constitution, in cases where the president of the senate can not act as governor, under § 16, art. 7, of the constitution. *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31.

IV. Salary.

Under the act of 1863 the salary of the governor, secretary of state, auditor and treasurer, commenced on the 4th of March, 1863. *Boyers v. Crane*, 1 W. Va. 176.

V. Powers and Duties.

Where Derived.—"Under our system of government, the governor has and can rightfully exercise no power except such as may be bestowed upon him by the constitution and the laws." *Lewis v. Whittle*, 77 Va. 415. See also, *Wolfe v. McCaull*, 76 Va. 876.

Power to Legislate.—The governor has no right to legislate. He clearly has no jurisdiction or power to pass a tax law. If he did attempt to enact such a law, no subordinate officer would be required to execute it nor would he at all be bound by it. *State v. Buchanan*, 24 W. Va. 362, 382.

Power over Judiciary.—"If anything is self-evident in the structure and organization of our government it is that the executive has no power to interfere with the judiciary in the performance of its duties." *Cardoza v. Epps*, 2 Va. Dec. 133.

Power over County Court.—Where a county court delivers persons convicted by it of murder to a jailer for safekeeping till brought back for execution, the governor has no authority to countermand a subsequent order

of such court requiring him to deliver them up. *Cardoza v. Epps*, 2 Va. Dec. 133.

"We find nothing in the constitution or laws of the state which authorized the governor to direct the keeper of the jail to disobey the order of the county court; and his act being without authority, furnishes no legal answer to the rule, and shows no cause why the mandamus prayed for should not be awarded." *Cardoza v. Epps*, 2 Va. Dec. 133.

Power to Contract—Employment of Counsel.—Every resolution requires the consent of both branches of the general assembly before it can become a law. A resolution passed by one branch only, authorizing the governor to employ counsel to consider a claim of the state, confers no power on him to bind the state. Va. Const., art. 4, § 8. *Field v. Auditor*, 83 Va. 882, 3 S. E. 107.

Recourse to the Courts.—A contract is made with the executive, under an authority given them by law; which directs that the auditor shall issue warrants upon the orders of the executive. The executive refuses to give such order. The party aggrieved may resort to the courts, by original petition, and have his rights enforced by their judgment. *Shields v. Com.*, 4 Rand. 541.

It seems that in such cases the party may obtain redress either in courts of law or equity, as the circumstances of the case may give jurisdiction to either tribunal. *Shields v. Com.*, 4 Rand. 541.

Power to Return Bill.—The legislature passed a bill, and presented it to the governor under the Virginia constitution, art. 4, § 8; but before he acted, it was recalled by a joint resolution. He returned it without approval. It was held, that the legislature had no power to recall the bill. The governor can not return a bill, with his veto and objections. In this case, his return of the bill was illegal, and it not having been vetoed, became a law. *Wolfe v. McCaull*, 76 Va. 876.

"The constitution prescribes with minuteness the course the governor must pursue with regard to bills placed in his hands, and its mandates are imperative. (*Cushing*, p. 931, § 2435; *Cooley Const. Lim.* 115.) The constitution fixed his duty. He can not evade that duty if he would, by allowing the legislature to recall the bill from his hands, and to defeat, by mere non-action, a measure they have once declared, with due solemnity, to have passed." *Wolfe v. McCaull*, 76 Va. 876.

When Governor Employed to Perform Act.—When the legislature requires an officer, other than the governor, to perform a public act, the constitutional provision, art. 7, § 5, does not authorize the governor to perform the act. *Shields v. Bennett*, 8 W. Va. 74.

If, in any case, the legislature may properly provide that a public act shall be done, and leave it to the governor, under this provision of the constitution, to do the act, yet it will not be presumed in the constitution of a doubtful statute, that the legislature intended the governor himself to do the act, and therefore did not intend to indicate another officer to do it. On the contrary, whenever the language of legislation can be understood to indicate such an officer, it will be construed to have such effect. *Shields v. Bennett*, 8 W. Va. 74.

VI. Subject to Mandamus.

See the title MANDAMUS.

"Although the governor in the exercise of the supreme executive powers of the state, may, from the nature of his authority, have a discretion which can not be controlled by judicial power, yet in regard to a ministerial act, which might have been devolved on any other officer of the state, and effecting any specific private right, he may be made answerable to the compulsory process of this court by mandamus." *Slack v. Jacob*, 8 W. Va. 612, 664, citing *State of Ohio v. Chase*, 5 O. St. 528.

Grace, Days of.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 445.

Grade Crossings.

See the title **CROSSINGS**, vol. 4, p. 122

Grade of Streets.

See the title **ABUTTING OWNERS**, vol. 1, p. 60, and references given.

Grammar and Punctuation.

See the title **CONTRACTS**, vol. 3, p. 407.

GRANDCHILD.—A power to appoint to children will not authorize an appointment to grandchildren. *Hood v. Haden*, 82 Va. 588, 595; *Morris v. Owen*, 2 Call 520. See the titles **POWERS**; **WILLS**.

In *Otterback v. Bohrer*, 87 Va. 548, 551, 12 S. E. 1013, it is said: "What is a 'child of a child?' When a father speaks of the youngest child of his child, or the youngest child of all of his children, he can mean nothing else but his grandchild. What does grandchild mean? Webster says grandchild means a son's or daughter's child."

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CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; CONSTITUTIONAL LAW, vol. 3, p. 140; CRIMINAL LAW, vol. 4, p. 1; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JURY; MINUTES OF COURT; TAXATION; TRIAL.

I. Definition.

A grand jury under the law as it now exists is defined to be a judicial court of inquiry, summoned and impaneled strictly in accordance with the provisions of the general law enacted for the purpose by the legislature; and any other body of men, however well qualified individually, would be neither a *de facto* nor a *de jure* grand jury, or entitled to perform the functions thereof. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

II. De Facto Grand Jury.

Such a thing as a *de facto* grand jury, not *de jure*, can have no existence. Both must coexist to make a legal grand jury, and there can be no other except by usurpation. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

III. Qualifications and Competency.

A. IN GENERAL.

A grand jury should be composed of persons qualified to serve in that capacity under the law, such qualifications being regulated by statute in Virginia and West Virginia. *Shinn v. Com.*, 32 Gratt. 899; *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225; *Com. v. Burton*, 4 Leigh 645; *Com. v. St. Clair*, 1 Gratt. 556; *Kerby v. Com.*, 7 Leigh 747; *Com. v. Cunningham*, 6 Gratt. 695; *Com. v. Helmondollor*, 4 Gratt. 536; *Com. v. Carter*, 2 Va. Cas. 319; *Com. v. Cherry*, 2 Va. Cas. 20; Va. Code, 1904, § 3977; W. Va. Code, 1899, ch. 157, § 2.

Act of 1867.—But the act of February 19th, 1867, can not be construed to prescribe a qualification to grand jurors *Bradford v. State*, 4 W. Va. 763.

If the act of February 19th, 1867, prescribe qualifications for grand jurors, the qualifications are of the same character as the act of November, 1863, and they must be construed together

as one act. *Bradford v. State*, 4 W. Va. 763.

"In Other Respects a Qualified Juror."—The phrase, "in other respects a qualified juror," must be interpreted according to the common law, and statutory requirements of jurors. *Booth v. Com.*, 16 Gratt. 519, 527. See the title JURY.

Common-Law Qualifications.—There were common-law qualifications of grand jurors. They were required to be *probi, aut liberi, et legales homines*. *Booth v. Com.*, 16 Gratt. 519.

Therefore, it is a good exception at common law to one returned on a grand jury, that he is an alien, or villain, or minor, or that he is outlawed for a crime, or that he was not returned by the proper officer, or that he was returned at the instance of the prosecutor. *Booth v. Com.*, 16 Gratt. 519.

B. PARTICULAR INSTANCES.

1. Residence.

In the County.—This court has heretofore decided that residence, within the county, is a necessary qualification of grand jurors; and the peculiar functions and duties of grand juries, as well as the structure of the clause of the act under consideration, would warrant, if necessary, the reading of it with the words "of the county," at the end of each disqualification. *Moran v. Com.*, 9 Leigh 651; *Com. v. Towles*, 5 Leigh 743. See also, *McCue v. Com.*, 103 Va. 870, 49 S. E. 623; *Com. v. Cherry*, 2 Va. Cas. 20; *Com. v. Long*, 2 Va. Cas. 318; *Com. v. St. Clair*, 1 Gratt. 556; *Day v. Com.*, 2 Gratt. 562, 563. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Residence in the State.—A naturalized citizen of the United States or a native citizen of any other state of the union, domiciled in Virginia being entitled to all the privileges of a citizen of this state, is a citizen and qualified as such to serve on grand juries. *Com.*

v. Towles, 5 Leigh 743; *Com. v. Cherry*, 2 Va. Cas. 20. See the title CITIZENSHIP, vol. 2, p. 823.

2. Householder or Freeholder.

Our statutes formerly required that grand jurors, to be competent as such, should be either householders or freeholders. *Com. v. St. Clair*, 1 Gratt. 556; *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225; *Kerby v. Com.*, 7 Leigh 747; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883; *Com. v. Carter*, 2 Va. Cas. 319; *Wysor v. Com.*, 6 Gratt. 711; *Com. v. Cunningham*, 6 Gratt. 695; *Moore v. Com.*, 9 Leigh 639; *Com. v. Helmondollor*, 4 Gratt. 536; *Com. v. Burton*, 4 Leigh 645; *Com. v. Reynolds*, 4 Leigh 663; *Com. v. Burcher*, 2 Rob. 826; *Moran v. Com.*, 9 Leigh 651. But this requirement no longer exists in Virginia. Va. Const., 1869, art. 3, §§ 1, 3; Va. Code, 1904, § 3977. But it still exists in West Virginia. See W. Va. Code, 1899, ch. 157, § 2. But see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

"The privilege of a freeholder residing in the county to serve on grand juries, is inherent by the common law, and sanctioned by our act of assembly, except so far as the latter may have taken it away on principles of public policy; therefore, in construing the latter, we deem it proper to adopt the interpretation which will least abridge the general privilege, and confine the exception to the necessity and reason of the enactment." *Booth v. Com.*, 16 Gratt. 519.

Freeholder—Who Is One—Person Having Equitable Title.—A person having the equitable interest in land, and entitled to call for legal title, is a freeholder qualified to serve as a grand juror. *Com. v. Helmondollor*, 4 Gratt. 536; *Kerby v. Com.*, 7 Leigh 747; *Com. v. Burcher*, 2 Rob. 826.

"In Bacon's Abridgment, vol. 4, p. 556, title 'Juries,' it is stated, 'that it seems agreed that whenever the letter of the common or statute law requires

that a juror should have freehold, the meaning is fully satisfied by his having the use of a freehold, and that it is not material whether he have it in his own or his wife's right; or whether it be absolute or upon condition; or an estate of inheritance, or only for the term of one's own or another's life; so that it be in the same county where the suit is brought, and actually continue in the juror till the time when he is sworn." *Com. v. Helmondollor*, 4 Gratt. 536.

"The statute prescribing the qualification of grand jurors directs (among other things) that a juror should be a freeholder. It becomes unnecessary to state the requisites constituting a freehold estate, since we find that as early as Co. Lit. 272, b, the English courts, in giving a practical exposition of the statute of 2 Hen. 5, ch. 3, stat. 2, prescribing the freehold qualification of jurors, decided that a cestui que use, 'who took the whole profits, and in the equity and conscience the land was his,' was a competent juror." *Kerby v. Com.*, 7 Leigh 747; *Com. v. Burcher*, 2 Rob. 826.

Mortgagors, or grantors in deeds of trust made to secure debts, while in possession and entitled to the equity of redemption, are freeholders and hence good jurors in Virginia. *Carter's Case*, 2 Va. Cas. 319; *Com. v. Burcher*, 2 Rob. 826.

A Purchaser in Possession under a Parol Contract.—A purchaser of land by parol contract, who is in possession, and has paid the purchase money, is a freeholder, and qualified to be a grand juror; though a writ of right brought against him by a third person, for the recovery of the land, is pending. *Com. v. Cunningham*, 6 Gratt. 695.

A Grantor by Deed of Trust, Remaining in Possession.—If a person has executed a deed of trust of all his land to secure the payment of a debt to his creditor; and the day of payment

is past; but the land is not sold by the trustee, and the grantor continues in the possession of the land (although in strictness of law, the freehold may be vested in the trustee, yet, by the equitable construction of the act concerning juries), he is not disqualified from being a grand juror. *Com. v. Carter*, 2 Va. Cas. 319.

Contract to Sell by Articles under Seal.—It seems that one who has contracted by articles under seal to sell his land, but has not yet conveyed it by deed, and therefore still holds the legal title, is a freeholder qualified to serve on a grand jury. *Com. v. Reynolds*, 4 Leigh 663.

A lot of land being sold for a sum of money payable by installments, the vendee receives immediate possession, and the vendor signs, seals, and acknowledges before magistrates, a conveyance of the land to the vendee in fee simple, which is thereupon, by consent of the parties, placed in the keeping of a third person, to be retained by him until the whole purchase money is paid, and to be then delivered to the vendee. The vendee pays some of the installments as they become due. Others are still unpaid, the time of payment not having arrived. Held, this vendee is a freeholder duly qualified to serve as a grand juror. *Com. v. Burcher*, 2 Rob. 826.

A Person Whose Title Is Undetermined Not a Freeholder.—A party in possession of land under a contract of purchase, having refused to accept a conveyance tendered to him, and instituted a chancery suit in which the question as to sufficiency of the title is yet undetermined, is not a freeholder qualified to serve as a grand juror. *Kerby v. Com.*, 7 Leigh 747.

Land Partly in One County—Sale for Taxes—Conveyance to a Trustee.—To indictment found in S. county in September, 1838, prisoner pleads in abatement that J. R., one of the grand jurors, was not a freeholder. On the trial of the issue joined on this plea,

it appears that the only land to which J. R., at the time of finding the indictment, had title, was a parcel in S. containing 691 acres, formerly part of a large tract lying mostly in S. but partly in W. county; in which latter county the whole tract was offered for sale in 1815, for arrears of taxes, but was not sold, and those taxes remained unpaid on the 1st of July, 1838; that in 1834, the owner conveyed the whole tract to a trustee, upon trust that if certain debts specified in the deed should not be paid within six months, the trustee should sell the land and pay those debts; but under this deed, no sale was ever made, that in 1837, the grantor in the trust deed sold and conveyed to J. R. the 691 acres, of which J. R. immediately received possession, and remained in possession at the time he was sworn as a grand juror. Verdict for commonwealth; and motion to set the verdict aside held to have been properly overruled. *Moore v. Com.*, 9 Leigh 639.

3. Owner or Occupier of Gristmill.

The legislature in 1748 (5 Hen. Stat. at Large, ch. 11, p. 523) disqualified the owner or occupier of a mill from serving in the office of a grand juror. *Moran v. Com.*, 9 Leigh 651; *Com. v. Long*, 2 Va. Cas. 318. See also, *McCue's Case*, 103 Va. 870, 49 S. E. 623. This peculiar disqualification still exists. Code, 1904, § 3977.

Limited to Jurisdiction within Which Mill Situated.—But in *Moran's Case*, 9 Leigh 651, it was held, that the disqualification of owners and occupiers of water gristmills, though general in its terms, is limited to the jurisdiction within which their mills are situated. *Booth v. Com.*, 16 Gratt. 519.

The part ownership of a tract of land on which there is a mill, which land has been allotted to, and is, with the mill, in the possession of a widow as her dower, is not a disqualification to act as a grand juror. *Wysor v. Com.*, 6 Gratt. 711.

4. Tavern Keeper.

The keeper of an ordinary or tavern is disqualified to serve as a grand juror. *Com. v. Willson*, 2 Leigh 739; *Com. v. Long*, 2 Va. Cas. 318. See also, Va. Code, 1904, § 3977.

Who Is a Tavern Keeper—Partners.

—A obtains a license to keep an ordinary. A opens a tavern under this license, and B is his partner in the business; but A alone resides at the tavern, and acts as keeper thereof. Held, B is not the keeper of an ordinary, disqualified to serve on grand juries, within the meaning of the statute, 1 Rev. Va. Code, ch. 72, § 2. *Com. v. Willson*, 2 Leigh 739. See Code, 1904, § 3977.

5. Aliens.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; ALIENS, vol. 1, p. 291.

6. Census Taker.

An appointment under a law of congress to take the census of a county, does not disqualify the appointee from being a member of the grand jury thereof. *Com. v. Strother*, 1 Va. Cas. 186.

7. Former Service as Juror.

A plea in abatement will not lie to an indictment because two or more of the grand jury which found the indictment had served on another grand jury at the same term. *Richardson v. Com.*, 76 Va. 1007. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

8. Jury Commissioner.

Being a jury commissioner does not disqualify a man from serving on the grand jury. *State v. Martin*, 38 W. Va. 568, 18 S. E. 748.

9. Persons over Sixty Years of Age.

Persons over sixty years of age are not disqualified from serving on grand juries; though they are exempted from the service if they choose to claim the exemption. *Booth v. Com.*, 16 Gratt. 519.

10. Free Negroes, Indians and Women.

As to the argument that if the first section of the act of 1853 does not prescribe a qualification, then there is no law to disqualify minors, free negroes, Indians and women, from serving on juries; it is a sufficient answer to say, that such persons are not *liberi et legales homines*, and are therefore not qualified jurors at common law. *Booth v. Com.*, 16 Gratt. 519.

Free negroes are also disqualified by statute to serve on grand juries, because they can not be citizens. *Booth v. Com.*, 16 Gratt. 519. But negroes are at present competent to serve on grand juries, provided they have the other qualifications required by the Virginia Code, 1904, § 3977.

11. Prior Formation and Expression of Opinion.

There is no law that gives an accused person the absolute right to have grand jurors accepted by the court who have formed and expressed unqualified opinion that he is innocent. There is no law, rule, or practice that compels the court to accept any grand juror to be on the panel who has formed and expressed an opinion that the accused is guilty. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

"Our statute allows the unsworn statement of the grand jurors to call for an indictment, and this shows that a bystander fully conversant with facts may be a grand juror. And I do not think the formation or expression of an opinion as to the case calls for exclusion, though Chief Justice Marshall, in the great trial of Aaron Burr (Fed. Cas. No. 14, 692g) for treason, allowed this objection, and other very respectable authorities have allowed it." 3 Rob. Prac. 89. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

12. Loyalty.

By the fifth section of the act of November, 1863, p. 109, acts of 1863,

a qualification theretofore unknown to the laws of the state, was prescribed for grand jurors. It was that they should be persons of known loyalty to the state and the United States, and who had not done certain acts specified in said section. *Bradford v. State*, 4 W. Va. 763. This requirement has been abolished.

13. Effect of Disqualification on Validity of Finding.

It has often been held, in other jurisdictions, that an indictment found by a grand jury, upon which a disqualified person is sitting, is void. The disqualified person may have been one of only twelve who voted for the indictment. 2 Haw. P. C., ch. 25, § 28. *Eastman v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259. See also, *Shinn v. Com.*, 32 Gratt. 899; *Com. v. Burton*, 4 Leigh 645; *Com. v. Long*, 2 Va. Cas. 318. But see *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225; *State v. Martin*, 38 W. Va. 568, 18 S. E. 748; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Deceit Practiced by Grand Juror.—

A corrupt nomination of himself to the sheriff, by a citizen of the commonwealth, to serve on the grand jury; or a false conspiracy or corrupt agreement between the sheriff and himself for that purpose, is sufficient to avoid an indictment or presentment found by a grand jury so constituted. *Com. v. Cherry*, 2 Va. Cas. 20; *Com. v. Thompson*, 4 Leigh 667. See also, *Com. v. Burton*, 4 Leigh 645, 667.

C. OBJECTION TO QUALIFICATIONS OR COMPETENCY OF GRAND JUROR.

1. How Made.

a. Plea in Abatement.

In General.—In some of the states it is considered that the only objections that can be taken to grand jurors by plea in abatement, must be such as would disqualify the juror to serve in

any case. In other words, the plea must show the absence of positive qualifications demanded by law. *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

But in Virginia, and formerly in West Virginia, want of qualifications or other objections to a grand jury are to be made effective by a plea in abatement. *Cherry's Case*, 2 Va. Cas. 20; *Long's Case*, 2 Va. Cas. 318; *Moore's Case*, 9 Leigh 639; *Kerby's Case*, 7 Leigh 747; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259; *Booth's Case*, 16 Gratt. 519, 520; *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812. See also, *McCue v. Com.*, 103 Va. 870, 49 S. E. 623. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

To indictment in Petersburg circuit court, defendant pleads: 1. That one of the grand jury which found the same, was, at the time he was summoned and sworn, the owner of the water gristmill situated in Chesterfield; 2. That one of the grand jury was, at the time of the finding the indictment, the owner of the water gristmill (without saying where the mill is situated). On demurrer to the pleas, held, neither of them is sufficient. *Moran v. Com.*, 9 Leigh 651.

Grand Juror Not a Freeholder.—In a prosecution for a misdemeanor at the instance of a voluntary prosecutor, the defendant files a plea in abatement, that one of the grand jurors who found the indictment was not a freeholder; and the issue made up on that plea is found for the defendant, and the indictment quashed. Held, the court should give judgment for the costs against the prosecutor. *Com. v. St. Clair*, 1 Gratt. 556.

Trial of Issue.—Upon an indictment for a felony, the prisoner pleads in abatement that one of the grand jurors who found the indictment against him, was at the time a surveyor of the highway; and the attorney for the commonwealth takes issue upon the plea.

The issue should be tried by a jury. *Day v. Com.*, 2 Gratt. 562. But when the questions raised are matters of record they are tried by the court. *State v. Martin*, 38 W. Va. 568, 18 S. E. 748.

Upon an issue of fact made on a plea in abatement to an indictment, to determine whether or not a grand juror was, at the time of finding an indictment, a resident of the city in which the indictment was found, the verdict of the jury will be considered in this court as upon a demurrer to evidence, and will not be disturbed if there was evidence in the case sufficient to sustain it. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

Waiver of Plea.—A plea in abatement raising objections to the manner of organizing the jury, or to the qualifications of grand jurors, is waived by pleading the general issue alone. *Early v. Com.*, 86 Va. 921, 11 S. E. 795.

b. Motion to Quash.

The incompetency of one grand juror is sufficient to render an indictment found by a grand jury of which he is a member, defective, for which defect it will be quashed. *Shinn v. Com.*, 32 Gratt. 899; *Com. v. Burton*, 4 Leigh 345.

But in West Virginia an indictment will not be quashed on the ground that one of the grand jurors who found the indictment was incompetent. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225; *Code*, 1889, ch. 157, § 12; *State v. Martin*, 38 W. Va. 568, 18 S. E. 748.

2. When Made.

Before Grand Juror Sworn.—In the case of a grand jury, a party indicted is not bound to object to a grand juror for any disqualification before he is sworn; for he is no party to the selection and constitution of the grand inquest of the county. But when he is indicted he becomes a party, and it is competent to him to avail himself of the disqualification. *Com. v. Cherry*, 2 Va. Cas. 20, 25; *Com. v. Carter* 3

Va. Cas. 319; *Hunter v. Matthews*, 12 Leigh 228.

Before Plea to Merits.—Objections to the competency or qualifications of a particular grand juror must be made at a preliminary stage of the case, before a plea to the merits; otherwise, they are considered waived. *Curtis v. Com.*, 87 Va. 589, 590, 13 S. E. 73; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812. Unless the proceedings are void from the beginning. *Curtis v. Com.*, 87 Va. 589, 590, 13 S. E. 73.

After Indictment Found.—Objection to the qualification of an individual grand juror can be taken after indictment found. *Com. v. Long*, 2 Va. Cas. 318; *Day v. Com.*, 2 Gratt. 562; *Com. v. St. Clair*, 1 Gratt. 556.

Can Not Be Raised for First Time in Appellate Court.—Objection that the grand jury was not constituted, and foreman not selected and sworn as required by law, can not be raised for the first time in the appellate court, but must be by plea in abatement. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

IV. The Oath of Grand Jurors.

Appearance on Face of Indictment.

—A third count of an indictment was objected to, because it did not appear on its face, that it had been found upon the oath of the grand jury. The court held, that "that difficulty is obviated by the fact of the grand jury having been actually sworn in open court, before the indictment was found, as appears from a transcript of the record filed with the petition; and therefore, the whole indictment must necessarily have been found upon oath of the grand jury. *Huffman v. Com.*, 6 Rand. 685.

Oath Administered by Clerk De Facto.—The fact that the oath is administered by the clerk de facto, at the time of administering the oath, is not sufficient to avoid a presentment for

gaming. *Hord v. Com.*, 4 Leigh 674. See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; GAMING, ante, p. 000.

V. Number Necessary to Constitute a Regular Grand Jury.

Statutory Provision.—Section 3977 of the Virginia Code, as amended by the act of February 25, 1890 (acts, 1889, 1890, p. 91, ch. 115), provides that a regular grand jury shall consist of not less than nine nor more than twelve persons. *Litton v. Com.*, 101 Va. 833, 44 S. E. 923. See Code, 1904, § 3677. See post, "Number," X, C.

Incompetent Juror Summoned.—Although one of the forty-eight persons directed by the judge to be summoned to serve as grand jurors for the ensuing twelve months, may be incompetent to serve as a grand juror, a grand jury of sixteen selected from this list, all of whom are competent, is a legal and duly qualified grand jury. *Shinn v. Com.*, 23 Gratt. 899. See also, *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

Record—Presumption.—The record of the indictment against P., sent to the circuit court, shows that it was found at the February term of the court by a grand jury of eight members; but it does not show that the February term was not one of the four regular terms of the said court, to which twenty-four citizens were required to be summoned to constitute a grand jury. In the absence of evidence to the contrary, it must be presumed that the indictment was found at a term when a grand jury might consist of only eight members. *Price v. Com.*, 21 Gratt. 846.

VI. Selecting, Summoning, and Impaneling.

A. HOW SELECTED.

"The grand jury must be selected in the manner prescribed by law. There

is no security to the citizen but in a rigid adherence to the legislative will as expressed in the statutes for our general guidance." *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

By Lot—Power of Judge and Sheriff.—To obviate the difficulty of partisanship, the legislature has provided for the selection of jurors, as near as may be, by lot, limited to a given number of the better class of citizens subject to jury service; not authorizing the sheriff to supply any other than adventitious vacancies. To the judge no power is given in the selection of grand jurors, but he is removed from partisan bias and temptation. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

Purpose of Statute.—The design of the statute in requiring courts to select from qualified voters a certain number of persons, who shall be grand jurors for a certain period thereafter, is to secure a sufficient number of grand jurors for that period. When a qualified grand jury is obtained from those thus selected, it is no valid objection to it that others on the list of venire may perchance be disqualified. The fact that any one on the list of venire is incompetent to serve is not sufficient of itself to vitiate an indictment found by a grand jury each one of which possesses every necessary qualification. *Shinn v. Com.*, 32 Gratt. 899.

B. BY WHOM SUMMONED.

By statute in Virginia, until a comparatively recent time, the sheriff was required ex officio to summon a grand jury, to attend on the first day of every term prescribed by law. *Com. v. Burton*, 4 Leigh 645; *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 627; *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73.

But now the statute provides that a venire facias to summon a regular jury shall be issued by the clerk prior to the commencement of each term at which such grand jury is required. *Curtis v. Com.*, 87 Va. 589; *Com. v. Burton*, 4

Leigh 645. See also, *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 627.

Grand Jury Summoned by Unauthorized Deputy.—Whether or not a grand jury summoned by an unauthorized deputy is valid or not was left undecided in the additional opinion of Brannon, J., in *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259. But the court seemed to say that it would neither invalidate the grand jury nor the action of the grand jurors.

C. POWER TO SUMMON AND IMPANEL.

Duty of Legislature.—It is made obligatory on the legislature to provide by general law for the summoning and impaneling of all grand juries, and it is made equally obligatory on the courts to conform strictly to the law so enacted; and it is the assured right of every citizen to require both so to do when his life, liberty, or property is at stake. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Power of Court to Summon and Impanel.—The power to procure the attendance of a grand jury, results from the criminal jurisdiction of the court; and had there been no statutory provision procuring the attendance of grand juries, the courts of criminal jurisdiction in this county, would have been vested with the common-law powers of the courts of oyer and terminer and jail delivery in England. *Com. v. Burton*, 4 Leigh 645.

It is clear that a criminal court possesses at common law, without statute, inherent power to impanel grand juries, and I know no limit; but I know, on above authority, that it can summon new grand juries at the same term, and this inherent power carries the ability to summon new ones as often as necessary exists. Opinion in *Burton's Case*, 4 Leigh 645; *Shinn's Case*, 32 Gratt. 899; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Power of Circuit Court of Tucker County.—And hence no one can or does

question that the circuit court of Tucker has jurisdiction to impanel a grand jury to inquire of and prefer an indictment for murder, and to try the case upon such indictment, or that it had jurisdiction in this particular instance. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Power of Corporation Court of Richmond.—The corporation court of the city of Richmond was authorized to impanel a grand jury on the 2d day of May, 1870, under the act of April 27th, 1870. *Chahoon v. Com.*, 21 Gratt. 822.

Record of Impaneling—Clerical Error.—The record of the impaneling of a grand jury states that the jurors, "were sworn a grand jury of inquest upon the body of Mineral county," etc. Held, that the word "upon" is clearly a clerical error, and is to be read "for." *State v. Gilmore*, 9 W. Va. 641.

D. THE PRECEPT OR PROCESS FOR SUMMONING — VENIRE FACIAS.

At Common Law.—At common law the process for summoning a grand jury was a precept, either in the name of the king, or of two or more justices of the peace, directed to the sheriff. This was anterior to and independent of any action of the court, the object being to have a grand jury in attendance at the commencement of the term. The court, however, had power to have a grand jury summoned during the term, as occasion might require. *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73. See also, *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 627; *Burton's Case*, 4 Leigh 645.

"Upon this precept the sheriff is to summon twenty-four or more out of the whole county, namely, a considerable number out of every hundred, out of which the grand inquest at the sessions of the peace, oyer and terminer or jail delivery, are taken and sworn, ad inquirendum pro domino rege et corpore comitatus." "The grand inquest returned the first day of the ses-

sions and sworn, commonly serves the whole sessions of the peace, oyer and terminer and jail delivery; yet the court may command another grand inquest to be returned and sworn, which is done ordinarily upon two occasions. 1. If before the end of the sessions, the grand jury having brought in all their bills, are discharged, by the court, and after that discharge, either some new felony or other misdemeanor is committed, and the party taken and brought into jail; or if after the discharge of the grand inquest, some offender be taken and brought in during the sessions. 2. The second ordinary instance of a new grand jury returned, is upon the statute, 3 Hen. 7, ch. 1, namely, a grand inquest impealed to inquire into the concealment of another grand inquest, etc." 2 Hal. P. C. 154, 156. *Com. v. Burton*, 4 Leigh 645.

Our statute, which makes it the duty of the sheriff, ex officio, to summon a grand jury to attend on the first day of the term, is a substitute for the precept above mentioned, and could not have intended to take from the court the highly convenient power which it otherwise would have possessed. *Com. v. Burton*, 4 Leigh 645.

Venire Facias Incorrectly Dated.—Where a venire facias for the grand jury was dated October, instead of September, by inadvertence or mistake, and afterwards corrected in accordance with the fact, and the grand jury duly summoned at the right time, it was held no ground for disturbing the judgment. *Davis v. Com.*, 89 Va. 132, 15 S. E. 388.

Venire Facias Conforming to Statute Passed after Accused Was Indicted.—The venire facias having been issued on the 18th of August, 1871, properly conformed to the provisions of the act of March 29, 1871, sess. acts, 1870-71, ch. 262, p. 357, which went into operation on 1st of July, 1871; though this act was not in force at the time the

prisoner was arrested, committed and indicted. *Price v. Com.*, 21 Gratt. 846.

At What Time the Venire Should Be Issued.—Section 3976, Va. Code, 1887, provides that venire facias to summon a regular grand jury shall be issued by the clerk prior to the commencement of each term at which a grand jury is required. *Curtis v. Com.*, 87 Va. 589, 591, 13 S. E. 73. See also, *Burton's Case*, 4 Leigh 645; *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 622. See Va. Code, 1904, § 3976.

The requirements of the West Virginia Code of 1899, ch. 157, § 3, respecting the summoning of grand juries, and the time of issuing the venire facias therefor, are directory, and hence substantial compliance therewith in summoning a grand jury is sufficient. *State v. Taylor (W. Va.)*, 50 S. E. 247.

Award of Process—Record Thereof.—It has never been held, that the award of process to summons a grand jury must affirmatively appear by the record and there is no principle for so holding. *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73; *Watson v. Com.*, 87 Va. 608, 13 S. E. 22. And it was decided in *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627, that where the record does not affirmatively show that an order to summons a grand jury was made, but is silent in respect thereto, it must be presumed that such an order was made. The order itself is not a necessary part of a record of the case, since the commencement of the case was the finding of the indictment, and that was necessarily subsequent to the making of the order. *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238. And it was held in *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812, that it is sufficient if the record shows that the venire was issued by order of the court.

Venire Facias Not Per Se Part of the Record.—The venire facias can only become part of the record by bill of exceptions. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

E. NUMBER FROM WHICH JURY CHOSEN.

The number of persons summoned, from which the jury is formed, is fixed by statute. *Shinn v. Com.*, 32 Gratt. 899; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883; Va. Code, 1887, § 3976; W. Va. Code, 1899, p. 1011; Va. Code, 1904, § 3976. See also, *Mesmer v. Com.*, 26 Gratt. 97. See ante, "Number Necessary to Constitute a Regular Grand Jury," V.

A regular grand jury is made up by the clerk from the forty-eight men selected. *Robertson v. Com.*, 1 Va. Dec. 851.

F. EXCUSING JURORS.

A court may excuse a grand juror if it substitute one who is qualified. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Hence excusing a competent juror does not impair the indictment if his place is filled by a competent one. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

G. SUPPLYING DEFICIENCY.

Where a statute expressly authorizes and requires the court, if a sufficient number of jurors summoned are not in attendance to constitute a grand jury, to cause a sufficient number to be returned from the by-standers or from the county or corporation at large, it is no objection if the court, because a sufficient number of the jurors summoned are not in attendance, causes the required number to be returned from the county at large. *Richardson v. Com.*, 76 Va. 1007; *Minor's Syn. Cr. Law* 247. See Va. Code, 1904, § 3976.

Section 3, ch. 157, W. Va. Code, 1899, requires all grand jurors to be drawn from a list and box prepared and preserved for the purpose in the manner provided by law, except that when the grand jurors so drawn and summoned failed to attend, the court under § 4 shall direct the sheriff to summon any qualified persons to serve as grand jurors whether included in the prepared

list or not. *State v. Carter*, 49 W. Va. 709, 39 S. E. 611.

H. PRESUMPTION OF LEGAL ORGANIZATION.

As a general rule the officers charged with the organization of a grand jury are presumed to have done their duty, and the presumption is that the jury is duly and legally constituted. *Mesmer v. Com.*, 26 Gratt. 976. And where an indictment filed the whole of a sheet of paper, and was then folded in another half sheet of the same size, on which half sheet the attorney endorsed "*Commonwealth v. Joseph Burgess, Indictment*," and immediately below, in the handwriting of the foreman of the grand jury, was endorsed, "A true bill," and where the record showed that the grand jury appeared in court and openly presented the indictment as a true bill, such must be considered as the indictment on which the grand jury passed and on which the jury found their verdict. *Burgess v. Com.*, 2 Va. Cas. 483.

Where the record shows that on a certain day "V. gentleman, foreman, this day appointed by the court as such" (and fifteen others naming them) "were empaneled and sworn a grand jury of inquest, in and for the body of the county of W., and having been charged were sent to their room to consider of the business before them" and no irregularity in summoning or convening the grand jury is pointed out, in a bill of exceptions it will be presumed that no such irregularity existed. *State v. Tucker*, 52 W. Va. 420, 421, 44 S. E. 427.

I. OBJECTIONS TO MODE OF SUMMONING, SELECTING OR IMPANELING.

In General.—Thompson & Merriam say in § 554: "In view of the fact that the finding of a grand jury is only an accusation, at most, it is not surprising that courts should not be astute in discovering technical irregularities in the process of procuring this jury (grand

jury)." *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

When Made.—It is well settled that objections to the mode of summoning a grand jury, must be made at a preliminary stage of the case before a plea to the merits, otherwise they are to be considered as waived. *Curtis v. Com.*, 87 Va. 589, 590, 13 S. E. 73; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812. Unless indeed the proceeding be void ab initio. *Curtis v. Com.*, 87 Va. 589, 590, 13 S. E. 73.

How Made.—A plea in abatement lies to an indictment on the ground that the grand jury which found the indictment had not been summoned according to law, and also because one of the grand jurors was not qualified to serve as such. *Early v. Com.*, 86 Va. 921, 924, 11 S. E. 795; *Com. v. Cherry*, 2 Va. Cas. 20; *Com. v. Long*, 2 Va. Cas. 318; *Moore v. Com.*, 9 Leigh 639; *Kerby v. Com.*, 7 Leigh 747; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259; *Booth v. Com.*, 16 Gratt. 519, 520. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Objection that the grand jury was not constituted and foreman not selected and sworn as required by law can not be raised for the first time in the appellate court, but must be by plea in abatement. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

Mere Irregularity in Selecting No Ground for Plea.—But it was said in *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, that mere irregularity in the manner of selecting a grand jury, when objection does not go to the competency of jurors, can not be taken advantage of even by plea of abatement. See also, *Bradford v. State*, 4 W. Va. 763; *State v. Martin*, 38 W. Va. 568, 18 S. E. 748.

Waiver of Plea.—A plea in abatement raising objections to the manner of organizing the jury is waived by pleading the general issue alone. *Early v. Com.*, 86 Va. 921, 11 S. E. 795.

Can Not Be Made in Appellate Court.—Objection that the grand jury was not selected as required by law can not be raised for the first time in the appellate court. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

Quashing Venire.—Under the act of 1853, respecting grand juries, a venire facias requiring the officer to summon grand jurors who own real or personal property of the value of \$100 will be quashed on notice of the prisoner. *Wash v. Com.*, 16 Gratt. 530.

The act of 1866, 1867, ch. 208, is mandatory, and hence a writ which does not comply with its requirements should be quashed. *Whitehead v. Com.*, 19 Gratt. 640.

The statute relating to the selection and qualification of grand jurors having been changed in July, 1902, it was not error in the judge of a county court, in selecting grand jurors for the August term, to quash a venire facias issued under the prior law, and to issue a new venire in conformity with the recent statute. Nor was it error to summon a regular instead of a special grand jury under the provisions of § 3978 of the Virginia Code. *Litton v. Com.*, 101 Va. 833, 44 S. E. 923.

Objection That List Was Not Made Out and Delivered to Sergeant Five Days before Term Time.—On the 18th of September, 1874, S., judge of the corporation court of W., issued his order in vacation to the clerk of the court, directing that a grand jury of ten citizens, etc., be summoned to attend the court on the 21st of September. Upon this order the clerk issued his warrant to the sergeant to summon certain grand jurors, naming them. Of the list furnished the sergeant, nine attended the court. At the September term of the court an order was entered as follows: "This day came a grand jury, to wit; naming six of those who had been summoned by the sergeant; who being elected, etc." Held, it is not a valid objection to this grand jury, that the list of the jurors was not made out and

delivered to the sergeant five days before the term. *Mesmer v. Com.*, 26 Gratt. 976, 987.

VII. Proceedings before Grand Jury.

A. INITIATING PROCEEDINGS.

When an indictment has been prepared by the proper officer of the court, it is submitted to the grand jury, and upon their finding it a true bill, the prosecution commences upon that indictment. *Com. v. Christian*, 7 Gratt. 631; *Minor's Syn. Cr. Law* 251.

B. SECRECY OF PROCEEDINGS.

Privileged on Ground of Public Policy.—The proceedings of grand jurors seem to be regarded as privileged communications, and upon grounds of public policy. "It is the policy of the law," says Greenleaf, "that the preliminary inquiry as to the guilt or innocence of a party accused should be secretly conducted. And in furtherance of this subject," he further says, "every grand juror is sworn to secrecy." 1 Greenl. on Ev., § 252. And by Bigelow, J., in *Com. v. Hill*, 11 Cush. R. 137, 140, it is said, that "the extent of the limitation upon the testimony of grand jurors is best defined by the terms of their oath of office, by which the commonwealth's counsel, their fellows, and their own, they are to keep secret." *Little v. Com.*, 25 Gratt. 921.

"It is the policy of the law, in the interest of the justice, that this preliminary hearing should be conducted with closed doors. This secrecy is not only consistent with, but essential to, the nature of the institution. The sufficiency of the proof can not be inquired into to invalidate an indictment found by a lawfully constituted grand jury. The presumption is that every indictment is found upon proper evidence. If anything improper is given in evidence before a grand jury, it can be corrected on the trial before the

petit jury." *Wadley's Case*, 98 Va. 803, 35 S. E. 452.

And hence a grand juror can not for any purpose be interrogated as to his action as a grand juror; nor is it an error for the court to refuse to permit a witness to be interrogated as to his action as a grand juror with a view of showing his prejudice. *State v. Baltimore*, etc., R. Co., 15 W. Va. 362.

C. WHO MAY APPEAR BEFORE GRAND JURY.

1. In General.

In this state the statute does not prescribe who may be present, and the grand jury, although constituted by statute, is to follow in its procedure the rules of the common law, unless a statute was otherwise provided. The rule as to secrecy prescribed by the English law, and embodied in the oath, is omitted from the oath prescribed by our statute. "As to the presence of persons not of the grand jury, a distinction appears to be made," says Mr. Bishop, "between the hearing of the testimony and the deliberations thereon." 1 Bish. Crim. Proc., § 861. In some early instances, not as of common practice, but, it seems, at the request of the officers prosecuting for the king, the evidence was produced publicly in open court to the grand jury, yet their deliberations were private. *Rex v. Shaftesbury*, 8 How. State Tr., 795, 771, 774, 775, 820, 821; *Poulterer's Case*, 9 Coke 55b. In modern times, however, the grand jury, though deemed a part of the court, always sits by itself while receiving testimony; and it is not believed that a departure from this practice, even in an exceptional instance, would not be allowed. *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

2. Right of Accused to Appear or Send Witnesses.

The grand jury is a one-side proceeding, and before it the accused has no right to appear or to send witnesses. It is only a means adopted by the state

for inquiring whether its criminal law has been violated, and to present its accusations for jury trial. By no means does it hear the whole case. It is only the state bringing a prosecution. The state presents to it its indictment, and the grand jury has only to say whether, upon the state's showing, the accusation is well made, or proper to be tried by the jury. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

3. Prosecuting Attorney and Assistant.

Will the presence of the prosecuting attorney before a grand jury vitiate an indictment? Our Code of 1868 (ch. 120, § 5) provided that "it shall be the duty of every prosecuting attorney in this state to go before the grand jury whenever, in his opinion, the public interest will be promoted thereby, or when called upon by the foreman to do so, to aid them with his advice and assistance in the discharge of their official duties. But he shall not be present when any vote is taken upon the finding of an indictment or presentment." This statute has been repealed, and for that reason it is claimed the legislature did not intend prosecuting attorneys to go before grand juries. In the first place, this section made it the duty of the prosecuting attorneys to do so, whereas before it was not imperative; and secondly, though the legislature may have so intended, it could only express its intent by enactment. This repeal left the subject as it was at common law. *State v. Baker*, 33 W. Va. 319, 10 S. E. 639. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

How is it at common law? the judges of England, in 1660, in the proceedings against the regicides of King Charles I. (5 State Tr. 947), resolved that any of the king's counsel might privately manage the evidence before the grand inquest, in order to the finding of the bill of indictment. So in the case against Hardy and others (24 State Tr.

199) for treason, in 1794, the solicitor for the crown went before the grand jury. *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

Better Practice.—The authorities are not distinct as to the effect of the presence of the third person while the jury deliberate on finding a bill, yet, at least, in the word of Hanna, J., "the better practice would be for the jury to exclude every other person from their room at such time; but we are not prepared to say they may not, in their discretion, permit the prosecuting attorney to remain." *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

4. Bailiff, Sheriff or Deputy.

See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

If, while the testimony is being introduced, a third party, not participating, is present, under no suspicious circumstances, as, for example, a bailiff, or one drawn as a grand juror, yet not in due form, according to some of the cases, this will not vitiate the finding. *Little v. Com.*, 25 Gratt. 921; *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

There is no case that we are aware of which has held that the indictment by a grand jury is vitiated merely because the sheriff or his deputy were in their room while they were deliberating and examining witnesses upon whose testimony the indictment was found. They are officers in attendance upon the grand jury, and in the performance of their duties it is often necessary for them to enter the grand jury room, and it may be whilst they are engaged in deliberating or hearing testimony on the case before them. *Richardson v. Com.*, 76 Va. 1007.

5. An Outsider.

It has been held, that the presence of a person not a member of the grand jury during its deliberations will be ground for setting aside the indictment. *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639, 640.

But if one drawn as a grand juror, yet not in due form, is present, this will not vitiate the indictment. *Little v. Com.*, 25 Gratt. 921; *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

D. EVIDENCE AS TO PROCEEDINGS BEFORE GRAND JURY.

1. How Grand Jurors Voted.

Where two or more of the grand jury which found an indictment had served on another grand jury at the same time, how they voted on the indictment as members of the first grand jury, can not properly be inquired into. *Richardson v. Com.*, 76 Va. 1007.

2. Proof of Testimony before Grand Jury.

By Grand Jurors.—Whether a grand juror is a competent witness at the trial to prove contradictory testimony given by a witness before the grand jury, was left undecided in the case of *Little v. Com.*, 25 Gratt. 921, 932.

A grand juror, who is witness on the trial of an indictment, can not, with a view of showing his prejudice, be asked anything which occurred in the grand jury room. *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362.

By Third Persons.—A third person who was present may be called to prove statements made by a witness before the grand jury different from those made on the trial. *Little v. Com.*, 25 Gratt. 921, 932.

"It has been expressly held, in England, on the trial of an indictment for perjury committed in giving evidence before the grand jury, that another person who was present as a witness in the same matter, at the same time, is competent to testify to what the prisoner said before the grand jury; and that a police officer in waiting was competent for the same purpose; neither of these being sworn to secrecy." *Little v. Com.*, 25 Gratt. 921.

Self-Incrimination.—The fact that witness testified before the grand jury, and that it was on his testimony that the indictment was found, will not de-

prive him of his privilege to decline to testify under ch. 10, § 20, Va. Code, 1873, ch. 195, § 2, on the trial of the party indicted. *Temple v. Com.*, 75 Va. 892. See the title WITNESSES.

E. OBJECTIONS TO PROCEEDINGS.

In General.—While a defendant may not go into the question of the evidence before a grand jury, nor the question of the swearing of the witnesses there, as there is then only an ex parte hearing of testimony, and there may be no witnesses, the grand jurors finding upon their knowledge, not a question of guilt or innocence, but that an offense is charged to have been committed, but if there be an incompetent grand juror, to whom exception is to be taken, or when as to the whole body, as, for instance, that the grand jury consisted of too many members, or too few, or that it was otherwise incompetent, or an irregularity in the summoning or impaneling of the grand jury, or the selecting of the jurors, or in any case where the authority of the body under the law of the land is wanting, and there is an illegal constitution or organization, an opportunity is afforded the accused, who is thus unlawfully charged, to effectively except to such error, because he can not be tried for a felony until he has been legally indicted. *Watson v. Com.*, 87 Va. 608, 13 S. E. 22.

Not Favored.—Grand juries are not generally selected on account of their legal acquirements, and doubtless often act upon evidence not strictly legal. If, however, the courts are to inquire into their proceedings, few indictments would come to trial without this preliminary. *Wadley's Case*, 98 Va. 803, 35 S. E. 452.

VIII. Charging Grand Jury.

Failure to Charge Grand Jury.—

Failure to charge the grand jury, as provided by § 3982 of the Virginia Code, does not vitiate an indictment

found by them. *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

"The provision is directory only, as are also the provisions of §§ 3984, 3991, of the Code." *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352.

Erroneous Charge.—When once the indictment has been returned "A true bill," it is immaterial whether the court erred in charging or omitting to charge the grand jury as the question then is to try the case and learn whether the accused is guilty. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

IX. Challenges.

Right to Challenge—Statutory.—Is there ever a right to a challenge to the panel or the polls of a grand jury, unless statute gives it? *Thomp. & M. Jur.*, § 507, says not. 1 *Bish. Cr. Proc.*, § 876, says it does not prevail in all states. There is no instance in Virginia. The statute does not give it. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

Thomp. & M. Jur., § 251, says: "Where a statute simply provides that an exception may be taken for disallowing a challenge, no exception lies for allowing a challenge," and says: "The reason is that when a competent jury, composed of the requisite number of persons, has been impaneled, the purpose of the law is accomplished. Neither party can be said to have a vested interest in any juror. Therefore, though one competent person has been rejected, yet, if another equally competent has been substituted in his stead, no injury has been done." See *Id.*, § 259. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Direct Challenge for Prejudice.—It would be destructive of the peace of the land, and productive of continual strife, recrimination, and bitterness, if judge or juror was subject to direct challenge because of partisan prejudice or bias. Hence, such a challenge is

contrary to public policy. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Sufficient Grounds of Challenge.

It is not a sufficient ground for a challenge to the array that a jury list was prepared by de facto commissioners only. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

X. Special Grand Juries.

See post, "Necessity of Grand Jury," XV, A; "Number Necessary to Concur," XV, B.

A. POWER TO SUMMON AND IMPANEL.

Statutory Provisions.—The provisions of § 3978 of the Virginia Code, are as follows: "A special grand jury may be ordered at any time by a county, corporation, or hustings court, or the judge thereof in vacation, the jurors to be summoned from a list furnished by the judge; and where a grand jury, regular or special, has been discharged, the court, during the same term, may impanel another grand jury, which may be a special grand jury." *Litton v. Com.*, 101 Va. 833, 44 S. E. 923; *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 627; *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238.

At Common Law.—And even at common law it is competent for a court to summon a special grand jury. *Shinn v. Com.*, 32 Gratt. 899.

When Court May Summon a Special Grand Jury.—Where one of the grand jury finding an indictment was incompetent, and for that reason the grand jury is dismissed and the indictment quashed, the court may direct a special grand jury of eight to be summoned and impaneled at the same term; and indictment found by this grand jury is valid. *Shinn v. Com.*, 32 Gratt. 899.

Summoned in Vacation—Record.—The first assignment of error here is that the record does not show that the special grand jury was not ordered by the judge in vacation. This assignment

was abandoned at the argument, upon the ruling in *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 627, the question having been raised by motion to quash the indictment, which motion the court overruled. *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238.

"The law does not require, as this assignment insists, that a special grand jury shall be summoned by the order of the judge in vacation." *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238.

Order of Judge—Appearance on Record.—The statute does not require the order of the judge to be entered of record. And when it appears by the record that six were elected, etc., it must be presumed that all this was done by the direction of the court. *Mesmer v. Com.*, 26 Gratt. 976.

B. POWERS OF SPECIAL GRAND JURY.

A special grand jury is qualified to perform any business that may properly come before it, and generally has the same powers as a regular grand jury. *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802.

C. NUMBER.

Section 3977 of the Virginia Code, as amended by the act of February 25, 1890 (acts, 1889-90, p. 91, ch. 115), provides that a special grand jury may consist of not less than six nor more than nine persons. *Litton v. Com.*, 101 Va. 833, 44 S. E. 923. See also, *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683; Code, 1904, § 3977.

Matter of Record.—All the statutes requires is that a number of grand jurors may be limited to six by the direction of the court. It does not require that the direction shall be matter of record. *Mesmer v. Com.*, 26 Gratt. 976.

Summoned in Vacation.—Nor it is a valid objection of the grand jury, that it was composed of six of the nine summoned by order of the court in vacation. *Mesmer v. Com.*, 26 Gratt. 976.

Constitutionality.—Section 3977, Va. Code, 1887, providing that a special grand jury shall consist of not less than six or more than nine persons, is not repugnant to articles 5, 15, of the amendments of the United States Constitution. *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683.

"To look to the construction of a grand jury, and of whom it shall be composed, we look to the statutes of the states; if they are silent, we may look to the common law, which is in force in this state, except so far as it has been modified or altered by statute. The state may compose the grand juries in her courts as by law shall be provided, and the number may be greater or less, as the lawmaking power may prescribe. There is no constitutional limitation on this question. If the law provides for a grand jury of seven, then an indictment by a grand jury of seven is due process of law. There is no prescription as to the number necessary to compose a grand jury other than that to be found in the statute; and, the grand jury in this case having been made up and constituted as the law prescribes, there is no error in the ruling of the county court on this point." *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683.

D. HOW SUMMONED.

No Venire Facias Required to Summon.—There is no requirement that a venire facias shall issue to summon a special grand jury, as in case of a regular grand jury. *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 627.

"Until a comparatively recent period, in Virginia no process of any kind was required for the summoning of a grand jury (*Curtis' Case*, 87 Va. 589, 13 S. E. 73), and had it been the intention of the legislature to require a venire facias to issue as well for a special grand jury as for a regular one, the intention would no doubt have been plainly expressed." *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 627.

When Summoned from List Furnished by Judge.—Without a writ of *venire facias*, a special grand jury may be summoned from a list furnished by the judge. *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627; *Combs v. Com.*, 90 Va. 88, 17 S. E. 881.

But a special grand jury, under § 3978, is to be summoned from a list furnished by the judge—evidently, from a list made at the time the special grand jury is ordered. *Robertson v. Com.*, 1 Va. Dec. 851.

The provision of the statute simply is that the jurors shall be "summoned from a list furnished by the judge," and the courts have no authority to superadd to the requirements of the statute. *Robinson v. Com.*, 88 Va. 900, 903, 14 S. E. 627.

E. NUMBER FROM WHICH JURY SELECTED.

Section 3978, Va. Code, does not require a special grand jury to be selected from a list of forty-eight men, prepared by the judge of the county court, in August of each year, to serve for the ensuing year. *Robertson v. Com.*, 1 Va. Dec. 851.

"There is not only nothing in the statute to indicate that the special grand jury is to be taken from the forty-eight names; but, if so construed, it would thwart the manifest object of the statute in providing for a special grand jury, which is, I take it, to empower the court or judge, when the exigencies of the business of the court required it, to order a special grand jury, and obviate the expense and delay of summoning a regular grand jury." *Robertson v. Com.*, 1 Va. Dec. 851.

XI. Discharge of Grand Jury or Grand Jurors.

Discretion of Court.—It is within the discretion of a court to discharge a grand jury. It is a common-law power. Our Code recognizes this power in saying that "when one grand jury has

been discharged, another may, by order of the court, be summoned to attend the same term." W. Va. Code, 1891, § 10, ch. 157, and § 9 says that, when one grand jury has found an indictment not a true bill, another indictment may be sent to it, or acted on by another grand jury, showing that the state may have another grand jury, and persist in her prosecution. Of course it can do so when there is no finding at all. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Improper Discharge of Grand Jury.

—The improper discharge of a grand jury does not impair an indictment found by a subsequent jury. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

When Duty of Court to Discharge Grand Juror.—If one of the grand jurors summoned lacks the necessary legal qualifications, the court must discharge him and order another to be sworn in his place. *Burton's Case*, 4 Leigh 645, 26 Am. Dec. 337; *Richardson's Case*, 76 Va. 1007.

On the first day of term of a circuit superior court, a grand jury is impaneled and sworn, and proceeds in discharge of its duties; but next day, it is discovered that one of the grand jurors wants legal qualification; upon which the court discharges him, and orders another to be sworn in his place. Held, this was regular, and the grand jury duly constituted. *Com. v. Burton*, 4 Leigh 645.

XII. Number of Grand Juries.

It is clear that no law forbids three grand juries at one term. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Burton's Case, 4 Leigh 645, 647, states the common law to be that another grand jury may be ordered upon two occasions: 1. If before the close of the session the grand jury have brought in all their bills and are discharged, and a new offense is committed or an

offender is brought in. 2. The second ordinary instance of a new grand jury returned is upon the statute 3 Hen. VII. ch. 1, namely, a grand inquest to inquire into concealment of another grand inquest. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

XIII. Powers of Grand Jury.

Whence Derived.—A grand jury must derive its power from and exercise its function under the authority of a legally constituted court. *Jackson v. Com.*, 13 Gratt. 795.

Protection to Citizen against Unfounded Accusations. — Formerly a grand jury was considered merely an accusing body, with which those charged with crime had nothing to do. Under our constitutions, state and national, a grand jury is recognized to be a necessary protection to the citizen against unfounded accusation or unjust prosecution, whether it emanates from "the government, or is prompted by partisan passion or private enmity." *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Thomp. & M. Jur., § 140, says: "The grand jury is merely an accusing body, and the liberty of the citizen does not require that nice inquiry should be made into the manner in which it has been organized. The main question is whether the prisoner has been justly accused or not. * * * Such attacks have been successful in American courts with scandalous frequency, and almost universally to the thwarting of public justice and the injury of society. But with reference to the constitution of the body to try the prisoner, the question is entirely different." *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Inquiring into Infractions of the Penal Law.—The grand jury is only a means adopted by the state for inquiring whether its criminal law has been violated and to present its accusations

for jury trial. It does not hear the whole case. It is the state bringing a prosecution. The state presents its indictment, and the grand jury have only to say whether the accusation is well made, or proper to be tried by a jury. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

The grand jury is the great instrument for inquiring into infractions of the penal laws, and bringing offenders to trial. *Com. v. Burton*, 4 Leigh 645.

XIV. Placing Grand Jury in Custody of Sheriff.

It is judicial usurpation or abuse of power to place the grand jury in custody of the sheriff. The grand jury is designed to be an independent court of inquiry, selected from among the best citizens of the county; and while nominally under charge of the court, as a constitutional adjunct thereof, the jurors are entitled to the same freedom of person, and to be regarded as of equal integrity and as free from bias and undue influence, as the judge himself. And they would have the same right to suspect and charge undue influence against him as he against them. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

XV. Finding of Indictments by Grand Jury.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

A. NECESSITY OF GRAND JURY.

Every indictment must be found by a grand jury legally selected, duly constituted and competent for the purpose. *State v. Williams*, 14 W. Va. 851, 869; *Va. Code*, 1889, § 3990; *Bell v. Com.*, 8 Gratt. 600; *Matthew's Case*, 18 Gratt. 989. See also, *State v. Whitt*, 39 W. Va. 648, 19 S. E. 873; *Watson v. Com.*, 87 Va. 608, 13 S. E. 22.

No man can be tried for a felony in the courts of this commonwealth except upon an indictment of a grand

jury; and no man can be considered as indicted unless it appear of record that an indictment against him was delivered in open court, and the fact recorded. *Cawood's Case*, 2 Va. Cas. 527; *Simmons v. Com.*, 89 Va. 156, 15 S. E. 386.

There are many offenses which can only be tried upon indictments found by a grand jury. *Com. v. Burton*, 4 Leigh 645.

Regular or Special Grand Jury.—But, under acts, 1889-90, p. 91, an indictment for murder may be found by either a regular or a special grand jury. *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802; *Robertson v. Com.*, 1 Va. Dec. 851.

B. NUMBER NECESSARY TO CONCUR.

It is not necessary that sixteen of the grand jury should concur to make a presentment or find a bill of indictment; but if twelve agree, it is sufficient. *Com. v. Sayers*, 8 Leigh 722.

"In 2 Hale's P. C. 161, it is stated that 'if there be thirteen or more of the grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, though some of the rest of their number dissent, it is a good presentment; for if twelve agree, it is not necessary for the rest to agree.' And it is understood that the practice in Virginia has been in conformity with this rule." *Com. v. Sayers*, 8 Leigh 722.

Statutory Provision.—All that the statute provides on the subject is that at least seven of a regular grand jury must concur in finding an indictment in any case, whereas an indictment may be found by a special grand jury upon the concurring votes of five of its members. Acts, 1889-90, p. 91. *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802.

C. SIGNATURE OF FOREMAN.

Appearance on Record.—It is further objected that the record does not show that the indictment was signed by the foreman of the grand jury. This was unnecessary, and it has been so held

by this court. *Price's Case*, 21 Gratt. 846; *White's Case*, 29 Gratt. 824; *Crump's Case*, 98 Va. 833, 23 S. E. 760; *Thompson v. Com.*, 20 Gratt. 724. See *State v. Heaton*, 23 W. Va. 773; *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539.

The record in the case does not show that the indictment was signed by the foreman. Such endorsement, though usual, is not necessary, and the record of the finding of the jury, upon the order book of the court, is the proper evidence of that fact. *Price v. Com.*, 21 Gratt. 846.

When Signature of Foreman May Explain Indictment.—The record of the court states that the grand jury presented the following indictments as "true bills," viz.: One against M. N., one against, etc., setting out eight names, and then one against Thomas and Richard Whitehead, and one against R. H. and G. C. not true bills. Though it is doubtful whether the indictment against Wills and Whitehead, belongs to the first or last class, the court may look to the indictment and the indorsement upon it by the foreman to ascertain the fact. *Whitehead v. Com.*, 19 Gratt. 640.

D. RECORD OF FINDING.

When a bill of indictment is found by the grand jury and endorsed "a true bill," by the foreman, it should be brought into court, presented by the grand jury, and then the finding should be recorded. *Com. v. Cawood*, 2 Va. Cas. 527; *State v. Heaton*, 23 W. Va. 773; *State v. Roberts*, 20 W. Va. 442, 40 S. E. 484; *State v. Gilmore*, 9 W. Va. 641; *State v. Fitzpatrick*, 8 W. Va. 707; *Shifflet v. Com.*, 14 Gratt. 652; *Earhart v. Com.*, 9 Leigh 671, 675; *Watts v. Com.*, 99 Va. 879, 39 S. E. 706; *Tefft v. Com.*, 8 Leigh 721; *Myers v. Com.*, 2 Va. Cas. 160; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413; *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 144, 38 S. E. 539.

It is a well-settled practice to record the findings of the grand jury, as part

of the proceedings of the courts. The record of the finding of the grand jury is as essential as the recording of the verdict of a jury; because it is the only legal proof of the finding of the indictment. (*Cawood's Case*, 2 Va. Cas. 527; *Price v. Com.*, 21 Gratt. 846, 858.) *State v. Gilmore*, 9 W. Va. 641; *McKinney v. Com.*, 8 Gratt. 589.

How Supplied.—An omission to record the finding can not be supplied by a paper purporting to be an indictment with an endorsement on it "a true bill," signed by the person who was the foreman of the grand jury at that time. *State v. Heaton*, 23 W. Va. 773.

Nor can it be supplied by the recital in the record that he stands indicted, nor by his arraignment, nor by his plea of not guilty. It can not be intended that he was indicted; it must be shown by the record of the finding. The recording of the finding of the grand jury is as essential, as the recording of the verdict of the jury. *Com. v. Cawood*, 2 Va. Cas. 527.

Proper Endorsement.—The only proper endorsement on an indictment is "a true bill," or "not a true bill," with the name of the foreman; and anything else is not a part of the finding of the grand jury. *Thompson v. Com.*, 20 Gratt. 724; *State v. Heaton*, 23 W. Va. 773.

But if additions are made, and are incorrect, or even inconsistent with the indictment they will not vitiate it; as they will be regarded as no part of the finding of the grand jury. *State v. Heaton*, 23 W. Va. 773; *Thompson v. Com.*, 7 Gratt. 724.

Description of Offense.—"The recording of the finding of the grand jury on the record book need only describe the offense with which the accused is charged as a felony or a misdemeanor." *State v. Heaton*, 23 W. Va. 773; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413. See also, *State v. Whitt*, 39 W. Va. 468, 19 S. E. 873.

Sufficiency of Record.—Where the order book contains an entry that the

grand jury returned into court and presented "an indictment against O. H. for murder—a true bill," such was held a sufficient record of the finding of an indictment. *Hodges v. Com.*, 89 Va. 265, 15 S. E. 513.

If the record says "A presentment for unlawful gaming against J. T.," it is sufficient. *Com. v. Tiernan*, 4 Gratt. 545. See the title GAMING, ante, p. 692.

The record entry of the finding of the indictment is as follows: "The grand jury returned into court having found the following indictment: 'The State (No. 1) v. Michael Gilmore. Indictment for selling intoxicating liquors to a minor. A True Bill. P. S. Minshall, Foreman.'" Held, that the record entry of the finding of the indictment was sufficient. *State v. Gilmore*, 9 W. Va. 641. See the title INTOXICATING LIQUORS.

And when, in an indictment it is alleged that a person without having a state license therefor, sold, and offered and exposed for sale, at retail, spirituous liquors and other drinks, and it appears by the record that an indictment for unlawfully retailing was presented, the record of the finding is sufficient. *State v. Fitzpatrick*, 8 W. Va. 707. See also, *State v. Chapman*, 25 W. Va. 408; *Crookham v. State*, 5 W. Va. 510; *Tefft v. Com.*, 8 Leigh 721; *Thompson's Case*, 20 Gratt. 724; *State v. Gilmore*, 9 W. Va. 641.

The record of the finding of an indictment under the statute for maliciously shooting, stabbing, cutting, etc., is as follows: "An indictment against Charles W. Crookham, malicious stabbing, a true bill." There was a motion made to quash the indictment, because there was not a proper entry made of the finding thereof by the grand jury. It was insisted that the entry should have been upon the record an indictment for "a felony." It was held, that all malicious stabbings are felonies, but all felonies are not malicious stabbings that the words "malicious stabbings"

used in the record of the finding of the indictment much more nearly indicate the character of the offense charged in the indictment than the word "felony" would, and therefore it is sufficient. *Crookham v. State*, 5 W. Va. 510.

On the 26th day of October, 1876, the grand jury, in and for the body of the county of Ritchie, in attendance upon the circuit court of said county, then in session, upon their oaths found an indictment; and the entry on the record of the finding of the indictment was as follows, viz.: "An indictment against B. S. Compton for trespass. A true bill." The indictment appearing in the record, and certified by the clerk as being the indictment found in the cause, was against Benjamin S. Compton, J. C. Gilman, G. Slutter, John O'Brien, Patsey Ames, Martin Ames, Martin King, Thomas Faulkner, John Tate, George Tate, Charles Gilman and Henry Keneline, for willful trespass. The defendants by their attorney, moved the court to quash the indictment in the cause, upon the ground that there was no record of the finding of the same; and the court sustaining the motion to quash, as to all the defendants, except the defendant, Compton. Whereupon the said B. S. Compton, by his attorney, moved the court to quash said indictment, as to him, for errors appearing on the face of the indictment, and on the ground that there was no record of the finding of said indictment as to him. This motion was overruled. Held, that if the indictment in the case at bar had been against the several persons therein charged and if there had been a record of the finding of the indictment as to all the persons therein charged, a part of them on trial before a jury might have been found guilty, and a part, not guilty. Indeed one of the parties indicted might have been found guilty, and all of the others found not guilty. *State v. Compton*, 13 W. Va. 852.

Drake & Cochren's Case, 6 Gratt. 665, determined that, "although the in-

dictment is against two persons jointly, and the record of the finding of the indictment only shows the finding as to one person, the entry is sufficient to show that the indictment was found against such one person. Upon the authority of that case the entry upon the record is sufficient to show that the indictment was found against Benjamin S. Compton, if the entry upon the record of the finding against 'B. S. Compton' is sufficient to identify the indictment against 'Benjamin S. Compton.' And it was the opinion of the court that an entry against B. S. Compton was sufficient to identify an indictment against Benjamin S. Compton. That the quashing of the indictment for the cause aforesaid did not, under the circumstances, amount to or operate to quash the indictment as to the defendant, Compton, but in fact only operated a dismissal of the indictment as to all the defendants therein named, except said Compton. *State v. Compton*, 13 W. Va. 852.

An indictment against Luke McKinney, John McKinney, and Joseph McKinney was sent to the grand jury, which indictment was returned to the court with the following endorsement: "*Commonwealth v. Luke McKinney, Thomas McKinney, John McKinney*. Indictment for willful trespass to personal property. A true bill. William Royse, Foreman." The record of the court set out that the grand jury adjourned on yesterday, appeared pursuant to the order of the adjournment, and retired to their room; and after some time returned into court, and presented an indictment against Thomas McKinney, Luke McKinney, and John McKinney for willful trespass to personal property, a true bill. A writ of *venire facias* was issued against the parties, which was served on Luke, John and Joseph McKinney; and thereupon Joseph McKinney appeared and moved the court to quash the said indictment as to him, or to set aside the service of *venire facias* upon him, and

discharge him from further prosecution in the cause, for want of any sufficient record of the finding of any bill of indictment against him. The court was of opinion that the sheriff's return of the venire facias as to Joseph McKinney should be quashed, and the said Joseph discharged from further prosecution upon the indictment, because it did not appear from the record that the said Joseph had been indicted; and it was not competent for the court to alter the record in that respect. *Com. v. McKinney*, 8 Gratt. 589; *Cawood's Case*, 2 Va. Cas. 527.

Indictment for unlawfully, willfully and maliciously setting fire to the woods near the plantation of A. M. and burning said woods and a fence belonging to said A. M. is described, in the record of the finding, as an indictment "for setting fire to the woods and burning the same;" held, a sufficient record of the finding. *Earhart v. Com.*, 9 Leigh 671.

A presentment of a grand jury in a county or corporation court, referred to in the minutes of the court, but without being spread at large upon them, is a part of the records of the court. *Myers v. Com.*, 2 Va. Cas. 160.

An indictment filled the whole of a sheet of paper, and was then folded in another half sheet of the same size, on which half sheet the attorney endorsed "*Commonwealth v. Joseph Burgess, Indictment*;" and immediately below, in the handwriting of the foreman of the grand jury, was endorsed, "A true bill. Robert Hamilton, foreman." Although the said half sheet of paper was blank, except the endorsements, and although it was not otherwise attached on the indictment than being folded around it, yet the indictment enveloped by it must be considered as the indictment on which the grand jury passed, and on which the jury found their verdict. If the objection were a good one, it comes too late after verdict. *Burgess v. Com.*, 2 Va. Cas. 483.

The record showed that the grand

jury returned into court having found the following indictments, to wit: "*State v. Thacker Coal & Coke Company*, a corporation. An indictment for a misdemeanor. A true bill. A. B. Straton, Foreman." It was claimed by the defendant's counsel that it did not appear from the record that the indictment was endorsed on the back of it, "a true bill," and signed by the foreman. The court held as follows: "The record, it is true, leave out the word 'indorsed,' but it shows that the grand jury returned into court the indictment against the defendant, 'A true bill,' signed by A. B. Straton, foreman. The indictment is not signed on the face of it. There is but one thing it could mean,—that the indictment was returned into court with the indorsement on it as stated on the record. The indorsement is no part of the indictment, further than as a mark of identification, and it is hard to conceive how the record of the finding of the indictment by the grand jury could be made up, other than from the indorsement upon the indictment itself. It is the record of the finding as returned by the grand jury." *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539.

Record states that two indictments against surveyors of roads are found true bills by grand jury, not naming the surveyors. Held, this is not a record of indictments found against any particular surveyors. *Com. v. Snider*, 2 Leigh 744.

Amendment of Record.—Where an indictment for a willful trespass was against J. M., but the grand jury endorses it as against T. M., "a true bill," and it is so noted in the record, the court can not alter or amend the record so as to make it conform to the indictment. *McKinney's Case*, 8 Gratt. 589.

Where the grand jury find an indictment against C. & D., but the clerk, in making a minute of the finding, accidentally omits the name of D., the record can not be amended at a subsequent term of the court, by inserting

the name of D. in the minutes. *Drake & Cochren's Case*, 6 Gratt. 665.

An Irreconcilable Conflict—Effect.—If an entry on the record should be irreconcilably in conflict with an indictment on which an accused is to be tried, the prisoner could not be properly tried on such an indictment for the record would show that no such indictment had ever been found by the grand jury. *State v. Heaton*, 23 W. Va. 773; *State v. Whitt*, 39 W. Va. 468, 19 S. E. 873. Thus where the record showed that the finding of the grand jury was for a felony while the indictment presented was not good otherwise than for a misdemeanor, there was an irreconcilable conflict between the two, and treating the record as an absolute verity it could not be contradicted, and it therefore showed that no such indictment as was there presented had been found by the grand jury; and, there being no record of an indictment for the misdemeanor there was presented a case in which a motion in arrest of judgment if made, should have been entered and allowed to prevail. *State v. Whitt*, 39 W. Va. 468, 19 S. E. 873.

Erasure of Part of Record—Effect.—A record stated that the grand jury "returned into court, and among other things, presented an indictment against Thomas Nutter for felonious assault and battery." "A true bill." The prisoner pleaded "not guilty." He afterwards asked for leave to withdraw his plea of "not guilty" which was granted. And thereupon he moved the court to strike the cause from the docket, because the finding of the indictment was not recorded. The ground of this motion was that in the order book of the court the four words, "presented an indictment against" had been erased. It appeared from the statement of the clerk that after he had written the words, he had erased them by drawing his pen repeatedly across each of the said words and had then rubbed his finger over them caus-

ing a blot for their whole length; he intended to have interlined them, but the interlineation had never been made by him or any other person. The four words were, however, legible and the erasing marks of the pen over them were plain and the large black mark or blot extended over the words apparently made by them, whilst the ink of the erasing marks, or the words, or perhaps both were undried. The court was of the opinion that the motion to strike the case from the docket should be overruled. *Com. v. Nutter*, 8 Gratt. 699.

Finding Not an Accurate Description—Effect.—If the recording of the finding by the grand jury on the record book does describe the offense particularly, and the offense so described is not an accurate description of the offense named in the indictment found by the grand jury, it will not vitiate the indictment, unless the offense, as it is recorded, is in irreconcilable conflict with the offense found by the grand jury. *State v. Heaton*, 23 W. Va. 773; *Drake & Cochren's Case*, 6 Gratt. 665; *State v. Fitzpatrick*, 8 W. Va. 707; *State v. Gilmore*, 9 W. Va. 641; *State v. Geyer*, 44 W. Va. 649, 29 S. E. 1020.

When Objection Made.—"In *McKinney's Case*, 8 Gratt. 589, an indictment for a misdemeanor was sent to the grand jury against Luke, John, and Joseph McKinney, and was returned indorsed 'a true bill.' But the finding was entered on the order book as an indictment against Luke, John, and Thomas McKinney. Accordingly, Joseph McKinney moved to quash the indictment as to him, on the ground that there was no record of the finding of an indictment against him; and the motion was sustained, on the authority of *Cawood's Case*. In *Shiflett's Case*, 14 Gratt. 652, a similar point was made, for the first time, in the appellate court, and no doubt was expressed that the objection would have been in time, if the finding of the in-

dictment had not been recorded." *Simmons v. Com.*, 89 Va. 156, 158, 15 S. E. 386.

Where a grand jury found an indictment against C. and D., but the clerk, in making a minute of the finding, accidentally omitted the name of D., the record could not be amended at a subsequent term of the court by inserting the name of D. in the minute. The indictment must be quashed. *Drake & Cochren's Case*, 6 Gratt. 665.

After Verdict.—An objection that the record of the finding of an indictment by the grand jury is insufficient, comes too late after verdict. *Burgess v. Com.*, 2 Va. Cas. 483.

E. RECORD OF RETURN BY GRAND JURY.

The record must show that the indictment was returned into court by the grand jury. *Com. v. Cawood*, 2 Va. Cas. 527; *Simmons v. Com.*, 89 Va. 156, 15 S. E. 386; *State v. Heaton*, 23 W. Va. 773; *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484; *State v. Gilmore*, 9 W. Va. 641. See the title INDICTMENTS, INFORMATION AND PRESENTMENTS.

"The bill of indictment is sent or delivered to the grand jury, who, after hearing all the evidence adduced by the commonwealth, decide whether it be a true bill or not. If they find it so, the foreman of the grand jury endorses on it 'a true bill,' and signs his name as foreman, and then the bill is brought into court by the whole grand jury, and in open court it is publicly delivered to the clerk, who records the fact. It is necessary that it should be presented publicly by the grand jury; that is the evidence required by law to prove that it is sanctioned by the accusing body, and until it is so presented by the grand jury, with the endorsement aforesaid, the party charged by it is not indicted, nor is he required, or bound to answer to any charge against

him, which is not so presented." Per *Brockenbrough, J.*, in *Com. v. Cawood*, 2 Va. Cas. 527, 541; *State v. Heaton*, 23 W. Va. 773; *Simmons v. Com.*, 89 Va. 156, 15 S. E. 386.

Where there was copied into the record, a paper, having the regular form of an indictment for murder against the prisoner, having upon it the endorsement "a true bill," and it appeared from the certificate of the clerk, that this was the precise indictment upon which the prisoner was arraigned, to which he pleaded not guilty, and for the trial of the issue on which the jury was impaneled; but it did not appear from any part of the record, that there was any entry made, that this indictment had been presented by the grand jury as a true bill; it was held, not to be a sufficient record of the fact that the bill was brought into court by the whole grand jury, and in open court publicly delivered to the clerk as was regarded by law. *Com. v. Cawood*, 2 Va. Cas. 527, 541.

Where the record leaves out the word "indorsed," but it shows that the grand jury returned into court the indictment against the defendant a true bill signed by A. B. Straton, foreman, and the indictment is not signed on the face of it, there is but one thing it could mean; that the indictment was returned into court with the indorsement on it as stated on the record and hence is a sufficient record of the return. *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 144, 38 S. E. 539.

When Defect May Be Shown.—It was held, in *Com. v. Cawood*, 2 Va. Cas. 527, that it was not too late, after the prisoner had pleaded the general issue to the indictment, to set up the fact that the record did not show that the indictment had been brought into court by the whole grand jury, and in open court publicly delivered to the clerk.

Grand Larceny.

See the title LARCENY.

GRANT.—See CONVEY, vol. 3, p. 506. And see the titles DEEDS, vol. 4, p. 396; PUBLIC LANDS.

Grant is a generic term applicable to the transfer of all classes of real property. *Chapman v. Charter*, 46 W. Va. 769, 34 S. E. 768, 772.

In *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986, 988, it is said: "Now, let us look into the deed before us. Without the closing clause it is perfectly clear that this deed vests a present fee-simple estate by the words 'do **grant**' in the present tense, importing in grammar, as well as daily language, present, actual transfer. We must give these words, found in the very heart of the deed—in its **granting** clause—their natural force."

Grass.

See the titles DAMAGES, vol. 4, p. 178; FIRES, ante, p. 126.

Gratuitous Bailments.

See the title BAILMENTS, vol. 2, p. 227.

Graves.

See the title CEMETERIES, vol. 2, p. 731.

Gristmills.

See the titles GRAND JURY, ante, p. 742; MILLS AND MILLDAMS.

Gross Cruelty.

See the title DIVORCE, vol. 4, p. 736.

GROSS IMMORALITY.—Gross immorality is willful, flagrant, or shameless immorality. The court said: "The word **gross**, as used in this connection, does not mean 'great and excessive,' but rather willful, flagrant, or shameful, showing a moral indifference to the opinions of the good and respectable members of the community and to the just obligations of the position held by the delinquent. Nor is the immorality involved confined to the question of fitness or unfitness for the office." *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274, 278. See also, the title PUBLIC OFFICERS.

Gross Negligence.

See the title NEGLIGENCE.

GROSS PROCEEDS.—See PROCEEDS.

GROUND RENTS.

CROSS REFERENCES.

See the titles CURTESY, vol. 4, p. 148; DOWER, vol. 4, p. 782; ESTATES, vol. 5, p. 160; LANDLORD AND TENANT.

Definition.—A rent charge or ground rent is real estate. *Willis v. Com.*, 97 Va. 667, 34 S. E. 460.

Subject to All the Incidents of Real Estate.—And a rent charge or ground rent being real estate, is subject to all of its incidents, including curtesy and dower. Upon the death of the owner it descends to his heir or devisee. Such rents, though not common in the state, are recognized as valid. If taxable at all, they are taxable as real estate, and it is error to enter them on the personal property books of the commissioner of the revenue. *Willis v. Com.*, 97 Va. 667, 34 S. E. 460.

Value of the Estate.—The value of the estate in a ground rent is not the amount of the annual rent, but the value of the corpus or principal which produces the rent of which the rent is the fruit or product. *Willis v. Com.*, 97 Va. 667, 34 S. E. 460.

Not Taxable.—No property can be assessed with taxes until the legislature has made suitable provision for that purpose. It has made no such provision for ascertaining and assessing for taxation the value of ground rents, and hence they are not taxable. *Willis v. Com.*, 97 Va. 667, 34 S. E. 460.

Right of Re-Entry—When.—In an action of ejectment it was held, that if a grant be made reserving a yearly rent, with a condition that the grantor may re-enter if the rent be not paid, after demand made upon the premises, if no property is found on the land, whereof distress can be made; the grantor, upon demand made, and failure to pay, no property to distrain being found on the land, may re-enter, and grant over to another. *Wartenby v. Moran*, 3 Call 491.

Distinguished from Quit Rents.—In an action of ejectment for the possession of a certain lot in the town of Winchester, the principal object of the suit was to try the title to a rent of five shillings per annum alleged to be due on the said lot. It was argued that this rent was a quit rent, and therefore abolished by act of legislature. But the court held, that this rent was a ground rent, or rent charge, and not a quit rent, because it was a rent due, not to the owner in his character of proprietor, or seignorial capacity, but as private owner of the soil. *Marshall v. Conrad*, 5 Call 364.

Recovery of—Statute of Limitations.—Trustees, by authority of an act of assembly, sell and convey land, reserving in the deed a ground rent, to be paid to the proprietor of land, when he should be ascertained. Upon a bill filed by the proprietor against the purchaser to recover the ground rents, held, the statute of limitations is no bar to the recovery. *Mulliday v. Machir*, 4 Gratt. 1.

Lapse of Time.—It appearing from the answer of the defendant, that the rents have not been paid, held, lapse of time is no bar to the recovery. *Mulliday v. Machir*, 4 Gratt. 1.

Interest.—The proprietor having delayed for many years to prosecute her claim for ground rents, she will not be allowed interest thereon. *Mulliday v. Machir*, 4 Gratt. 1.

Relief in Equity—When Proper.—The deeds executed by the trustees not having reserved any right of re-entry or distress, and containing no covenant by the purchaser to pay the ground rents, and the proprietor not being a party to the deeds, the party claiming under the proprietor is entitled, from

the difficulty of proceeding at law, to come into equity for relief. *Mullday v. Machir*, 4 Gratt. 1.

Failure through Ignorance to Pay Ground Rent Promptly Will Not Forfeit Lease.—In the case of a lease for ninety-nine years, renewable forever, upon payment of an annual ground rent on a given day, each year, and taxes, and on the payment of one year's rent extraordinary and the costs of preparing contract, at the end of the first period, with right of the landlord to re-enter at any time during the term for default in payment of rent for six months, and hold the premises until the rent and taxes are paid, the mere failure at the end of the first period to pay the one year's rent extraordinary and costs, through ignorance of the fact that the term had expired, and under the circumstances of this case, does not entitle the landlord to re-enter and take permanent possession of the premises, and a court of equity will compel the lessors to perform their covenant to renew. *Selden v. Camp*, 95 Va. 527, 28 S. E. 877.

Growing Crops.

See the title CROPS, vol. 4, p. 94.

Growing Trees.

See the title TREES AND TIMBER.

Guano.

See the title FERTILIZERS, ante, p. 37.

GUARANTEED DIVIDENDS.—In *Gordon v. Richmond, etc., R. Co.*, 73 Va. 501, 515, it is said: "This argument, however, utterly ignores the fact that there is such a thing as guaranteed stock with **guaranteed dividends**, or, what is the same thing, 'preference capital,' which, in a division of assets, will rank before and perhaps to the exclusion of the ordinary shares. Green's *Brice's Ultra Vires*, p. 172." See also, the title STOCK AND STOCK HOLDERS.

GUARANTY.

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CROSS REFERENCES.

See the titles **BILLS, NOTES AND CHECKS**, vol. 2, p. 401; **CONTRIBUTION AND EXONERATION**, vol. 3, p. 461; **INDEMNITY**; **PARTNERSHIP**; **SUBROGATION**; **SURETYSHIP**; **WARRANTY**.

As to the assignment of a bond or nonnegotiable note as importing a guaranty of payment, see the title **ASSIGNMENTS**, vol. 1, p. 770. As to the right to judgment against a deceased joint guarantor where there is a remedy against the survivor, see the title **CREDITORS' SUITS**, vol. 3, p. 787. As to guaranty of dividends of a private corporation, see the title **STOCK AND STOCKHOLDERS**.

I. Definition, Nature and Distinctions.

A. DEFINITION.

"The guaranty of payment of a bond or note is an undertaking, on the part of the guarantor, that he will pay the debt if the principal does not." *Welsh v. Ebersole*, 75 Va. 651.

In *Colgin v. Henley*, 6 Leigh 85, the court said: "I consider that any writing signed by A and addressed or given to B by which the writer declares his willingness, assent or intention, to pay to B a certain sum of money, is a

promise to pay that sum, whatever be the form of words in which it is clothed."

Guarantor.—A guarantor is one who becomes responsible for the debt, default, or miscarriage of another person. *Kearnes v. Montgomery*, 4 W. Va. 29; *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921, 923.

B. NATURE.

The contract of a guarantor is collateral and secondary. *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921; *Arents v. Com.*, 18 Gratt. 750, 769.

"The contract of the guarantor is his own separate undertaking, in which the principal does not join." *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883.

"The contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its nonperformance." *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921; *Kearnes v. Montgomery*, 4 W. Va. 29.

"A guaranty is not an absolute undertaking as in case of suretyship, but a conditional one to answer for the debt, default or miscarriage of another." *Welsh v. Ebersole*, 75 Va. 651.

"A guaranty may embrace alike negotiable instruments and common-law obligations for the payment of money." *Welsh v. Ebersole*, 75 Va. 651.

C. DISTINCTIONS.

Guaranty and Suretyship Contrasted.

—Guaranty is distinguished from suretyship in being a collateral secondary, while the latter is a primary obligation. *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883; *Kearnes v. Montgomery*, 4 W. Va. 29; *Arents v. Com.*, 18 Gratt. 750, 769. See the title SURETYSHIP.

"The guarantor contracts to pay, if, by the use of due diligence, the debt can not be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default; or, in other words, guaranty is an undertaking that the debtor shall pay; suretyship, that the debt shall be paid." *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883; *Arents v. Com.*, 18 Gratt. 750, 769.

"A guarantor is often discharged by the indulgence of the creditor to the

principal, and is usually not responsible unless notified of the default of the principal. A surety, on the other hand, is an original promiser and debtor, and is held ordinarily to know every default of his principal. A surety, by his contract, undertakes to pay if the debtor do not; the guarantor undertakes to pay if the debtor can not. The one is insurer of the debt; the other an insurer of the solvency of the debtor." *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883; *Arents v. Com.*, 18 Gratt. 750, 769.

From the nature of a suretyship, the undertaking is immediate that the act shall be done, which, if not done, makes the surety responsible at once; but from the nature of a guaranty non-ability (in other words, insolvency) must be shown. *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883.

"The guarantor contracts to pay if, by the use of diligence, the debt can not be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default. *Kearnes v. Montgomery*, 4 W. Va. 29." *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921; *Arents v. Com.*, 18 Gratt. 750, 769.

Guaranty and Assignment Contrasted.

—In *Welsh v. Ebersole*, 75 Va. 651, 656, the court said: "In the first place, it is important to inquire into the rights and obligations resulting from a guaranty and an assignment. A guaranty is not an absolute undertaking as in case of suretyship, but a conditional one to answer for the debt, default or miscarriage of another. The guaranty of payment of a bond or note is an undertaking, on the part of the guarantor, that he will pay the debt if the principal does not. According to some authorities the guarantor contracts to pay if, by the exercise of due diligence, the debt can not be made out of the principal. In every case we

must look to the terms of the guaranty and the circumstances under which it was made to ascertain the character and extent of the undertaking. *Arents v. Com.*, 18 Gratt. 750, 769. A guaranty may embrace alike negotiable instruments and common-law obligations for the payment of money. On the other hand, assignments relate only to nonnegotiable securities. The assignor in effect agrees that the assignee shall recover the full amount of the bond from the debtor, and if, after the exercise of due diligence, he is unable to do so, he, the assignor, will make good the amount received by him upon the assignment. *Peay v. Morrison*, 10 Gratt. 149, 155."

Guaranty and Indorsement of Negotiable Instrument.—In *Arents v. Com.*, 18 Gratt. 750, the court said: "The contract of a guarantor of a negotiable instrument differs from that of an endorser in respect to the degree of diligence incumbent on the holder. This difference is thus stated in *Story on Prom. Notes*, § 460: 'In the case of an endorsement, the endorser contracts to be liable to pay the note, in case of its dishonor, if it is duly presented for payment to the maker at its maturity, and due notice is given to him of the dishonor, and not otherwise. In the case of a guaranty, the rule is not equally strict; and the guarantor contracts that, upon the dishonor of the note, he will pay the amount upon a presentment being made to the maker, and notice given him of the dishonor within a reasonable time; and this reasonable time is ordinarily measured by the fact, whether by the omission to make due presentment at the maturity of the note, and to give him due notice of the dishonor he, the guarantor, has sustained any loss or injury. If he has, then he is exonerated pro tanto; if he has not sustained any loss or injury, then he is liable for the whole note. So that punctual presentment for payment and punctual notice to the guarantor are not indispensable

to charge him; whereas both are ordinarily indispensable to charge the endorser.'"

II. What Constitutes.

A. GENERAL STATEMENT.

Where the consideration of a defendant's undertaking or promise is for money or property to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money or property, or from whom the consideration proceeds, such promise or undertaking is collateral. *Radcliff v. Poundstone*, 23 W. Va. 724; *Ware v. Stephenson*, 10 Leigh 155.

B. PROMISE OF GUARANTOR.

If C. authorize H. to say to a merchant, "that he, C., would pay for any goods sold to his son-in-law, L.," or to any merchant of whom L. "might purchase," or "might wish to purchase goods, that he would pay for L.," a certain sum; this is a collateral promise. *Cutler v. Hinton*, 6 Rand. 509.

N. rents property to T., who undertakes to have certain improvements put up thereon; and he contracts with H. to execute the work. H. proceeds and does a part of the work, and receives some payments from T.; but finding that T. is embarrassed, he stops the work and declares that he will proceed no further with it. N. then tells H. to go on and finish the work, and he will pay him. H. then does the work; and after it is done settles with T., and takes his bond for the balance due to him. T. being unable to pay him, H. sues for the whole balance due him for the work. It was held, that T. not having been released from his liability to H., the promise of N. is a collateral promise. *Noyes v. Humphreys*, 11 Gratt. 636.

H. holds a mortgage of G.'s land to secure a debt presently due, and C. holds a mortgage of the equity of redemption of the same land; C. writes to H. that he is willing to agree to see

him paid \$500 for G. on account of G.'s mortgage to H. within sixteen months. Held, this is not a mere proposal for an arrangement, but under the circumstances, a promise to pay. *Colgin v. Henley*, 6 Leigh 85.

C. BLANK INDORSEMENT OF NEGOTIABLE PAPER.

One makes a negotiable note to a payee, and others put their names on its back, the payee not indorsing it, and it is then delivered to payee. He may treat them all as joint makers, or he may treat the two putting their names on its back as indorsers or guarantors, as he chooses, unless he agrees, before or on delivery of the note, to treat them in a particular one of those characters. Unless he agrees to treat them as indorsers, no protest or notice of nonpayment is necessary to hold them as joint makers or guarantors. *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512.

If a third party put his name in blank upon the back of a negotiable promissory note made payable to another party, and to which he is a stranger, while the same remains in the hands of the maker; if the indorsement were after the date of the note, however long, the payee may treat him as a guarantor, and may write over the signature a guaranty consistent with the nature of the case. *Powell v. Com.*, 11 Gratt. 822, 828; *Orrick v. Colston*, 7 Gratt. 189; *Watson v. Hurt*, 6 Gratt. 633.

B., the payee of a negotiable note of N., payable at the E. bank, endorsed his name on it and put it in the bank for collection. It was not paid at maturity, and B. withdrew the note, and after holding it for some years, and after the E. bank had ceased to exist, he transferred it to H., writing over his name the words "protest waived." H., failing to obtain payment of the note from N., brought his action against B. to hold him responsible upon his endorsement of the note. It

was held, that the E. bank having ceased to exist, when B. transferred the note to H. it was not at the time of the transfer a negotiable note payable at a bank, and under the statute, Code of 1873, ch. 141, § 7, B. was not responsible as endorser of the note, but only as assignor or guarantor. *Broun v. Hull*, 33 Gratt. 23.

D. BLANK INDORSEMENT OF NONNEGOTIABLE PAPER.

In *Welsh v. Ebersole*, 75 Va. 651, the court said: "In the case of a non-negotiable security, however, the endorsement does not pass the legal title. It has no legal import. It may mean an assignment where there is a subsisting obligation, or, as in the present case, a guaranty or some other form of undertaking to be established by the evidence. I think, therefore, it was competent for the plaintiff to declare upon the endorsement as a guaranty, if such was the understanding. And it was competent for him, before, or at the trial, to write out such guaranty above the signature of the defendant, in conformity with the contract of the parties."

"The result of the various authorities would seem to be in relation to a blank endorsement of an instrument not negotiable, that where it is not part of the original transaction, but subsequently made, then in the absence of controlling proof it is deemed a mere guaranty, and the endorser treated only as guarantor." *Hopkins v. Richardson*, 9 Gratt. 485, quoted in *Welsh v. Ebersole*, 75 Va. 651, to which is added: "It is but just to say, that in this last quoted remark Judge Lee was, perhaps, referring to the irregular endorsement of an instrument not negotiable by some person other than the payee."

In *Kearnes v. Montgomery*, 4 W. Va. 29, it is said: "If a stranger endorse his name in blank on the back of paper not negotiable, he is prima facie guarantor, but this presumption may

be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred."

But in *Burton v. Hansford*, 10 W. Va. 470, the court, in commenting in the decision in *Kearnes v. Montgomery*, 4 W. Va. 29, said: "But the reasoning of Judge Maxwell, in that case was inconsistent with the views above expressed and if I am right in the conclusion reached that there is no good ground for the distinction between the prima facie liability to the payee of a stranger who has endorsed at the time it was made a note which is not negotiable and one which is negotiable, then the reasoning of Judge Maxwell is inconsistent with the opinion of the court in *Orrick v. Colston*, 7 Gratt. 189. But these views of Judge Maxwell do not seem to have been approved by Judge Brown, for while he concurs with him in the decision rendered, he does not concur with him in his views, though Judge Berkshire did. Judge Maxwell, in his opinion, says: 'If a stranger endorses his name in blank on the back of paper not negotiable, he is prima facie guarantor, but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred.' He, however, neither assigns any reason for this position nor does he cite any authority to sustain it. If we are to infer that he thought there was a difference in such case between the liability of a stranger who endorses a note not negotiable and one who endorses a negotiable note, I think both reason and authority show that such distinction is not well founded. The review of the cases before cited satisfy my mind that no such distinction can properly be drawn. And if there is no such distinction then, as I have endeavored to show above, the responsibility of a stranger so endorsing

would not be that of a guarantor only, but at the option of the payee, it would prima facie be, either that of an original promisor or that of a guarantor. In the particular case, then, before the court, if Judge Maxwell's view of what was shown by the evidence be correct, this prima facie case against the endorser that he might be held as original promisor, was rebutted by the evidence which shows that the understanding was that he was only to be bound collaterally. I regard this expression of opinion by Judge Maxwell, as a dictum not concurred in by Judge Brown, and open to consideration whenever a case arises which fairly presents the point."

Illustrative Cases.—"In the case of *Kearnes v. Montgomery*, 4 W. Va. 29, the defendant owing the plaintiff, proposed to him to take for his debts the bond of third parties, which the defendant had drawn payable directly to the plaintiff. The plaintiff refused to accept this bond, as it was payable to the plaintiff instead of to the defendant, unless the defendant would endorse it. The defendant wrote his name on the back of it, and the plaintiff accepted it, surrendering to the defendant his bond which plaintiff held for the debt. The bond not being paid, the plaintiff brought an action of assumpsit against the defendant, and before the trial wrote over the defendant's endorsement, 'for value received, I hereby become the security of the obligors in the within bond.' The court held, that the plaintiff could not hold the defendant bound as original promisor or security, but only as guarantor. *Orrick v. Colston*, 7 Gratt. 189, 198." *Burton v. Hansford*, 10 W. Va. 470.

R. assigns the bond of G. to K. by endorsing his name in blank thereon for the purpose of enabling K. to buy goods on the faith of his endorsement, and H. sells goods to K. upon the faith of the same, and before the time of payment for the goods arrives G. be-

comes insolvent. H. may maintain an action of assumpsit against R. either as assignor or guarantor of the bond. *Hopkins v. Richardson*, 9 Gratt. 485.

Where a nonnegotiable note bears on its back the signatures of the promisee and another person, in such manner as would make them first and second endorsers, respectively, if the note were negotiable, the parties so signing are not deemed to have thereby made a complete and specific contract, analogous to the contract of commercial endorsement, making them liable as guarantors in the order of their signatures; and parol evidence is admissible to show the relation which they bear to one who asserts a liability against them on such note, but when such paper does not represent an existing debt, but is made for the purpose of obtaining on it a loan of money for one, or all, of the parties to it, a person who makes such loan on the faith of it and takes it, may, in the absence of an agreement to the contrary of which he has notice, treat those whose names are on the back of it as copromisors with him who signed on its face, or as guarantors, at his election. *Young v. Sehon*, 53 W. Va. 127, 44 S. E. 136.

Parties make a nonnegotiable note, and other parties put their names on its back. It is blank as to payee's name, and is to be filled with the name of the person who should furnish money upon it. The parties intend it to be used to raise money upon it. It is delivered to one of the makers to be so used. The name of the party agreeing to furnish money upon it is inserted in it as payee, and it is delivered to him, he furnishing the money upon it. He has right to treat all as original promisors or makers, or some as makers and others as guarantors, as he chooses, and sue them as such. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

E. LETTERS OF CREDIT.

A letter written by a party to mer-

chants with whom he had been in the habit of dealing, introducing to them his brother who was a stranger to them, stating that this brother was going to their city to purchase goods, and requesting them to introduce him to some of the houses at which the writer dealt, "with assurance that any contract of his will, and shall be promptly paid," is a guaranty. *Moore v. Holt*, 10 Gratt. 284. See the title **LETTERS OF CREDIT**.

T., in a letter to H., asked him to let F. have as many boots and shoes as he wanted, and said that he, T., would see H. paid. This letter was presented, and H., on faith of it, sold bills of boots and shoes to F., to whom, previously H. had refused credit. Three months later T. recalled the letter, at a time when F. owed H. nothing. H. did not return the letter, but continued to sell goods to F. In suit of H. against T. on the guaranty; held, the letter constituted a continuing guaranty until revoked by T. *Tischler v. Hofheimer*, 83 Va. 35, 4 S. E. 370.

"The words 'any goods,' when used in letters of credit, has repeatedly been construed as affording evidence of a continuing guaranty, where the order contained no limitation as to time." *Tischler v. Hofheimer*, 83 Va. 35, 4 S. E. 370.

III. Essential Elements.

A. COMPETENCY OF PARTIES.

State as Guarantor.—The acts of March 20, 1848, and of March 29, 1851, authorized the guaranty of the state upon the bonds of the city of Wheeling, to pay her subscription to the stock of the Baltimore and Ohio Railroad Company, payable to bearer and transferable by delivery, though not payable to the company, but to a third person. *Arents v. Com.*, 18 Gratt. 750.

Municipal Corporation as Guarantor.—The power conferred on a city to acquire suitable works and machinery for the generation of electricity for the

use of the city and its inhabitants, and to do all things necessary or proper to carry into effect the powers conferred does not authorize the city to guarantee the bonds of another corporation, in which it has no interest, to enable it to furnish electric lights to the city and its inhabitants. The powers of municipal corporations are limited to those granted in express terms, those necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. The right to become guarantor for another is not within any of these limitations. It is immaterial that the city is protected from loss as such guarantor. *Lynchburg, etc., St. R. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951. See the title MUNICIPAL CORPORATIONS.

B. NECESSITY FOR REQUEST TO GUARANTOR.

To render binding a promise of one person to pay the debt of another it is not necessary that such promise should be made at the request of the person whose debt the promisor assumes, or at the request of the creditor. *Colgin v. Henley*, 6 Leigh 85.

C. ACCEPTANCE OF GUARANTY.

In *Colgin v. Henley*, 6 Leigh 85, it was held, that a forbearance for a period of six months, on the part of the guarantee to enforce his claim against the party for whose benefit a contract of guaranty was made amounted to an acceptance.

Upon an objection taken in an appellate court that it did not appear that the promise of guaranty had been accepted, it was held, that no such objection appearing by the bill of exception, filed in the lower court, to have been made there, it can not be regarded in the appellate court. *Colgin v. Henley*, 6 Leigh 85.

D. CONSIDERATION.

See the title CONTRACTS, vol. 3, p. 339.

E. NECESSITY FOR WRITING.

See the title FRAUDS, STATUTE OF, ante, p. 516.

IV. Construction of Contract.

A. GENERAL STATEMENT.

"We must, in every case, look to the terms of the guaranty and to the circumstances under which it was made, to ascertain, by rules of construction, the character and extent of the undertaking." *Arents v. Com.*, 18 Gratt. 750, 769; *Welsh v. Ebersole*, 75 Va. 651.

The true intention of the parties is, however, always the subject of elucidation by proof which may be by parol, and the interpretation to be placed upon the endorsement will be always just such as will carry that intention into effect. *Welsh v. Ebersole*, 75 Va. 651; *Hopkins v. Richardson*, 9 Gratt. 485.

B. AS TO MEANING OF TERMS USED.

In *Colgin v. Henley*, 6 Leigh 85, the court said: "It is objected, that he does not promise to pay, but says, 'I am willing to agree to see, you paid; but is not the meaning the same? I am willing to agree—or I do agree—or I am willing to see you paid; are they not different forms often used, especially by unlearned men, to express the same idea? Look at the cases; they will show that the courts never catch at words, where the meaning is clear.'"

Where the words of the guarantor are at all doubtful, "the court will take into consideration the situation and circumstances of the parties, to enable it to judge of their responsive intention and understanding, at the time of the agreement made." *Colgin v. Henley*, 6 Leigh 85.

C. AS TO DEGREE OF LIABILITY.

Where a negotiable promissory note, made payable to a particular person or order, is first indorsed by a third person, and then delivered to the payee,

such third person is held to be an original promisor, guarantor, or indorser according to the nature of the transaction and the understanding of the parties at the time, and this may be shown by parol proof. *Roanoke Grocery, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612. See post, "Rights and Liabilities of Guarantor," VII.

In *Welsh v. Ebersole*, 75 Va. 651, the court said: "Nothing is perhaps better settled than that a person who is not the payee of a note, but indorses his name thereon in blank, may be treated by the payee as guarantor, promisor or indorser, according to the agreement which may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. Story on Promissory Notes, Lee 479; *Watson v. Hurt*, 6 Gratt. 633; *Orrick v. Colston*, 7 Gratt. 189."

D. CONSTRUCTION ALIKE AT LAW AND IN EQUITY.

In *Colgin v. Henley*, 6 Leigh 85: "In *Russell v. Clark*, 7 Cranch 89; Chief Justice Marshall (discussing the necessity alleged in the bill for coming into equity upon certain letters said to amount to a guaranty) remarks: 'So far as respects the question whether these letters constitute a contract of guaranty, there can be no doubt that the construction in a court of law or a court of equity must be precisely the same, and that any explanatory fact, which could be admitted in the one court, would be received in the other.'"

V. Steps Necessary to Bind Guarantor.

A. NOTICE OF ACCEPTANCE OF GUARANTY.

A guarantor undertaking to pay upon receiving reasonable notice of the failure of the principal debtor to pay the debt when due, dispenses with notice of acceptance of the guaranty by the parties to whom it is addressed;

even if the law would have required such notice. *Wadsworth v. Allen*, 8 Gratt. 174.

B. DUTY TO PROCEED AGAINST PRINCIPAL DEBTOR.

Generally, where one has agreed to pay the debt of another, if that other does not pay it, the property of the one thus making the promise can not be subjected to the payment of the debt, until the property of the original debtor is first exhausted. *Welsh v. Ebersole*, 75 Va. 651; *Wilson v. Jackson*, 5 Leigh 102; *Arents v. Com.*, 18 Gratt. 750; *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883; *Kearnes v. Montgomery*, 4 W. Va. 29; *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921; *McNeel v. Auldridge*, 25 W. Va. 113.

And in a suit to subject the property of him collaterally bound, it is necessary to make defendants the personal representatives and heirs of the original debtor, he being dead. *McNeel v. Auldridge*, 25 W. Va. 113.

Illustrative Cases.—In *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921, the court quoted with approval *Farrow v. Respass*, 33 N. C. 170, on the guaranty, "I hereby guaranty the payment of the within note." It was held, the guarantor was not primarily liable, and in order to charge him it was necessary that the creditor should be diligent in endeavoring to collect the note from the principal unless diligence would have been unavailing.

M. is indebted to W. by bond, and J. guarantees the debt. W. recovers judgment against M. and sues out an elegit, on which a moiety of M.'s land is extended in June, 1824, but W. does not get possession; a warrant had been issued in 1822, from the treasury of U. S. against M. for a debt due U. S. and under this warrant, the land extended to W. is sold in July, 1824, and purchased for the U. S. in pursuance of instructions from the treasury. M. still

holds possession till November, 1825, when the land is rented out under an interlocutory order of the federal court, in a suit there pending of the U. S. against M. and W. touching the title to the land; and by another interlocutory decree the land is sold, and the proceeds held subject to future order; but no final decree has yet been made in that suit. Held, until and unless W. be evicted, the extent of the moiety of the land under his eligit is a satisfaction of the debt due him from M. and, therefore, no action as yet lies for W. against J. on his guaranty of the debt. *Wilson v. Jackson*, 5 Leigh 102.

Where Collateral Mortgage Is Given.

—In *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921, the court quoted with approval *Barmann v. Carhartt*, 10 Mich. 338, to the following effect: "Where one guaranties the collection of a note which is secured by a collateral mortgage referred to in it, and at the same time assigns the mortgage with the note, he is not liable upon his guaranty until resort has been had to the mortgage as well as to the note for the collection of the moneys secured."

In *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921, the court quoted with approval *Johnson v. Shepherd*, 35 Mich. 115: "A guaranty of collection of a debt secured by mortgage creates no obligation on the part of the guarantor to pay until after foreclosure, decree, and a failure to obtain payment out of the mortgaged premises and out of the property of the principal."

When Principal Is Insolvent.—When a guarantor guaranties the payment of a bond secured by collateral mortgage referred to in the bond, he is not liable upon his guaranty until resort has been had to the mortgage, also to the bond, for the collection of the moneys secured, unless the principal be insolvent, rendering further pursuit fruitless.

Middle States Loan, etc., Co. v. Engle, 45 W. Va. 588, 31 S. E. 921.

C. DEMAND AND NOTICE OF DEFAULT.

1. Necessity for.

Notice.—A guarantor is usually not responsible unless notified of the default of the principal. *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883; *Arents v. Com.*, 18 Gratt. 750.

Exception.—But where one transfers a bond with an undertaking "to see the money paid," he is not entitled to notice of the default of the obligor. *Austin v. Richardson*, 3 Call 201, 2 Am. Dec. 543.

Demand.—To render the guarantor of a negotiable instrument liable, it is necessary that a presentment of the instrument shall be made to the maker within a reasonable time. *Arents v. Com.*, 18 Gratt. 750.

The assignee of a bond transfers it for value, without assignment, but undertakes verbally to guarantee it if the transferee calls upon him to do so, to enable him to dispose of it. The transferee disposes of the bond without calling for the guaranty. The assignee is no longer liable on the promise to guarantee. *Fant v. Fant*, 17 Gratt. 11.

2. Time of Making.

Reasonable Time.—To render the guarantor of a negotiable instrument liable on his guaranty, it is necessary that due notice of the dishonor of the instrument by the maker shall be given him within reasonable time. *Arents v. Com.*, 18 Gratt. 750.

What is reasonable notice of the failure of the principal to pay is a question for the jury upon the testimony. *Wadsworth v. Allen*, 8 Gratt. 174.

In *Arents v. Com.*, 18 Gratt. 750, it is said, with reference to the time of notice of default, "and this reasonable time is ordinarily measured by the fact, whether by the omission to make due presentment at the maturity of the note, and to give him due notice of the

dishonor he, the guarantor, has sustained any loss or injury. If he has, then he is exonerated pro tanto; if he has not sustained any loss or injury, then he is liable for the whole note. So that punctual presentment for payment and punctual notice to the guarantor are not indispensable to charge him."

3. Waiver of Right.

Though in general the contract of a guarantor is to pay, if, after due diligence, the debt can not be made out of the principal, yet the intention of the parties must govern, and if it was the guarantor's intention to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly. *Arents v. Com.*, 18 Gratt. 750.

VI. Transferability.

To give effect to the manifest intention of the parties, the right to enforce the guaranty of a coupon bond transferable by delivery unless lost by laches or otherwise, must be held to be coextensive with the right to enforce payment of the bond or coupon. The guaranty, as an accessory to the bond or coupon, follows it and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment of the bond or coupon. *Arents v. Com.*, 18 Gratt. 750.

VII. Rights and Liabilities of Guarantor.

See ante, "Distinctions," I, C; "Steps Necessary to Bind Guarantor," V.

A. RIGHTS.

A guarantor may specify in the letter

A guarantor of a debt may maintain of credit which he gives, the terms on which he will be bound. *Wadsworth v. Allen*, 8 Gratt 174. See the title LETTERS OF CREDIT.

a foreign attachment against his principal, before he has paid the debt. *Moore v. Holt*, 10 Gratt. 284.

B. LIABILITIES.

Nature of Guarantor's Liability.—

The guarantor contracts to pay if, by the use of due diligence, the debt can not be made out of the principal debtor. *Kearnes v. Montgomery*, 4 W. Va. 29; *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883; *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921; *Welsh v. Ebersole*, 75 Va. 651, 656; *Arents v. Com.*, 18 Gratt. 750.

Where Guarantor Waives Demand and Notice.—

If it appears to have been the intention of the guarantor to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly. His contract, in such a case, is a guaranty of payment, or of punctual payment, by the principal debtor, and not merely a guaranty of solvency, or of ultimate payment, after the usual means of enforcing it are employed. *Arents v. Com.*, 18 Gratt. 750, 770.

Extent of Liability.—A stranger who endorses negotiable paper at the time it is made, is prima facie liable to the payee as original promisor or as guarantor, as the payee may at any time elect. But it may be shown by parol evidence that he intended to bind himself only as guarantor, or even as second endorser; and if so shown by such evidence, he can only be held bound according to the original understanding. *Burton v. Hansford*, 10 W. Va. 470. See ante, "As to Degree of Liability," IV, C.

The transferrer for value, of a negotiable note, though not a guarantor of the solvency of the parties to the note, is a guarantor of the genuineness of the instrument. Nor is it material whether the person making the transfer receives the consideration for his own use, or

for the use of another; unless he is acting as agent, and discloses not only his agency, but the name of the principal for whom he is acting. *Lyons v. Miller*, 6 Gratt. 427.

VIII. Discharge of Guarantor.

By Conduct of Creditor.—A guarantor is often discharged by the indulgence of the creditor to the principal. *Piedmont, etc., Co. v. Morris*, 86 Va. 941, 11 S. E. 883.

Bond Given by Principal.—The fact that the principal gives his bond for the goods he purchased does not release the guarantor since the question between the guarantor and guarantee is not what evidence of the debt the latter may have taken from the purchaser, but whether the price of the goods has been paid at the time stipulated in the contract of sale. *Wadsworth v. Allen*, 8 Gratt. 174.

By Acceptance of Security.—The guarantor of a negotiable note, by accepting a security which has been provided by the maker for his indemnity, does not abandon the character of guarantor and assume that of principal debtor. *Arents v. Com.*, 18 Gratt. 750, 775; *Watkins v. Crouch*, 5 Leigh 522.

IX. Pleading.

Form and Sufficiency of Declaration.—A special count, that shows a consideration for a promise of one to guarantee the debt of another, and does not allege, that the other has not paid the debt, is fatally defective. *Winkler v. Chesapeake, etc., R. Co.*, 12 W. Va. 699. See generally, the title PLEADING.

In a declaration on a collateral promise, the plaintiff should aver notice to the guarantor, of the performance of the act contemplated by the promise, and perhaps, of a failure to pay by the person, in whose favor the undertaking was made; but the omission of these averments will be cured by the statute

of jeofails, after verdict. *Pasteur v. Parker*, 3 Rand. 458.

A demand on the person for whose benefit the promise is made, is not necessary to be laid in the declaration, as he is the debtor, and must seek his creditor and pay him. *Pasteur v. Parker*, 3 Rand. 458.

X. Evidence.

A. ADMISSIBILITY.

Statement of Third Party.—In an action on a collateral promise a statement or account in writing by a third person, of the amount for which the defendant is liable, is not admissible as evidence, although that person was the agent employed by the defendant in procuring the performance of the contract. *Pasteur v. Parker*, 3 Rand. 458. See generally, the title EVIDENCE, vol. 5, p. 295.

Parol Evidence to Alter Contract.—J. executes to W. a note payable on demand, which is endorsed in blank by B., who thereby intends to guaranty the payment of the note. It was held, that the guaranty can not be altered by proof of a parol agreement at the time of the execution of the note between J., B. & W. that the note was not to be paid until the happening of a contingent event. *Watson v. Hurt*, 6 Gratt. 633.

Entries in Books of Creditor.—If C. authorize H. to say to a merchant, "that he, C., would pay for any goods sold to his son-in-law, L.," or to any merchant of whom L. "might purchase," or "might wish to purchase goods, that he would pay for L." a certain sum; if the merchant charged the goods to L., the person to whom they are delivered, such entry in his books is (like the admissions of a party), strong evidence against him, that he is dealing with L. and not with C. but vice versa, if the entry be against C., the promisor, such entry is not evidence for the merchant, so as to make that an original, which would have been otherwise a collateral

promise. *Cutler v. Hinton*, 6 Rand. 509.

B. WEIGHT AND SUFFICIENCY.

Proof of a general guaranty as to future undertaking, not shown to be made as a specific inducement to secure the contract in suit, is sufficient

to sustain a plea alleging that in consideration of the making of such contract the plaintiff undertook and promised that such future undertaking would certainly be done and performed by plaintiff and others. *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583.

Guardian Ad Litem.

See the titles HUSBAND AND WIFE; INFANTS; INSANITY.

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CROSS REFERENCES.

See the titles HABEAS CORPUS; HUSBAND AND WIFE; INFANTS; INSANITY; JUDICIAL SALES; PARENT AND CHILD; PLEADING; RECORDING ACTS; RECORDS; TRUSTS AND TRUSTEES.

As to contest over the guardianship of a child, see the title HABEAS CORPUS. As to judicial notice of accounts of fiduciaries, see the title JUDICIAL NOTICE. As to resulting trusts in favor of wards see the title TRUSTS AND TRUSTEES. As to removal of guardian as next friend, see the title INFANTS.

I. Forms of Guardianship.

A. GUARDIAN BY NATURE.

See the title PARENT AND CHILD.

Father as Guardian.—The father is the natural guardian of his infant children and in the absence of good and sufficient reasons, shown by the court, such as ill-usage, grossly immoral principles or habits, want of ability, etc, is entitled to their custody, care and education. *Rust v. Vanvacter*, 9 W. Va.

600; *McDodrigill v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. 878; *State v. Reuff*, 29 W. Va. 751, 2 S. E. 801; *Green v. Campbell*, 35 W. Va. 698, 14 S. E. 212; *Merritt v. Swimley*, 82 Va. 433; *Coffee v. Black*, 82 Va. 567. See also, *Taylor v. Taylor*, 103 Va. 750, 50 S. E. 273.

Mother as Guardian.—When the father is dead, the mother is entitled to the custody of her child, when the facts disclose nothing which should induce

the court in the exercise of a sound discretion to deprive her of the custody, and a second marriage does not deprive her of the right, where there is no legal guardian of the child. *Armstrong v. Stone*, 9 Gratt. 102; *McDodrill v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. 878.

Remarriage of the mother does not disqualify her, under the West Virginia Code, 1891, ch. 82, § 7. *State v. Reuff*, 29 W. Va. 751, 2 S. E. 801. Compare *Mears v. Sinclair*, 1 W. Va. 185, decided before this statute. See also, post, "Testamentary Guardians," I, B.

Not Entitled to Care of His Estate.—Neither father nor mother as guardian by nature is entitled to the care or possession of child's estate. *McDodrill v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. 878.

B. TESTAMENTARY GUARDIANS.

See post, "Guardians in Socage," I, C.

Origin and Statutory Provisions.—

"By the common law the natural right of the father to the custody of his infant child arose out of his duty to maintain and support it, and continued only so long as he was obliged to do so; and, as this duty ceased with his life, so did his right to control or direct the custody of the child, except where he had by indentures lawfully bound the child to another as an apprentice. This right, however, was extended, under certain circumstances, after his death, during the minority of the child, or for any less period by the statute of 12 Car. II, ch. 24, which authorized the father, although himself an infant, by deed or will to appoint guardians for such of his children, born or unborn, who were infants and unmarried at the time of his death, until they should respectively attain the age of 21 years, or for any less time, who were entitled to have the custody of the children as well as of their estates. 1 Bl. Comm. 462; 2 Bl. Comm. 88, and note

10." *State v. Reuff*, 29 W. Va. 751, 2 S. E. 801.

"This provision of the English statute was, with slight alterations, inserted in the revised Code of Virginia (§ 1, ch. 108, Rev. Code, 1819). The same provision was in substance inserted in § 1 of chapter 127 of the Code of 1849, but subject to the important qualification contained in the seventh section of that chapter which declares that 'every guardian who shall be appointed as aforesaid (that is to say, in any of the words prescribed in the six preceding sections of that chapter) shall have the custody of his ward, and the possession, care, and management of his estate, real and personal, and out of the proceeds of such estate shall provide for his maintenance and education; but the father of the minor, if living, and, in case of his death, the mother while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor and the care of his education.' *State v. Reuff*, 29 W. Va. 751, 2 S. E. 801.

"These provisions of the Code of Virginia were in substance adopted by this state in the first seven sections of chapter 82 of the Code of West Virginia; but by the seventh section of that chapter, as amended by § 7 of chapter 53 of the acts of 1882, the cruel implication that the mother by a second marriage has rendered herself unworthy to have custody of the person of her own infant child has been removed; for that section, as amended, declares 'that the father of the minor if living, and, in case of his death, the mother, if fit for the trust, shall be entitled to the custody of the minor, and to the care of his education.' *State v. Reuff*, 29 W. Va. 751, 2 S. E. 801, 804.

Power of Appointment.—In *Taliferro v. Day*, 82 Va. 79, it was held, that a wife had no authority to appoint a testamentary guardian for a niece of her husband.

Language Necessary to Appoint.—

A bequest in a will to the testator's son of a sum of money "from the proceeds to educate him in the best manner under the direction of my said executors" does not constitute such executors the testamentary guardians of testator's son, the court saying: "The declaration of his intention should be distinct and unequivocal and in terms inconsistent with the existence of the power and authority of the natural guardian." *Kevan v. Waller*, 11 Leigh 414.

Where, in the execution of a power of appointment, a will makes the following provision, "The property my husband left me a life estate in, I leave to Charles T. and Mary D.; when this child is old enough to be sent to school, I wish Charles to educate and give her \$5,000 as her portion of the estate;" held, this does not constitute Charles T. guardian of Mary D. *Taliferro v. Day*, 82 Va. 79.

A testator having devised and bequeathed real and personal property to his daughter, directs that she shall have a good education, and live in a respectable family, and authorizes his executor to use part of the principal of the estate given her, if the income be not sufficient to carry his purpose into effect, the daughter being at the time under fourteen years of age, quære, whether this amounts to the appointment of the executor testamentary guardian of the infant daughter. *Dupuy v. Hardaway*, 4 Leigh 584.

Incidents.—It is settled under the statute that the authority conferred on testamentary guardians, is joint and several; it is not a mere naked authority, but coupled with an interest; if one dies, it goes to the survivor; if one refuses, the other may qualify without him; each is a complete guardian, if the other does not qualify. *Kevan v. Waller*, 11 Leigh 414.

C. GUARDIANS IN SOCAGE.

In the case of *Truss v. Old*, 6 Rand. 556, decided in 1828, it is said: "Our

statute concerning guardians recognizes only two descriptions of guardians who have any power over the property of their wards; guardians in socage, and those appointed by the father under that statute, who are put in all respects upon the footing of the former, our statute in this respect being a copy of the statute of 12 Car. 2, ch. 14. Under that statute it has been held, that although the statutory guardian, and the guardian in socage, have no beneficial interest, yet their authority is coupled with a legal interest, and is not barely an office. *Shaftsbury v. Shaftsbury*, Gilb. Rep. 172; *Eyre v. Shaftsbury*, 2 P. Wms. 102, S. C. It is an interest like that of a trustee for the separate use of a married woman, an executor in trust, or an administrator of an estate of which there is no surplus, after the payment of debts, all of whom have a legal, without any beneficial interest. When we consider the purposes for which the law appoints guardians to infants, it is obvious that to enable them to effect the objects of their appointment, they must have a legal right to the exclusive possession and control of the infant's property, so long as the guardianship continues, without which they could not manage the property beneficially for the infant, as by renting, or cultivating, and disposing of the produce of their lands, hiring their other property, and selling that which is perishable, and which might otherwise be wholly lost. The infant being incapable of making any contract in respect to these subjects, his guardian could not make a valid contract in his name, and must of necessity transact all in relation to his ward's property, in his own name." See also, *Hunter v. Lawrence*, 11 Gratt. 111.

"Accordingly, the authorities are uniform that a guardian in socage has a legal right to the possession and disposition of his ward's land, during the continuance of his wardship. *Littleton* (B. 2, § 123) takes this for granted,

by stating that when the guardianship terminates, the ward may enter, and oust the guardian. So the guardian in socage may justify the occupation of the land against the heir himself. Kelw. 46, b. He may grant a copy holding reversion, or remainder, in his own name, as dominus pro tempore, 2 P. Wms. 122; *Shopland v. Ryoler*, Cro. Jac. 55 and 99: He may sue and avow in his own name, 2 P. Wms. 122: He may make a lease for years, during the wardship, upon which an ejectment may be maintained, 14 Vin. Abr. 185, pl. 4; and see *Ibid.* pl. 3, and 6, and cases there cited. He may have an action of trespass against a stranger, for spoiling the grass in the socage lands, in his own name, and not in the name of his ward. Br. Trespass, pl. 175; Br. Garden, pl. 5, cited in Vin. Abr. 196, pl. 3, note. He may have a writ of right of ward, and recover the land and damages, as well as the body of the ward, 14 Vin. Abr. 190, pl. 1, 2. He may have an ejectment of ward, and if the ward himself enters and ousts him of the land, he may recover it by a writ of intrusion of ward. Br. Eject Custod. pl. 11, cited 14 Vin. Abr. letter N. pl. 1, note. And to the same effect was the civil law, from which the law of guardianship in socage was in a great degree taken. 'Tutores sive pupilli eorum, sive ipsi possident, possessorum loco habentur.' Dig. Lib. 2, ch. 15, § 5. If the defendant in this case had entered and cut and carried away the trees without the license of the guardian, the ward could not have maintained the action of trespass. That would have belonged to the guardian, who must have accounted to the ward for the damages recovered. But, being done by the permission of the person legally in possession, there was no trespass whatever." *Truss v. Old*, 6 Pand. 556, 559.

Existence in Virginia.—"In the 1st section of the act of 1785 (12 Hen. Stat. 195), in the 2d section of the act of 1792 (1 Stat. at large, N. S. 104), and

in the 4th section of the act of 1819 (1 Rev. Code 406), power was given to the chancery courts 'to require security from any guardian in socage.' Notwithstanding this indirect recognition of the existence of the guardianship in socage, by the legislature, and omission to declare any authority in the county courts to make original appointments of guardians, a practice prevailed in the county courts of making such appointments; and this, without any regard to the rights of the persons entitled to such appointments according to the laws of the guardianship in socage; though the right of the ward, founded in the same laws, to terminate the guardianship on arriving at the age of fourteen years, was (from a supposed analogy, doubtless) still recognized and respected. The revisors, in their report (653-4), call the attention of the legislature to this state of things, and to the doubts which existed, on the one hand, as to whether, since the abolishing of all feudal tenures by our act of 1779, guardianship in socage could, with propriety (notwithstanding the implied recognition before adverted to), be said to exist in Virginia; and the other, as to whether the county courts had not usurped authority in undertaking to make original appointments; and conclude by saying, that in order, if possible, to remove all ambiguity in the law, they had thought it best 'to omit any reference to the guardianship in socage, to retain the provision of the act of 1748, and define the powers and duties of guardians.' The law (with some immaterial alterations) has been enacted as reported by the revisors; and, as we have seen, after giving to the father the right to appoint a guardian for his child by his will, it vests the circuit and county courts with full power to appoint guardians for all minors who have not testamentary guardians; declares that the guardian appointed by will shall continue in office till the termination of the period limited in the

will, and that the guardian appointed by the court shall continue in office till the ward arrives at the age of twenty-one years; omits any reference to the guardianship in socage; and whilst it gives to the guardian the possession, care and management of the ward's estate, real and personal, omits the provisions of the acts of 1794 and 1819, which, in giving to guardians the power to make leases, declared that the same should not exceed the period when the ward should arrive at the age of fourteen years. I can see nothing on the face of the law, or in the history of the circumstances preceding and attending its passage, from which to conclude that it was the purpose of the legislature to give or save to the ward the right claimed in this case. On the contrary, the intention to deny the existence of the right is plainly to be deduced, not only from the language of the law, where it has spoken on the subject, but also from the obvious purpose and meaning of its silence where it should have spoken, if it had intended to recognize or save the right." *Ham v. Ham*, 15 Gratt. 74, 80. See also, 1 Min. Inst. 454 (4th Ed.). See post, "Removal of Guardian," III, E.

D. JUDICIAL GUARDIANS.

1. Guardians for Minors Generally.

This article practically treats questions relating to judicial guardians of minors and a reference is therefore made to prior and subsequent sections of the article.

2. Guardians Ad Litem.

See the titles INFANTS; INSANITY.

3. Guardians for Insane Persons.

As to committees of insane persons, see the title INSANITY.

II. Appointment and Qualification of Judicial Guardians of Minors.

A. AUTHORITY TO APPOINT.

Power of Courts of Chancery.—Courts of chancery in Virginia have

always had the power to appoint guardians, and such power has not been taken away. Chapter 219, § 11, Va. Code, 1849; *Durrett v. Davis*, 24 Gratt. 302; Va. Code, 1887, § 2599; W. Va. Code, ch. 82, § 3.

County Courts.—The appointment of a guardian by election of an infant is made on the chancery and not on the common-law side of the county court, hence the superior court of law has no jurisdiction to grant a writ of error to said court in such cases. *Ficklin v. Ficklin*, 2 Va. Cas. 204.

See the act of assembly, 1 Rev. Va. Code, 1819, ch. 108, § 4, by which, the superior courts of chancery and county and corporation courts, in chancery, are vested with the power of controlling guardians, hearing and determining all matters between them and their wards, requiring security from guardians in socage, displacing faithless guardians, and appointing others in their stead, and giving such directions, and making such rules and orders for the government, maintenance, and education of wards, and for the preservation of their estates and for the conduct of their guardians, as may be proper. It would seem, then, that as the courts of chancery have such controlling power, they are the proper tribunals before whom the election by an infant of his guardian should be made, although Hargrave tells us, that such election is frequently made before a judge on the circuit. In this state, the superior courts of law have uniformly refused to appoint guardians (except ad litem), and to receive the election of infants. See Hargrave's Notes (on the doctrine of Guardians and Wards), on Coke Litt. 88, b. Notes 65 to 70, inclusive; 1 Black. Com. 460-4, and Tucker's Note, 5. Note in Edition of 1853 to *Ficklin v. Ficklin*, 2 Va. Cas. 204.

Recorders.—Recorders under the old Code had power to appoint guardians of infants. *Reed v. Hedges*, 16 W. Va. 167; *Mathews v. Wade*, 2 W. Va. 461.

B. DOMESTIC GUARDIAN OF NONRESIDENT INFANTS.

When a minor, though living in another state, has estate in Virginia it is proper to appoint a guardian in Virginia. *Taliaferro v. Day*, 82 Va. 79.

C. REGULARITY OR PROPRIETY OF APPOINTMENT.

The regularity or the propriety of the appointment of the guardian can not be determined upon a writ of habeas corpus. *Mathews v. Wade*, 2 W. Va. 464; *Rust v. Vanvacter*, 9 W. Va. 600; *Armstrong v. Stone*, 9 Gratt. 102. See the title HABEAS CORPUS.

Appointment of Guardian Can Not Be Questioned Collaterally.—Where a guardian has been appointed by a chancery court, though such court have only power to remove and appoint, and not to appoint in the first instance, the validity of that appointment can not be questioned in a collateral proceeding. No other court, unless it be an appellate court, is authorized to inquire whether the power was exercised upon a proper occasion. *Durrett v. Davis*, 24 Gratt. 302.

D. EVIDENCE OF APPOINTMENT.

Early in 1857, R. devised to W. real estate charged with payment of certain legacies, all whereof W. promptly paid, except one of \$1,250 to the infant children of S. December 18th, 1857, W. paid this legacy to S. and took his receipt. April 3d, 1859, for slaves delivered by W. to S. under a decree rendered some time before in a suit by S. as next friend of his children, and for balance of a residuary legacy to them then paid by W. to S., a receipt and a refunding bond were executed by S. to W. Neither the receipts nor the bond were signed by S. "as guardian," but in the last receipt and in the bond reference was made to S. as the guardian of said children. Later W. devised said real estate to E. and his personalty to his sister. After at-

taining their majority these children claiming that S. was not their guardian on December 18th, 1857, and that the payment of the legacy by W. to S. on that day, was unauthorized, sued W.'s administrator for the payment thereof. The records of G. county, wherein the qualification of S. as such guardian should have been, were destroyed, much time had elapsed, the memory of S. had failed, and evidence was lost, etc. Held, the established facts show that S. was the guardian of his children, though the time of his appointment is left uncertain by lapse of time, destruction of records, etc. Yet it is fairly inferable that he was such guardian when he received the \$1,250 legacy. *Thurston v. Sinclair*, 79 Va. 101.

E. BOND.

See post, "Guardian's Bonds," VI.

1. Necessity.

Not a guardian by nature, but only a guardian appointed, who has given bond as and when required by law, is entitled to the possession, care, and management of his ward's estate. *McDodrill v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. 878.

Refusal or Inability to Give Bond.

In the case of *Page v. Taylor*, 2 Munf. 492, Judge Coalter says: "The bond of a guardian must be taken in open court; not only because the court, and the court alone, must approve of the security, but because, in case of the inability, or refusal of the guardian to give such security, the court is to appoint either another guardian, or a curator."

2. Taking of Bond a Judicial Act.

The taking of a guardian's bond is a judicial, not a ministerial act, and must be done in open court, the sufficiency of guardian's bond being a question for the court to decide. The clerk's duty is merely to prepare the bond and insert the penalty directed by the court and to see that the bond is duly filed and preserved, and for

these only is he answerable. Page *v.* Taylor, 2 Munf. 492.

3. Sufficiency and Validity.

Variations from Statutory Form Do Not Invalidate the Whole Bond.—Where a guardian's bond contains a covenant to indemnify the justices constituting the court at the time it was taken, although this is not required by the statute, it does not avoid the bond; and although the condition in the guardian's bond is not as extensive as the statute requires, it binds the obligors as far as it goes. Pratt *v.* Wright, 13 Gratt. 175. See also, Reed *v.* Hedges, 16 W. Va. 167; Barnum *v.* Frost, 17 Gratt. 398.

A condition of a guardian's bond having been in general use for many years, quare, if the court would not sustain it though it was not in conformity to the statute. Pratt *v.* Wright, 13 Gratt. 175.

Necessary Recital.—It is not necessary that the conditions of a guardian's bond state that the guardian was appointed. Call *v.* Ruffin, 1 Call 333; Pratt *v.* Wright, 13 Gratt. 175; Reed *v.* Hedges, 16 W. Va. 167.

One Bond Sufficient for Two Wards—Equity Will Adjust Their Claim.—One guardian's bond may be taken for two infants, and where one gets judgment against the surety and it is feared the penalty of the bond will not satisfy the claims of both infants, judgment will be given for the whole amount of his claim in favor of the first infant, and if what is left is not sufficient to satisfy the second infant's claims, their rights will be adjusted in a court of equity which will relieve the security from any excess over the penalty and proportion the penalty between the infants. Call *v.* Ruffin, 1 Call 333. See also, Reed *v.* Hedges, 16 W. Va. 167.

Liability of Justices.—As to the liability of the justices for taking insufficient bond, see post, "Release, Exoneration or Discharge," VI, A, 3, d.

III. Termination of Guardianship.

A. MAJORITY OF WARD.

Upon the coming of age of a ward, the guardianship terminates. Armstrong *v.* Walkup, 12 Gratt. 608.

The authority of a guardian appointed by the court continues to the infant's age of twenty-one unless it be revoked. Ross *v.* Gill, 4 Call 250. See also, Ham *v.* Ham, 15 Gratt. 74.

B. MARRIAGE OF FEMALE WARD.

The guardianship over a female infant is terminated by her marriage. Guerrant *v.* Hocker, 7 Leigh 366. See also, Armstrong *v.* Walkup, 12 Gratt. 608.

C. MARRIAGE OF MALE WARD.

The marriage of a male ward apparently does not terminate the guardianship of his estate. Ware *v.* Ware, 28 Gratt. 670.

D. DEATH OF GUARDIAN.

Guardianship is terminated by the death of the guardian. Armstrong *v.* Walkup, 12 Gratt. 608.

E. REMOVAL OF GUARDIAN.

Court Guardian's Authority Continues Till Ward Attains His Age.—Where a county court has regularly appointed a guardian for a minor under the age of fourteen, the infant, on reaching the age of fourteen, can not have a guardian of his own selection appointed in the place of the one already appointed, merely because he prefers him, and without showing any cause. Ham *v.* Ham, 15 Gratt. 74; Ross *v.* Gill, 4 Call 250.

"It is obvious that the right given to the minor to nominate his guardian, by the 4th section of chapter 127, extends, in terms, to the case only where, there being no incumbent in the office under an appointment by the court, or by the will of the father, the court is about to appoint a guardian. In such case, if the minor be under the age of

fourteen years, the court appoints one of its own selection. But if the minor is above the age of fourteen years, he has the right to nominate his own guardian, who, if approved by the court (that is, I apprehend, if a fit and proper person, worthy to be approved by the court), is to receive the appointment." *Ham v. Ham*, 15 Gratt. 74, 77. See also, 1 Min. Inst. 455 (4th Ed.).

Removal by the Circuit Court.—A large discretion is necessarily vested in the circuit court in the removal of guardians, and where it appears that the guardian is managing his ward's estate for his own advantage, rather than for the good of his ward, it is not error to remove him. *Snavely v. Harkrader*, 29 Gratt. 112.

The circuit court may remove a guardian for refusal to give a new bond. *Jennings v. Jennings*, 22 Gratt. 313. See ante, "Necessity," II, E, 1.

Guardian Should Have Reasonable Time to Give New Bond if Required.

—On motion in the county court to require a guardian to show cause why he should not give a new bond, on failure to show cause, the court should order a new bond to be given in a reasonable time. It is not proper to order his removal from office immediately. *Sage v. Hammond*, 27 Gratt. 651.

Guardian Entitled to Notice.—An order revoking a guardian's appointment, upon a rule granted on motion of his sureties for counter security, without summons to the guardian, or appearance by him, is void, at least as to persons dealing with the guardian without notice of such revocation. *Bank of Virginia v. Craig*, 6 Leigh 399.

On Removal, a Receiver May Be Appointed.—Where the guardian is plainly unfit for the trust, it is proper for a court of chancery to take the estate from him and put it in the hands of a receiver, for management, until the wards are capable of taking care of it, or until another guardian is duly appointed. Such receiver must give

bond. *Sage v. Hammond*, 27 Gratt. 651.

In a bill by infants against their guardian for an account and payment, it being shown in the cause that the guardian is wholly unfit for the office, the court may appoint a receiver to collect and receive the property of the wards, and require the guardian to pay over to him the money of his wards in his hands, and to transfer and deliver to him the property of the infants. *Sage v. Hammond*, 27 Gratt. 651.

Appeal.—There was no appeal, under 1 Rev. Code, ch. 64, § 2, ch. 66, §§ 50, 51, from an order of a county court appointing or displacing a guardian, to the superior court of chancery, or thence to the court of appeals. *Dupuy v. Hardaway*, 4 Leigh 584.

Appointment of Successor.—A second guardian can not be appointed until the first has been removed. *Kester v. Hill*, 42 W. Va. 611, 26 S. E. 376.

F. RIGHTS, DUTIES AND LIABILITIES UPON TERMINATION OF GUARDIANSHIP.

Upon the appointment of a second guardian, the former guardian's authority, as guardian, to receive and pay monies, ceases. *Walker v. Walke*, 2 Wash. 195.

Duty and Liability of Former Guardian to His Successor.—It is the duty of a guardian, whose powers as such are revoked, to account to his wards, or to his successor as guardian, if there be one, for their estate, including evidences of claims which may have come into his hands; and if after such revocation he collect any money on account of any such claims, he, and his surety as guardian, are accountable therefor to the parties entitled thereto; at least, provided such payment be made in good faith, by a person who is not informed of such revocation, and who believes at the time of making it that the party claiming to be guardian is so in fact, and has authority, as such,

to receive the money. *Sage v. Hammonds*, 27 Gratt. 651.

Mode of Settlement of Guardian's Accounts on Termination of His Office.—From the termination of the guardianship, the accounts should be settled on the ordinary principles as between debtor and creditor; compound interest should not be allowed. *Cunningham v. Cunningham*, 4 Gratt. 43; *Garrett v. Carr*, 1 Rob. 196; *Armstrong v. Walkup*, 12 Gratt. 608; *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213; *Windon v. Stewart*, 48 W. Va. 488, 37 S. E. 603.

Sums paid after that time by the guardian to the ward will be credited at the respective dates of such payments, so as to stop interest pro tanto from those dates. *Garrett v. Carr*, 1 Rob. 196, 197.

IV. Powers, Duties and Liabilities.

A. POWERS.

1. Custody of Ward.

Grandmother Not Entitled to Custody of Infant as against Lawful Guardian.—The Virginia Code of 1860, ch. 127, § 7 provided that, "Every guardian shall have the custody of his ward and the management of his estate, but the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor and the care of his education." Held, where the father and mother are dead, the grandmother is not entitled to the custody of the infant, as against the lawful guardian. *Mathews v. Wade*, 2 W. Va. 464.

Domestic Guardians of Nonresident Infants.—When a minor, though living in another state, has estate in Virginia, it is proper to appoint a guardian in Virginia, and having been duly appointed and qualified, such domestic guardian is entitled to the custody of the ward's estate, but, the father being

alive, he is entitled to the custody of her person. *Taliaferro v. Day*, 82 Va. 70.

Construction of Will.—A testatrix, by the first clause of her will, expressed the desire that her child be permitted to remain with, and be reared by, the sisters of the testatrix, and be trained as their own. By the second clause she expresses the desire that her husband be made guardian of the child, and that he continue to manage the business and property of the testatrix as formerly, receiving the profits for the support of the child as far as need be, and the residue appropriating to his own use for life, and upon his death that the entire property be given to the child. The arrangement for the custody of the child was not intended to be temporary, but permanent, and to continue as long as necessary to accomplish the purposes of the will. The second clause of the will has reference to the property interests of the child, and not to the custody of its person. *Stringfellow v. Somerville*, 93 Va. 701, 29 S. E. 685. See generally, the title WILLS.

2. Custody and Management of Ward's Estate.

a. In General.

Powers of Guardian over Estate of His Ward.—Although the guardian has no beneficial interest in the estate of his ward, still his authority is coupled with an interest, and is not barely an office. In respect to the real estate, he may make a lease for years, upon which ejectment may be maintained; he may have an action of trespass against a stranger, in his own name, for spoiling the grass; he may have a writ of right of ward, and recover the land and damages, as well as the body of the ward; he may assign dower and institute proceedings for partition. In respect to the personal estate, his powers are very extensive. His authority extends to the collection of debts and other choses in action belonging to the ward, to the receipt of legacies and

distributive shares, and granting acquittances for the same. He may assign mortgages, compromise and submit to arbitration, and in fine, do whatever is necessary to protect the ward's interest. *Ware v. Ware*, 28 Gratt. 670. See also, *Truss v. Old*, 6 Rand. 556; *Hunter v. Lawrence*, 11 Gratt. 111. See ante. "Testamentary Guardians," I, B; "Guardian in Socage," I, C.

Power over Personal Estate—Bonds.

—A guardian has the power to sell his ward's personal estate, hence where he has possession of a bond of his ward's assigned to him by an executor, whatever interest the ward has in it, is subject to the guardian's control; he can receive the money due on it, if voluntarily paid, can sue on it in a common-law court in the name of his assignor, for his own use as guardian, or he can sell the bond. *Hunter v. Lawrence*, 11 Gratt. 111. See also, *Truss v. Old*, 6 Rand. 556.

Custody of the Law.—Money, credits, and property are in the custody of the law when held by guardians, in their representative and administrative capacity. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81. The court says: "They are accountable to courts for what they administer, and there is ordinarily the same reason that the law's custody of things and credits should not be disturbed in their hands as there is for nondisturbance in the hands of a sheriff or other officer." See CUSTODIA LEGIS, vol. 4, p. 161.

Authority of Guardian to Receive Money Due His Wards.—Where there are three wards, a payment made to the husband of one, who is also the guardian of another, should be charged only to the two for whom he is authorized to receive it and not to the third ward, an adult, who has given him no such authority. *Armstrong v. Walkup*, 9 Gratt. 372.

b. Bringing Suits.

See also, post, "Parties," V, F, 1, c.

Power of Guardian to Sue for Trespass.—Guardians in socage and testa-

mentary guardians, although they have no beneficial interest, have a legal interest in, and right to the possession of their ward's property, and can maintain an action for trespass to ward's property. *Truss v. Old*, 6 Rand. 556. See also, *Ware v. Ware*, 28 Gratt. 670.

Ward's Power to Sue for Trespass.—

A ward can not maintain an action of trespass in his own name. *Truss v. Old*, 6 Rand. 556.

But where there is no guardian, the infant may maintain an action of trespass in his own name by his next friend. *McDodrill v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. 878.

Assumpsit.—A guardian can bring assumpsit in his own name on a draft made payable to the guardian. *Jolliffe v. Higgins*, 6 Munf. 3.

Suit for Partition.

Ward's Lands Sold When Partition Can Not Conveniently Be Made.—A guardian has authority to institute proceedings in equity for a partition of the ward's lands, and if partition can not conveniently be made and the interests of wards require it, the court will order a sale. Va. Code, 1887, § 2564; *Zirkle v. McCue*, 26 Gratt. 517.

Where, in a guardian suit, there is an allotment of part of the land and sale of the residue, the allotted part and the proceeds of the part sold must each be divided among all the cotenants of the entire subject, in the absence of a consent decree, when adults only are interested, and it is error to sell the undivided interests of infants in such suit, when there is no proceeding therein by their guardian for such sale in the manner prescribed therefor by law. *Stewart v. Tennant*, 52 W. Va. 559, 560, 44 S. E. 223.

Power of Husband's Guardian over Wife's Property.—

The guardian of an infant husband has the power to reduce into possession the choses in action of the wife. *Ware v. Ware*, 28 Gratt. 670.

Guardian Must Sue for Ward's Property in Name of Infant, as His Next Friend.

A guardian is not authorized to file a bill in his own name to obtain possession of the property of his ward; but must file it in the name of his ward as his next friend; calling himself "guardian of the ward" is not sufficient. And the objection for want of proper parties may be made for the first time in the court of appeals, if it was not waived in the lower court, and the want of parties appears on the face of the bill. *Sillings v. Bumgardner*, 9 Gratt. 273; *Burdett v. Cain*, 8 W. Va. 282; *Stewart v. Crabbin*, 6 Munf. 280.

Assault and Battery Committed on an Infant.—An action for assault and battery committed on an infant should be brought in the name of the infant, by his guardian, not by and for the guardian. The latter is error for which the judgment would be reversed, even after a general verdict in favor of the plaintiff, before January 1st, 1820. But see Rev. Code, 1819, vol. 1, ch. 128, § 103; *Stewart v. Crabbin*, 6 Munf. 280.

c. Defending Suits.

See the title INFANTS.

Guardian's Defense Binding on Infant.—Where a guardian, appointed by the county court, with its sanction, defends a suit against her ward, her defense is binding on the ward, but if the guardian die before the decree, though all the testimony has been taken, a guardian ad litem must be appointed. *Beverleys v. Miller*, 6 Munf. 99.

Guardian Has a Right to Notice, When His Ward's Land Is to Be Condemned.—In condemnation proceedings the guardian of the infant owners of the land proposed to be taken, must be notified, and has a right to appear and make a defense on behalf of his wards. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

d. Purchase of Ward's Property by Guardian.

A party holding a fiduciary relation to trust property can not become the purchaser of such property, either directly or indirectly; and if he does the sale is voidable and may be set aside at the mere pleasure of the beneficiaries, although the price may have been adequate and the purchaser gained no advantage. This rule applies to guardians. *Reilly v. Oglebay*, 25 W. Va. 36. See post, "Rights and Liabilities of Purchaser," IV, A, 2, g, (7).

e. Conversion of Realty into Personalty or Personalty into Realty.

Guardians have no right to convert the personalty of their wards into realty without the previous sanction of a court of chancery. *Boisseau v. Boisseau*, 79 Va. 73.

"Mr. Schouler in his work on Domestic Relations, at page 466, says 'conversions, that is to say, changes made in the character of trust property from personal into real, or real into personal, are never favored. The previous sanction of chancery should always be sought, and this is only given under strong circumstances of propriety. The same may be said of exchanges of the ward's property.'" *Boisseau v. Boisseau*, 79 Va. 73, 75.

"In 2 Kent's Commentaries, at marginal page 230, that distinguished author says: 'The guardian must not convert the personal estate of the infant into real, or buy land with the infant's money without the direction of the court of chancery. The power resides in that court to change the property of infants from real into personal, and from personal into real, whenever it appears to be manifested for the infant's benefit.'" *Boisseau v. Boisseau*, 79 Va. 73, 75.

Ward May Either Take the Land or Subject It to His Claim.—Where a guardian uses her ward's money to buy land, the ward has her election to take the land, or to subject the land to the

amount of her money so applied. *Hughes v. Harvey*, 75 Va. 200.

Trusts in Favor of Wards Resulting from Application of Their Money to the Purchase of Lands.—To create a resulting trust in favor of a ward in a tract of land purchased by his guardian, the trust funds must either have been paid at the time of, or entered into the consideration for the contract of purchase, though paid afterwards. If a guardian purchases a tract of land, with her own money and takes the deed in her own name, the mere fact that she satisfies the unpaid purchase money out of the guardianship funds, which afterwards come into her hands, can not create a resulting trust in favor of her wards. A court of equity, in a proper case, may treat such funds, so used and to the extent thereof, as a charge against the land. *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868.

f. Sale of Ward's Personal Estate.

As a general rule, a guardian has the legal title of the ward's personal estate; and has the power and authority to sell it. Hence, where a bond executed to an executor is transferred by him to a guardian as part of the ward's estate, he may sell and transfer the bond. *Hunter v. Lawrence*, 11 Gratt. 111.

"The interest of the ward requires that his guardian should have the power to sell his personal estate. Under certain circumstances, readily conceived, an immediate expenditure of money might be indispensable to protect the estate against loss; the guardian might find that the best mode, or only mode, of raising the money, was by a sale of bonds belonging to the ward's estate. Under such circumstances, a delay for collection might be injurious or even ruinous to the ward's fortune. It is no valid objection to allowing the guardian this power, to say, it may be abused. Every power, however necessary, may be abused. The objection would apply to every case in

which one party is entrusted with the property of another. This power is justified by the reason and fitness of things, and is moreover well sustained by authority." *Hunter v. Lawrence*, 11 Gratt. 111, 129.

A guardian has the like power to sell the personal estate of his ward, which an executor has to sell the assets of his testator. *Bank of Virginia v. Craig*, 6 Leigh 399.

Expenditure or Sale of Ward's Principal Since 1873.—"A guardian may, in a proper case, expend the principal of his ward's personal estate, or a portion thereof, for his education and maintenance, if he deem it best for the interest of his ward; and if the court be satisfied that such expenditure was in good faith actually made, and was judicious and proper, and where the expenditure has been so made by the guardian, or a sale of the personal estate, or a part thereof, has for such purpose been judiciously made by him, it will be sanctioned by the court, if, when such expenditure or sale for the purpose was made, the court, if applied to, would have ordered it. Sections 8, 9, Rev. Code, 1873. But though a guardian may thus, in a proper case, subject to the court's approval, expend the principal of his ward's estate, yet the legislative policy is express that such expenditure shall not be a charge upon the ward personally, nor upon his real estate. See § 9, Rev. Code, 1873." *Cumming v. Simpson* (Va.), 1 S. E. 657, 662. See also, *Gayle v. Hayes*, 79 Va. 542.

Transfer of Stock.—Bank stock standing in the name of F., guardian of C., may be sold and transferred by the guardian and the officers of the bank have no right to control or prevent him from transferring it on their transfer book. *Bank of Virginia v. Craig*, 6 Leigh 399.

Standing Timber Is Realty, after Falling, Personalty.—Timber trees, while standing are real property and

the guardian has no authority to sell them, but if they are cut down or detached in any other way they become personal property and the guardian can sell them, but the ward can not maintain trover for them. *Truss v. Old*, 6 Rand. 556.

g. Sale of Ward's Real Estate.

(1) In General.

Interests of Infants Paramount Consideration in Sale of Their Lands.—A court of chancery should only decree a sale of infants' lands in accordance with the statute, when it is manifestly to the interest of the infants, and should direct the proceeds to be invested in such a way as to secure the interests of all who may be interested in the fund. *Garland v. Loving*, 1 Pand. 396.

(2) Application to Court.

(a) Necessity.

See post, "Necessity," IV, A. 2, g, (4), (a).

(b) Application by Bill.

Failure to Aver That the Guardian Sues "as Guardian."—A failure to aver formally in a bill to sell infants' lands, that the guardian brings the suit "as guardian" is no ground for reversal, where the bill follows the statute in other respects, and states his qualification as guardian. *Cooper v. Hepburn*, 15 Gratt. 551. See also, *Zirkle v. McCue*, 26 Gratt. 517.

Affidavit by Guardian.—If the bill is sworn to by the guardian at any time before the court acts upon it, the statute is complied with. *Durrett v. Davis*, 24 Gratt. 302.

Amendment of Bill to Include Other Lands.—Where it appears in the progress of a cause that the sale of other lands is proper, the bill may be amended accordingly, without constituting a new cause. *Pennybacker v. Switzer*, 75 Va. 671.

Suit to Sell Infants' Lands Not Proper Vehicle to Enforce Debts against Such Lands.—A suit brought by a guardian to sell infants' lands, under

ch. 128, Va. Code, 1860, the bill in which contains no matter as to the existence of debts of the person from whom their estate descended, and asks no relief in that respect, can not be made the vehicle to enforce such debts against such lands. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447.

(3) Parties.

Necessary Parties—Representation.

It is not necessary to make persons, not in being and who have only a contingent interest in the subject matter, or if in being, who are sufficiently "represented" parties to a bill to sell infants' lands, such parties being "represented" by the parties before the court, holding the immediate interests. *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698. See also, *Cooper v. Hepburn*, 15 Gratt. 551; *Garland v. Loving*, 1*Rand. 396.

H. devises real estate to M. during his natural life, and to his children if he should have lawful issue; if not, then at his decease to H.'s grandchildren. At the death of H., M. is not married, but he afterwards marries and has lawful children. Upon the birth of the first child of M., the remainder was vested in the child, subject to open and let in the afterborn children as they severally came into being; and the remainder in favor of the grandchildren was defeated. And therefore the grandchildren were not necessary parties to a suit by the guardian of M.'s children for a sale of the real estate. *Cooper v. Hepburn*, 15 Gratt. 551.

When Guardian, Though an Heir, Is Not a Necessary Party Defendant.—A guardian, who would be an heir of his ward, brings suit to sell his ward's land, and after he ceases to be guardian goes on the bond for the purchase money as surety, the guardian is not a necessary party defendant. *Durrett v. Davis*, 24 Gratt. 302.

(4) Order of Sale.

(a) Necessity.

"When stripped of much connected

with its history which has no material bearing upon the case here, the simple point for decision is, can a guardian expend, for the support, maintenance, or education of his wards, their real estate, or the proceeds thereof in his hands, stamped with the character of realty, in excess of the annual income from same, without first obtaining from the circuit court having jurisdiction in the premises an order to that effect? It is plain under the law that he can not do so. Sections 8, 9, 13, ch. 123, Code, 1873." *Cumming v. Simpson* (Va.), 1 S. E. 657, 661.

Not until act passed March 17th, 1873 (*Ibid.*, § 13), was it lawful for the court to order application of proceeds of ward's real estate, beyond annual income, to his maintenance and education. And under that act such order must always precede such application. *Rinker v. Streit*, 33 Gratt. 663. *Gayle v. Hayes*, 79 Va. 542; *Cumming v. Simpson* (Va.), 1 S. E. 657.

"It will be observed that by the act of 1872-3, *supra*, the application of the proceeds of the infant's real estate, beyond the annual income, can be applied to his maintenance and education, only upon the order of the circuit court, when it shall be made to appear to the satisfaction of the court, that the proper maintenance, education, or other interests of the infant, require it. There is no provision authorizing the court to sanction any sale which had been previously made of the infant's real estate which, if it had not been so made, the court, at the time of allowing such disbursements, would have ordered, as is made by the ninth section of the same chapter, in relation to the infant's personal estate. The sale or application of the infant's real estate to his maintenance and education is authorized by said act only on the previous orders of the circuit court in chancery, made from time to time, as the exigencies of the case may require. There is nothing in said act which indicates an intention of the legislature

that it should be retroactive in its operation. In accordance with the settled doctrines on this subject by repeated decisions of this court, the said act can be construed to be only prospective in its operation. And in this case, a large proportion of the expenditures made by the guardian, were made prior to the passage of said act of assembly, when there was no law in existence, which authorized under any circumstances or conditions the subjection by the courts of any part of the corpus of the infant's real estate to their payment." *Rinker v. Streit*, 33 Gratt. 663, 667. See also, *Cumming v. Simpson* (Va.), 1 S. E. 657.

Realty as Assets—Infant's Realty.—Statute making real estate of any person dying intestate assets for payment of his debts, does not warrant a sale of infant's real estate, even to satisfy a claim for necessities. Code, 1873, ch. 127, § 3. *Gayle v. Hayes*, 79 Va. 542.

In *Gayle v. Hayes*, 79 Va. 542, the court said: "The third section, ch. 127, Code, 1873, relied on by appellant, has been, in one form or another, the law since March, 1842, and it was intended to make real estate legal assets for the payment of all debts. Before that time it was only bound for the payment of specialty debts. When it was enacted, and long afterwards, till March 19th, 1873, the real estate of infants was not liable to the payment of any charges of his guardian, or quasi guardian, for his maintenance or education. 1 *Minor's Inst.* 442; *Garrett v. Carr*, 1 Rob. 196, 209; *Jackson v. Jackson*, 1 Gratt. 143, 150."

Creditor of Infant.—A creditor who furnishes necessities occupies no higher ground quoad infant or his property than his guardian occupies. *Evans v. Pearce*, 15 Gratt. 513; *Gayle v. Hayes*, 79 Va. 542.

(b) Power of Courts to Order Sale.

aa. In General.

No Inherent Power in Chancery to Sell Infant's Lands Independent of Statute.—In a dictum in *Pierce v.*

Trigg, 10 Leigh 406, 413, Tucker, J., held, that there was no inherent power in a court of chancery to change the real estate of an infant into personalty by a sale of his lands. Parker, J., concurring. See also, *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014.

It seems that in Virginia, a court of equity has not authority, under its general jurisdiction as guardian of infants, to sell their real estate whenever it is for the advantage of the infants to do so. *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698. See also, *Rinker v. Streit*, 33 Gratt. 663.

Infant's real estate can be sold only upon proper proceedings under the statute providing for such sale (Va. Code, ch. 116, § 2609), or upon a proper bill for partition and sale. *Snavelly v. Harkrader*, 29 Gratt. 112.

County Courts.—In 1860, county courts had jurisdiction to sell decedent's real estate to pay his debts, though they did not have jurisdiction of guardian's suits to sell infants' real estate to promote their interests, or of partition suits where the shares exceeded in value \$300. *Woodhouse v. Fillbates*, 77 Va. 317.

The Virginia Code of 1849 divested the county courts of jurisdiction in proceedings by guardians to sell infants' lands; but causes already pending were excepted, ch. 157, § 3, so that decrees in such causes were valid. *Pennybacker v. Switzer*, 75 Va. 671.

"Prior to the revised statutes of 1849 and 1850, the county courts were clothed with authority to decree the sale of infants' land upon the application of the guardian, either where it was made to appear that the interest of the infant would be promoted by a sale and the investment of the proceeds, or where it was shown in such suit it would be for the interest of the infant to have the land sold and the proceeds applied to the ancestor's debts in order that the slaves might be exempt from such liability. (Sup. to

Rev. Code, ch. 166, p. 223-4)." *Pennybacker v. Switzer*, 75 Va. 671, 680.

bb. For Maintenance and Education.

Law Allowing Sale of Infants' Lands Not Retroactive.—Until the 19th of March, 1873, Va. Code, 1873, ch. 127, § 13, there was no law in Virginia which permitted any part of infant's real estate beyond the annual income to be appropriated to his maintenance or education. On that day, an act was passed giving the circuit courts power to make such appropriation. This act was held not to be retroactive in effect in *Rinker v. Streit*, 33 Gratt. 663; *Gayle v. Hayes*, 79 Va. 542; *Cumming v. Simpson* (Va.), 1 S. E. 657. Compare dicta in *Cooper v. Hepburn*, 15 Gratt. 551.

"By § 13, of the same chapter of the Code, the circuit, county and corporation courts in chancery, may make any order for the custody and tuition of an infant, and the management and preservation of his estate; and when it shall be made to appear to the satisfaction of a circuit court of chancery that the proper maintenance and education, or other interests of an infant require, that the proceeds of his real estate, beyond the annual income thereof, should be applied to the use of said infant, it shall be lawful for such court to make such orders from time to time as may be necessary to secure such application; and to the extent that such proceeds may be so applied, they shall be deemed and taken to be personal estate, but no further. This provision was not engrafted into our laws until it appeared in the session acts of 1872-3, ch. 191. And previous thereto no sale of an infant's real estate was ever made, except under the particular provisions of the statutes, Rev. Code, ch. 96, § 20, and ch. 108, §§ 16, 23, which do not authorize the sale of an infant's real estate, or any part of it, for his maintenance and education. Judge Tucker said, in *Pierce v. Trigg*, 10 Leigh 419: 'It is notorious, that

until the passing of these statutes, no sale of an infant's real estate was ever made except under the authority of a private act of assembly. And the proceeds of a sale made under those acts, if the infant dies under twenty-one years of age, was considered as real estate and passed to such persons as would have been entitled to the estate if it had not been sold. (Rev. Code, ch. 108, § 21.) The law is the same now. Code of 1873, ch. 124, § 12." *Rinker v. Streit*, 33 Gratt. 663, 667.

cc. What Interest May Be Sold.

Statutes to Be Construed Liberally.

—The statutes providing for the sale of infants' lands are to be construed liberally, so as to include contingent estates in remainder, etc., as well as fee simple estates. *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698; *Garland v. Loving*, 1 Rand. 396. See also, *Vaughan v. Jones*, 23 Gratt. 444, 456; *Troth v. Robertson*, 78 Va. 46.

"In *Talley v. Starke*, 6 Gratt. 339, a testator directed his estate, after payment of his debts, to be kept together until his youngest child should come of age, to be controlled and managed by his executor and his wife with their best discretion, so as to make it productive of the greatest amount of profits for the support of his wife and children. It was held, that a court of equity might direct a sale of the real estate under the statutes, 1 Rev. Code 409, 410, etc., if it was for the benefit of the infant children, and those who were of age consented. Indeed, no question was raised in that case as to the nature of the interest of the infants in the real estate decreed to be sold; that interest being an uncertain present interest in the profits, and uncertain future interest in the estate itself, that is, uncertain as to its proportion; but the question was, whether the direction of the testator that his estate should be kept together, amounted to an absolute prohibition of a sale thereof in the meantime, which would

have made it incompetent for the court to decree such a sale. But the court, construing the statutes according to their obvious meaning and policy, held, that there was nothing in the will which could prevent the exercise of the power." *Faulkner v. Davis*, 18 Gratt. 651, 672, 98 Am. Dec. 698.

By the act of February 18, 1853, sess. acts, ch. 34, p. 39, and the previous acts on the subject, courts of equity had authority to sell the land in which infants had an interest, whether in possession or remainder, vested or contingent, if the proper parties could be brought before the courts. *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698.

"The first of them is to be found in 1 Rev. Code, 1819, pp. 409, 410, ch. 108, §§ 16-23, being a portion of the general act concerning guardians, etc., passed February 18, 1819. The provisions of that statute are familiar to us all, as all of us have often, no doubt, proceeded under it to obtain a decree, at the suit of a guardian for the sale of the real estate of his ward. It is confined in its terms to a case in which the real estate sought to be sold belongs to the infant only, and in which no other person has any interest in it, present or future, vested or contingent." *Faulkner v. Davis*, 18 Gratt. 651, 664, 98 Am. Dec. 698.

"The next statute on the subject is the act passed March 3d, 1827, Sup. Rev. Code, p. 134, ch. 104, which declares that the sixteenth section of the act of 1819 before referred to, 'shall be held and construed to extend as well to cases where more than one infant shall be interested in the land sought to be sold, as where any one or more of those interested shall be of full age. The meaning of this act is sufficiently apparent, and it seems, by its terms, to be confined to a case in which the real estate sought to be sold belongs to the infant parties and to the other parties directed to be convened before the court by summons or by publication,

and in which the interest of the parties respectively is vested and not contingent." *Faulkner v. Davis*, 18 Gratt. 651, 665, 98 Am. Dec. 698.

"The next statute which will be noticed, although it does not directly belong to the branch of the subject I am now considering, but is indirectly connected therewith, and was afterwards consolidated with those before mentioned, is the act authorizing the sale of trust estates in certain cases, passed January 20th, 1832, Sup. Rev. Code 208, ch. 150. The provisions of this act are also sufficiently familiar to us all, and need not be further noticed, at least for the present. In the Code of 1849, the statutes aforesaid (with some others which had been passed having some connection with the subject, but not noticed in the foregoing review because not material to the present inquiry), are condensed, and form title 36, chapter 128, of that Code, the subject of it being, 'lands of persons under disability.' The next statute in order is the act of February 18, 1853, concerning the sale of estates belonging to infants or insane persons, or held for cestuis que trust. Acts of 1852-3, p. 49, ch. 30. This act is merely an amendment, though it may be a very material amendment, of §§ 2, 5 and 7 of chapter 128 of the Code just referred to. The amendment of the second section inserts therein these words, as descriptive of the estate for the sale of which a bill is thereby authorized to be filed: 'Whether the estate of the minor or insane person, or of any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate vested or contingent, and whether the guardian, committee or trustee, or the minor, insane person or any of the persons interested, reside in this state or not.' The amendment of the fifth section need not be noticed. The only amendment of the seventh section seems to be an addition at the end of it in these words: 'And for the

protection of the rights of all persons interested therein, whether such rights be vested or contingent;' which was made in consequence of the amendment of the second section. The amendments made by this act are embodied in chapter 128 of the Code of 1860." *Faulkner v. Davis*, 18 Gratt. 651, 665, 98 Am. Dec. 698.

"The next statute in order and the last on the subject, is the act of March 15, 1858, entitled 'An act to authorize the sale of estates subject to a limitation contingent upon the dying of any person without heir or heirs of the body, or children or offspring or descendant or other relative.' Acts of 1857-8, p. 46, ch. 46. The first section of that act declares, 'that when any estate, real or personal, is given by deed or will to any person, subject to a limitation contingent upon the dying of any person without heir or heirs of the body, or issue of the body, or children or offspring or descendant or other relative, it shall be lawful for the circuit courts, upon a bill filed by the person holding the estate subject to such limitation, in which bill all persons then living and contingently interested shall be made defendants, to decree a sale of such estate, real or personal, and to invest the proceeds of sale, under the decree of the court, for the use and benefit of the person so holding the estate, subject to the limitations of the deed or will creating the estate; provided, however, that the bill of the plaintiff shall set forth the facts which, in his opinion, would justify the sale of the said estate; to be verified by the affidavit of the party.' The second, third and fourth sections prescribe rules and modes of proceeding similar to those prescribed in regard to the sale of infants' and trust estates. The fifth section is in these words: 'The decree rendered in such suit shall be as binding upon all persons who may be born thereafter and become interested in the said estate, in like manner and to the like extent as it is upon

the parties to the said suit.' This last act is embodied in chapter 116 of the Code of 1860, concerning the creation and limitation of estates, and their qualities, and forms the twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth sections of that chapter, p. 561." *Faulkner v. Davis*, 18 Gratt. 651, 666, 98 Am. Dec. 698.

"The last act, that of March 15, 1858, may be passed by, for the present at least, with only a few observations. It was passed long after the sale to Davis, and therefore can not, directly, apply to the case, though it may be useful for the purpose of illustration. And then, too, it is not confined to infants, nor indeed does it mention infants, or refer to infancy at all, at least by name, but expressly applies to any estate, real or personal, given by deed or will to any person, though not under disability, or whether under disability or not, subject to a limitation contingent upon the dying of any person without heirs, etc. It certainly provided for cases which, or, at least, some of which, have been provided for by no former statute; that is, cases in which there might be no living person under any disability having any interest in the estate. It does not refer to trust estates, but applies, if it is not confined, to any legal 'estate, real or personal, given by deed or will to any person, subject to a limitation contingent, etc.,' and authorizes a decree for the sale of the estate to be made, 'which shall be as binding upon all persons who may be born thereafter and become interested in the said estate, in like manner and to the like extent, as it is upon the parties to the said suit.'" *Faulkner v. Davis*, 18 Gratt. 651, 667, 98 Am. Dec. 698.

M. as guardian of his infant children files a bill for the sale of the real estate held by himself for life and by his children in remainder; and it is sold accordingly. This is authorized by the statute. *Cooper v. Hepburn*, 15 Gratt.

551. See also, *Zirkle v. McCue*, 26 Gratt. 517, 525; *Reed v. Hedges*, 16 W. Va. 167, 198; *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698.

Petroleum Oil.—"This court on November 17, 1897, decided in the case of *Wilson v. Youst*, reported in 43 W. Va. 326, 28 S. E. 781, that 'The petroleum oil lying under a tract of land which has been devised to a life tenant who is in possession, and which is to go to certain infant children after the decease of the life tenant, may be sold, upon the petition of the guardian of said infants, under the provisions of chapter 82 of the Code, or leased; and the life tenant will be entitled to the interest of the royalty during the continuance of the life estate, and then the residue or corpus of the royalty will be paid to the remaindermen.'" *Ammons v. Ammons*, 50 W. Va. 390, 394, 40 S. E. 490.

(5) Additional Bond.

No Need for Security When Sale Is on Credit.—Where the sale of infants' lands is on credit to be secured by the purchaser, there is no necessity for requiring security of the guardian. *Talley v. Starke*, 6 Gratt. 339.

Discretion of the Court.—A court of equity may direct the payment of the proceeds of the sale of infants' real estate to their guardian, without requiring additional security even where it exceeds \$300, notwithstanding the language of the statute, ch. 79, § 3. W. Va. Code, 1891, but it is advisable to follow the statute. *Reed v. Hedges*, 16 W. Va. 167.

Liability of the General Bond.—The bonds given in accordance with the statute on the sale of infant's lands are primarily liable for the proceeds, and the general guardian's bond, if liable at all, is only secondarily so. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433. But see *Reed v. Hedges*, 16 W. Va. 167.

Where a party is appointed guardian of the estate of infants, and enters into bond as such, and during the continuance of his trust he files a bill under

the statute for the purpose of obtaining a decree for the sale of real estate belonging to his wards, it is the duty of the court to see to the investment of the proceeds of sale for the use and benefit of the persons entitled to the estate; and before such sale is made the guardian shall in open court enter into bond with approved security in a penalty equal to double the value of the estate to be sold, conditioned for the faithful application of the proceeds of sale. *Kester v. Hill*, 42 W. Va. 611, 26 S. E. 376.

Where such bond is given in open court, with approved security, in a pending suit for the sale of his wards' land, the sureties on his original bond as guardian are not liable for the faithful accounting for the proceeds of such sale, as the statute clearly intends that sufficient bond and security shall be taken by the court in which such suit is pending to protect those interested in its proper application; and it was no part of the duties of the guardian to sell the real estate of his wards until so directed by a decree of the court, and it is the duty of the court to protect the estate by proper security. *Kester v. Hill*, 42 W. Va. 611, 26 S. E. 376. See ch. 83, W. Va. Code, 1891; ch. 83, W. Va. Code, § 3242.

Bond Taken as Guardian.—Under a fair construction of the last clause of § 3 of ch. 79 and § 13 of ch. 82 and of § 7 of ch. 83 of the Code of 1868, it is competent, and in many cases eminently proper, for the circuit court to direct the proceeds of realty in a case of partition brought under the said seventy-ninth chapter to be placed by the court in the hands of the guardian, as such, of the infant or infants to whom the same belong; and the circuit court in taking bond with security under the last-named sections may take the bond from the guardian as such; but perhaps this is not indispensable. *Reed v. Hedges*, 16 W. Va. 167.

The bond taken in the circuit court is

substantially in the form of the guardian's first bond given before the recorder; but this does not avoid the bond taken in the circuit court. The bond taken by the circuit court will be treated as additional security from the guardian, as it was competent for the court to require the guardian in such case to give bond with security as such guardian. *Reed v. Hedges*, 16 W. Va. 167, 168.

(6) Confirmation.

If a guardian has made a sale and afterwards applies to a court of chancery to affirm it, the court, if it appear that the interests of the infant manifestly required such sale and that it was advantageous to them, may affirm such sale instead of ordering a new one. *Garland v. Loving*, 1 Rand. 396.

Appeal.—A bill is filed in 1836 by an executor and guardian, charging that the personal estate of his testator is not sufficient to pay his debts; and that it is for the interest of the infants to sell their land; and that he had made a contract for the sale of the land which he deemed highly beneficial to the infants. The bill is not sworn to; nor does it appear that the testimony was taken in the presence of the guardian ad litem, or upon interrogatories agreed to by him. In the same year a decree is made confirming the sale, and authorizing and directing the executor as commissioner to convey the land upon the payment or securing of the purchase money; and directing him to report to the court. The cause is continued regularly until 1845, when, on the motion of the plaintiff, an order is made for the settlement of the guardian's accounts; and then the cause is continued until January, 1853, when the death of one of the infants and the marriage of the other is suggested; and the husband and wife obtain an appeal from the decree of 1836. Held, the appeal was improvidently allowed, and should be dismissed. The cause should be sent back, and the plaintiff required

to amend his bill and make the purchaser and those claiming under him, parties. He should be allowed to make the affidavit prescribed by § 16, of the act, 1 Rev. Code 405, concerning guardians, and to show, if he can, that the evidence was properly taken; and both parties should be allowed to introduce further evidence. And if upon taking the proper accounts, and the evidence introduced, it should appear that the sale was necessary under the facts existing at the time, and was fairly made, and for a full price, the same is not to be set aside on account of the irregularities in the proceedings. *Hughes v. Johnston*, 12 Gratt. 479.

Confirmation of Sale Curing Defects.—A purchaser of infants' land under decree of court can not, eighteen months after confirmation of sale, object that one of the infants was over fourteen at the time of suit and failed to answer the bill in proper person; he is protected by Va. Code, 1887, § 3425, from any future claim of this infant. *Cooper v. Hepburn*, 15 Gratt. 551. As to effect of confirmation in curing irregularities in proceedings of sale where the sale is beneficial to the infants, see *Daniel v. Leitch*, 13 Gratt. 195; *Cralle v. Meem*, 8 Gratt. 496; *Garland v. Loving*, 1 Rand. 396.

The court, if it deemed it necessary for the protection of the purchaser, might have directed the infant to file an answer after the objection was made. *Cooper v. Hepburn*, 15 Gratt. 551.

(7) Rights and Liabilities of Purchaser.

Sales of Infant's Lands—Ward May Elect to Take the Land or the Proceeds.—Where land is devised to be sold for the benefit of a ward, the ward can elect the land or the proceeds and if the guardian sells such land, a court of chancery will not enforce such sale, where it seems not to ward's advantage and the purchaser knows the circumstances, but will elect for the ward. *Turner v. Street*, 2 Rand. 404.

Tender or Offer to Return Purchase Money.—An infant, whose land has been sold under an erroneous decree, and the purchase money paid to his guardian, and who sues for reversal of the decree and cancellation of the deed, must tender with his bill the purchase money, or offer therein to repay it. *Stewart v. Tennant*, 52 W. Va. 559, 561, 44 S. E. 223.

Purchaser Must See to Regularity of Proceedings, but Not to the Truth of Matters Stated in Bill.—Although a purchaser at a judicial sale may be required to see to the regularity of the proceedings upon which the jurisdiction of the court is founded, he is not bound to investigate the truth of the matters stated in the bill and deposed to by the witnesses touching the estate owned by the infant. His title can not be affected because the case made by the record happens not to be warranted by the facts. *Durrett v. Davis*, 24 Gratt. 302.

Rights of Infants to Set Aside Sale.—There has been a sale of the land of an infant under the decree of the proper court, in 1860, and a payment of the purchase money. In 1870, the infant by his next friend files his petition in the cause to set aside the decree and sale, on various grounds. Held, the guardian of the infant who brought the suit is one of the persons who would be entitled to the estate if the infant died under age, and he is not a party as such. At the same term at which the decree for the sale of the land was made, the guardian resigned his guardianship, and it was ordered that the suit abate as to him, and that it should proceed in the name of the second guardian who had qualified. At the sale of the land the first guardian became the surety of the purchaser of the land for the purchase money. He could never be heard to impeach the decree or the title acquired under it. But if he could, though the purchaser might object, the infant can not object because the purchaser has not acquired

a perfect title. *Durrett v. Davis*, 24 Gratt. 302.

C. dies in 1855, leaving a widow and children, some of them infants. Dower is assigned to the widow; and the guardian of the infants files a bill for the sale of the interest in the dower property, making the widow and adult children defendants. In March, 1863, there is a decree for a sale of the whole property, and the sale is made and the proceeds invested in confederate bonds, the widow to receive the interest during her life. After the infants come of age, they seek to set aside the sale on the ground that it was not for their interests. Held, if the court which pronounced the decree had jurisdiction of the subject and the parties; if its proceedings were regular and in accordance with the requirements of law; and the decree is sustained and justified by the evidence then introduced, the infants will not be allowed, as against a bona fide purchaser, to go out of the record, to show that upon facts and events arising subsequent to the rendition of the decree, their interests were not promoted by a sale of their real estate. *Walker v. Page*, 21 Gratt. 636.

In this case all the papers in the cause were destroyed, except the decrees; but the decrees showing by their recitals that the proceedings had been regular, and that the court was satisfied the sale was for the interest of the infants, and the investments and conveyances having been made, according to the decree, the sale and investments will be sustained. *Walker v. Page*, 21 Gratt. 636, 637.

When Purchase by Guardian Will Be Enforced.—A purchase by a guardian of his ward's lands, at a sale thereof at public auction, instituted by him, will be enforced, where the price is adequate, and the guardian has been in possession of the land for fourteen years, without question. Such sale will be enforced against the guardian and

his sureties on the purchase money bonds. *Redd v. Jones*, 30 Gratt. 123.

Resale.—Payment of purchase money to an unbonded commissioner is void, Va. Code, 1887, § 3397, unless a certificate of the clerk that such commissioner has given the required bond is published with the advertisement of sale, Code Va., § 3399, and the land will be sold again for the benefit of the wards by a rule against the purchasers to show cause against such resale, and it is too late to raise the objection for the first time in the appellate court, that the remedy against the guardian and his sureties should have been exhausted before proceeding against the purchasers, especially where the guardian is insolvent. In such a case when a resale is ordered, the former sale is not set aside; but the property is sold as the property of the purchaser. If it brings more than the debt, he is entitled to the surplus, if less he is responsible for the deficiency. *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. 195.

Ward filed bill against guardian for settlement. Guardian had loaned ward's money to W., secured by trust deed on Pedlar Mills. By consent decree, trust deed was transferred to ward, and commissioner appointed to collect loan and pay over to ward. Trustee made sale under trust deed to O., who paid part and gave bonds for residue, and made default. Sale was reported to court. Two days afterwards a rule was issued and served on O., to show cause next day why Pedlar Mills should not be resold. Next day a decree of resale was entered. Held, neither trustee nor purchaser being parties to the suit, and the sale not being judicial, the decree is a nullity quoad those persons. *Ogden v. Davidson*, 81 Va. 757.

Sale of Interest in Remainder.—A purchaser of real estate devised to infants in remainder, and sold under decrees in a summary proceeding,

brought under chapter 83 of the Code, who, before paying all the purchase money, discovers that the decree of sale and proceedings are, in material respects, not in conformity with the statute, and, therefore, so erroneous as to becloud and endanger his title, may file his petition in said proceeding for the purpose of having such error corrected and his title cleared, and have relief thereon as far as it is in the power of the court to give it. *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490.

When, in such case, the infant remaindermen, by their guardian, bring a suit in chancery to compel the purchaser to pay the balance of purchase money due, exhibiting with the bill all the decrees and orders made and papers filed in the summary proceeding, and the purchaser answers the bill, averring as new matter constituting a claim for affirmative relief, the error and irregularity in the decrees, and prays a correction of the same, and confirmation of the sale, and also files a cross bill for the same purpose, the original bill should be treated and regarded as a rule, in the summary proceeding, to show cause why the purchaser should not be proceeded against for the failure to pay the purchase money, and the answer and cross bill of the purchaser as his petition in the summary proceeding for correction of the error and perfecting of his title. *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490.

When the real estate so sold is an estate in remainder, created by a devise to the daughter of the testator for her natural life, remainder in fee to her heirs, and the sale is made upon the application of the guardian of her children, her children, born after such sale, are deemed to have been before the court by representation, and can claim no interest except in the fund arising from the sale, and in it they are entitled to share equally with the others. *Ammons v. Ammons*, 50 W. Va. 390, 391, 40 S. E. 490.

Quære, whether said principle of representation is qualified to the extent that a decree of sale, which fails to provide for, and protect, the interest of persons not in esse and so deemed to be before the court, by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests, is ineffectual to pass their title to the purchaser. *Ammons v. Ammons*, 50 W. Va. 390, 391, 40 S. E. 490. See also, ante, "What Interest May Be Sold," IV, A, 2, g, (4), (b), cc.

Private Bids—Bid Accepted by Court—Effect.—Upon a bill for the sale of infants' real estate, the court decrees a sale, and directs the commissioner to sell at private sale; and he advertises for sealed proposals, which are to be opened at a certain day in the presence of the court. Proposals are put in, and the court accepts one of them, and forthwith confirms the sale, and directs the party to execute it according to its terms. Such a purchaser stands upon the same footing as any other purchaser at a judicial sale; and is not entitled to any other or further relief. *Cooper v. Hepburn*, 15 Gratt. 551, 552.

(8) Validity of Proceedings.

Presumption in Favor of Regularity of Proceedings.—Where the records in a suit for the sale of infants' land have been destroyed during the war, in the absence of proof to the contrary, all proceedings will be presumed to have been duly taken, in accordance with the maxim, *omnia præsumentur rite esse acta*; and such sale can not afterwards be collaterally attacked except for errors affecting the jurisdiction. *Pennybacker v. Switzer*, 75 Va. 671.

Recitals in Decree, Conclusive in Appellate Court.—Where the decree recites that the bill was filed in due time and all steps regularly taken, such recitals are conclusive in the court of appeals. *Durrett v. Davis*, 24 Gratt. 302.

Sale Not to Be Set Aside for Techni-

cal Informalities—True Interest of Infant to Govern.—The power to sell the estate of those who have no capacity to be heard is a very grave one, and only to be exercised with great caution. Still it is an indispensable power, and is vested in some tribunal in every well regulated state. Sound policy requires that judicial sales shall not be brought into disrepute by the practice of vacating decrees for slight and minute defects in the preparation of causes, when the true meaning and spirit of the law has been observed. If the court clearly perceives that the sale when made was an advantageous one, it ought not to regard mere technical informalities which do not substantially affect the validity of the proceedings, or the rights and interests of the infant. In determining whether the sale was a beneficial one, we must look to the circumstances as they existed at the time it was made, and not to subsequent events. *Durrett v. Davis*, 24 Gratt. 302.

Court May Refuse to Confirm, When Necessity for Sale Has Ceased.—It is proper for a court to refuse to confirm a sale of ward's land, under § 2609, Code, 1887, if the necessity for the sale has ceased to exist; but if it seemed proper at the time to bring the suit and the ward united in the application, it is proper to rent the land out to pay the costs of the suit. *Harkrader v. Bonham*, 88 Va. 247, 16 S. E. 159.

Effect of Failure of Title to Part of Tract.—When lands are sold by metes and bounds, in a suit to sell infants' lands, instituted by their mother as guardian, subject to her right of dower therein, and the lands are sold subject to the right of dower and with warranty of title, and she shows the tract to the purchaser before the sale, and puts him in possession and he enjoys, without disturbance, the land then shown him, the title to that being perfect; on its turning out that the metes and bounds set out in the deed include land not shown to the purchaser, and never held or claimed by the vendor or

those under whom she claims, the court by a rule, may require the vendee to pay the whole of the purchase money, without allowing him any abatement for the land which was not shown him, but which is included in his deed and to which his title is worthless, on the ground that she did nothing to mislead the vendee. *Crislip v. Cain*, 19 W. Va. 438.

A Proper Sale, Not Set Aside, after Confirmation, at Suit of Wards.—If a sale appears to have been properly made in a suit by guardian for partition of wards' lands, and all adult parties approved and sale was confirmed, purchase money paid and conveyance made, such sale can not be afterwards questioned by wards. *Zirkle v. McCue*, 26 Gratt. 517.

Dower.—It is no valid objection to a sale of an infant's land by a guardian that the dower of the widow in the land was not laid off or provided for before the sale, the widow having answered and assented to it. *Durrett v. Davis*, 24 Gratt. 302, 303.

(9) Application of the Proceeds.

A guardian, having in his hands the proceeds of the sale of ward's real estate, can not satisfy therewith a judgment, recovered by him against the administrator of his ward's ancestor. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213.

h. Lease of Ward's Real Estate.

(1) In General.

Power of Guardian to Lease Ward's Lands—To Whom Rent May Be Reserved—In Whose Name Action to Be Brought.—There is no doubt, but that a guardian may lease the lands of the ward during infancy, if the guardianship so long continue; and, in this case, the demise being from year to year, if another guardian had been appointed, the term would have ceased. The reservation of the rent to the infant was proper, and can not be likened to the case of a reservation to a stranger; for the inheritance being in the ward, there

is a privity between her and the lessee, and therefore, there is no doubt of her right to maintain an action of debt to recover the arrears of rent. It is true, that the guardian may, by a lease in writing reserve the rent to himself, to cover advances which he may make for the use of the ward; and in that case the action must be brought in his own name, unless he assign the lease to the ward. The reason why the ward can not in such a case maintain the action is, that, as he must declare upon the written lease, there would be a variance between the allegation and the proof. But in either case, there is no doubt but that a payment of the rent to the guardian, during the continuance of the wardship, would be a good discharge of the tenant for so much. *Ross v. Gill*, 1 Wash. 89. See also, *South Penn Oil Co. v. McIntyre*, 44 W. Va. 296, 28 S. E. 922.

Lease Need Not Be at Public Outcry.—A guardian may lease his ward's land either by private contract or public outcry. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

Proper Method of Finding Rental Value of Ward's Lands.—The method of finding the annual rental value of the ward's estate by taking the average of the value fixed by a number of witnesses, is proper. *Snively v. Harkrader*, 29 Gratt. 112.

Limited to Period of Infancy.—Leases by the guardian of an infant to extend beyond the period of infancy are void, hence a lease until the heir shall marry or come of age, with liberty to give it up at end of any year, on three months' notice, and, unless the heir, when of age or married want the property and give three months' notice before the expiration of the year, to last until the ensuing year, is void. *Ross v. Gill*, 4 Call 250.

(2) Gas or Oil Leases.

See also, the title MINES AND MINERALS.

Without authority from a court of

equity in a proper proceeding, a guardian, in this state, can not lease the land of his ward for oil, or gas purposes, or for other developments. *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533.

Petroleum in Place Is Realty.—Oil in place under land is a part of the realty and a conveyance of the right to remove it under what is called an "oil lease" is in effect a sale and must be made in accordance with the provisions of the statute governing the sale of infants' lands by guardians. *W. Va. Code*, ch. 82; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781. See also, *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490; *South Penn Oil Co. v. McIntyre*, 44 W. Va. 296, 28 S. E. 922.

i. Deed of Guardian.

See the title DEEDS, vol. 4, p. 385.

j. Investment of Ward's Estate.

Investment of Ward's Estate by Order of Court.—Before a county court can make any order for the investment of a ward's estate, the commissioner must have posted a list of the fiduciaries' accounts before him for settlement, at the courthouse door, according to the statute, ch. 132, § 16, *Va. Code*, 1860; *Code*, 1887, § 2693. For failure to do so, such order may be set aside on motion. *Whitehead v. Whitehead*, 23 Gratt. 376.

k. Application of Ward's Estates to Guardian's Indebtedness.

The court will not allow, much less aid, a guardian to apply the estate of his wards to the discharge of his own individual indebtedness. *Dobyns v. Rawley*, 76 Va. 537.

A guardian can not appropriate his ward's estate to pay his private debts, such an application is a breach of his trust and the guardian is chargeable. *Asberry v. Asberry*, 33 Gratt. 463; *Jennings v. Jennings*, 22 Gratt. 313; *Hunter v. Lawrence*, 11 Gratt. 111.

Appropriating Note Given for Money Lent as Guardian.—A guardian can not treat as his individual property, a note given him for money lent as guardian,

until he has either paid it or been in some way released from it; the mere fact that he has secured it is not enough, unless such security is accepted by the wards. *Dobyns v. Rawley*, 76 Va. 537.

Selling Property to Pay Individual Debts.—A guardian violates his trust when he sells or transfers the property of his ward to pay his own debt. *Hunter v. Lawrence*, 11 Gratt. 111.

1. Marriage Settlements.

Contracts of marriage settlement, made by infants through their guardians are binding. *Tabb v. Archer*, 3 Hen. & M. 399. The husband, at least, can not have it set aside. *Lee v. Stuart*, 2 Leigh 76.

Wife Must Be a Party.—Marriage articles made between the guardian of an infant feme on the one part and her intended husband on the other, to which she is no party, and which have not been executed, are of no binding force on her, where there are no acts of the feme, after she has attained full age and when sui juris, of such a nature as to adopt or ratify the marriage agreement made for her by her guardian. *Healy v. Rowan*, 5 Gratt. 414.

m. Waiver of Ward's Rights.

It is not competent for guardians to waive the rights of their wards. *Hite v. Hite*, 2 Rand. 409.

Consent of Guardian Ineffectual to Prejudice His Wards.—A guardian can not, by consent to a proceeding which would be void and ineffectual to prejudice the estate of the infants, render it effectual to prejudice their estate. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447.

Reference to Ascertaining Debts and Liens.—A suit against a decedent's representatives to charge his estate with a debt and a suit brought by a guardian to sell infant's lands under chapter 128, Va. Code, 1860, are heard together, and, by consent of the parties, who are sui juris, and the guardian of the infants, an order is made refer-

ring the causes to a commissioner to ascertain debts of the decedent, and also liens against lands descended to his heirs from the decedent for the debts of such heirs. Such consent by guardian is, as to the infants, ineffectual to make such reference valid to ascertain the liens against the lands of such infants for the debts of their father, who was an heir of said decedent first named, as the suits are not competent to enforce such liens, and such reference will not stop the statute of limitations as to debts against the father of said infants. But such reference as to others sui juris will be valid by reason of their consent to it, and will, as to liens against them, stop the statute at the date of such reference. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447.

Consent to Trespass.—If a guardian consents to a trespass to his ward's property no action can be maintained by any one. *Truss v. Old*, 6 Rand. 556.

3. Power to Fix Domicil.

A guardian can not fix the domicil of his ward. The domicil of infant wards is not changed by the remarriage of their mother, who is their testamentary guardian, and her removal with her husband out of the state, carrying the children with them. *Mears v. Sinclair*, 1 W. Va. 185.

B. DUTIES.

1. In General.

"It is a general principle applicable to fiduciaries of all kinds, and, amongst others, to guardians, that no more should be required of them than that they act in good faith, and with the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs." 1st Min. Insts. 479 (4th Ed.), citing *Elliott v. Carter*, 9 Gratt. 541, 559-60; *Davis v. Harman*, 21 Gratt. 194, 200; *Myers v. Zetelle*, 21 Gratt. 731, 760; *Crickard v. Crickard*, 25 Gratt. 410, 421.

The duty of every fiduciary is to

keep the trust fund separate and distinct from his own property and to apply it in the due course of administration or to invest it securely for the benefit of the parties entitled. *Asberry v. Asberry*, 33 Gratt. 463.

A guardian's duty is simple. He is to receive the estate, collect the rents, hires, etc., and dispose of the produce. He is not required to keep funds in hand to meet possible claims. His disbursements are generally confined to the support and education of the ward, and the preservation of the property. *Garrett v. Carr*, 1 Rob. 196, 209.

2. Support, Maintenance and Education of Ward.

"Section 7, ch. 82, Code, requires the guardian out of the proceeds of the ward's estate to provide for his maintenance and education." *Pinnell v. Hinkle*, 54 W. Va. 119, 120, 46 S. E. 171.

In the case of *Armstrong v. Walkup*, 9 Gratt. 372, 376, the court, referring to a guardian, says: "The office he held made it his duty to take care of the persons and property of his wards, and to provide for their support and education out of the profits of their estate."

"And the present Code, embodying the substance of former laws on this subject, expressly recognizes the obligation of the guardian to apply the profits of the ward's estate to his maintenance. It provides that the guardian 'shall have the custody of the ward, and the possession, care and management of his estate, and out of the proceeds of such estate shall provide for his maintenance and education.' Code of 1849, ch. 127, § 7." *Barnum v. Frost*, 17 Gratt. 398, 414.

When Ward Shall Be Apprenticed.—

"The law expressly provides (1 Rev. Code, ch. 108, § 25, p. 410), that if an orphan hath no estate, or not sufficient for a maintenance out of its profits, he shall be apprenticed to learn a trade, or some occupation which will enable him to get an honest livelihood." An-

derson *v. Thompson*, 11 Leigh 439, 458. See also, *Hooper v. Royster*, 1 Munf. 119. For the present statutory provisions, see Va. Code, 1904, ch. 115.

3. Investment of Ward's Estate.

See ante, "Investment of Ward's Estate," IV, A, 2, j; "In General," IV, B, 1; "Failure to Invest," V, E, 3, c.

Investment of Surplus Income.—"If the guardian complies with the requisitions of the law, all difficulty as to the mode of settling is avoided. His inventory shows the estate received; his annual account, the income; and he is entitled to the aid and instruction of the court as to the disposition of the surplus. This surplus of any one year, not being required for disbursements, becomes a part of the principal, and, as such, can not be expended by the guardian to meet disbursements of succeeding years, except by the permission of the court. As a general rule, the court, looking to the benefit of the ward's estate, would direct the surplus to be either invested in stock producing an annual return, or loaned out to punctual borrowers who would pay the interest. If under any circumstances a secure investment at simple interest should be deemed advisable, the guardian, acting under the advice of the court, would be justified in making it. The money being so invested, the guardian would be held to account annually for only so much of the interest as he received." *Garrett v. Carr*, 1 Rob. 196, 210.

Exercise of Discretion.—In 1873, G. qualified as guardian of T. and four other infants. In September, 1875, G. filed his bill for a settlement of his accounts against his wards, all of whom were nonresidents, and an order of publication was duly executed, and they duly appeared by guardian ad litem. Account showed in guardian's hands, in money, \$8,261.16, received February 1, 1874, and also one bond for \$1,000, G. loaned J., February 4, 1874, on trust deed. In May, 1876,

court confirmed report, and ordered G. to pay T., who had obtained his majority, one-fifth of the money—i. e., \$1,632.23—and to collect the bond. Four days after decree, G. assigned this bond to T., in part settlement and exchange for the \$1,632.23 he had been ordered to pay T. The bond was worthless, the security being worthless when G. loaned J. the money. In September, 1877, G. took back the bond from T. and claimed it to be part of his ward's assets. Before lending the \$1,000, G. employed attorneys of good standing to investigate the security, and they reported it good and free from encumbrances; for which service they were paid \$100, deducted from the \$8,261.16. But encumbrances existed and exhausted the security, and G., who was also an attorney, had been so connected with their creation as to give him notice thereof. In July, 1878, a decree was entered holding G. harmless for the loss of the \$1,000. In April, 1880, the wards filed a bill to set aside that decree because it was based on a report founded on depositions taken when they were unnotified and unrepresented. G. Answered. Depositions were taken proving the bill. On hearing the consolidated cases, the court decreed that no cause had been shown for reopening the decree complained of, and dismissed the bill with costs. On appeal, it was held, that under the circumstances, G. did not act in loaning the \$1,000 to J. with the discretion and judgment which his duty required. *Burwell v. Burwell*, 78 Va. 574, 575.

4. Duty to Account.

See post, "Accounting and Settlement," V.

C. LIABILITIES.

1. Liability of Guardian.

See post, "Accounting and Settlement," V; "Guardian's Bonds," VI.

a. To Ward.

(1) Conversion of Ward's Assets.

Where guardian appropriates his ward's assets to his own private pur-

poses, it is a breach of trust for which he is liable; which liability is not removed by his subsequent reacquisition of those assets. *Burwell v. Burwell*, 78 Va. 574, citing *Hunter v. Lawrence*, 11 Gratt. 111.

Conversion of Bond.—The conversion by a guardian to his own use of a bond of his ward makes such bond the property of the guardian, and irrevocably so, in the option of his ward, and renders him liable for the amount thereof. *Burwell v. Burwell*, 78 Va. 574. See also, *Asberry v. Asberry*, 33 Gratt. 463.

Wards' Bond Used to Pay a Judgment against Himself.—A guardian will be held responsible for the loss of a bond, payable to his wards, when he converts it to his own use by paying an individual judgment against himself, as guardian; the reacquisition of the bond afterwards, by the guardian makes no difference. *Burwell v. Burwell*, 78 Va. 574.

"It was a breach of trust, in the first place, for this guardian to appropriate the money collected for his ward to his own purposes; it was a breach of trust, in the next place, to use the Jones bond, which was payable on its face to his five wards, in payment of a personal decree against himself for moneys of his trust which he had collected and used for over two years; it was a greater wrong, after he had used the Jones bond to pay his private debt, when he believed the bond to be good, to take the bond back, after fifteen months, when he knew it to be worthless, and attempt to saddle its loss upon his wards." *Burwell v. Burwell*, 78 Va. 574, 582.

(2) Liability for Loss.

Proper Discretion.—In a case where it was decided that a guardian had power to sell a bond belonging to his ward's estate, the court said: "But in any exercise of his authority the guardian must, at his peril, have acted with proper discretion, in reference to the

ward's interest." *Hunter v. Lawrence*, 11 Gratt. 111, 129.

Bond Credited to Wards.—About 1849, M. executed his bond to E. for a debt he owed him, without security. E. died in 1852, and A. qualified as his administrator, and as guardian of his children. On the 1st of January, 1853, M. and K., as his surety, executed to A., guardian of the legatees of E., a paper, intended to be a bond, payable on demand for \$936.63, for the debt of M. to E. A. settled his accounts as guardian, charging himself with this bond. He died in 1867 or 1868, when the bond went into the hands of his administrators, one of whom offered it to the wards, but they declined to receive it, when he brought suit upon it against M. and K., recovered judgment, and issued execution in December, 1869, which was unproductive. From the date of the bond to the end of the war M. and K. were in independent circumstances. At the end of the war M. was very much injured, but still owned valuable land. K. was injured by the war, but he was able to pay his debts until 1869, when his land was greatly injured by a flood. Held, the estate of A. is liable to the wards for the debt. *Ergenbright v. Ammon*, 26 Gratt. 490.

Tresspass.—If a guardian consents to a trespass to his ward's property, the ward must seek compensation from the guardian. *Truss v. Old*, 6 Rand. 556.

(3) Conversion of Personalty into Realty.

Guardians have no authority to convert the personality of their wards into realty without the sanction of a court of chancery first obtained, and if they do so, may be called to account by their ward. *Boisseau v. Boisseau*, 79 Va. 73.

Sale of Property Purchased for Wards.—Where guardian properly invests wards' funds in real estate, and mistakenly, through no bad faith of his, conveyance thereof is made to the

wards' mother, and on discovery of the mistake, guardian procures her to convey the property to the wards by deed to be held in escrow, until wards' maturity, so as to give them option then to accept the conveyance, or to reject it and leave the property in the mother, and by accident the deed of conveyance is destroyed, and after her death the property is sold without objection on the wards' part, to pay her debts, guardian should not be held accountable. *Elliott v. Howell*, 78 Va. 297.

(4) Balance Due Ward on Termination of Guardianship.

The mere execution of a bond by a former guardian to his successor, for a balance due ward, does not exonerate the former guardian's estate from its primary liability. *Bennett v. Claiborne*, 23 Gratt. 366.

(5) Suits against Guardian.

A court of equity will not countenance the unjust litigation of an undutiful son against his mother, although she is his legal guardian. *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868.

Upon a bill filed to recover from the defendant a small sum of money, less than fifty dollars, alleged to have been received by him as guardian of the plaintiff and for a part of which he receipted for as such; but there being no other evidence that he had been appointed guardian or acted as such; and it appeared that very soon after receiving the money he paid over and accounted to the mother of the plaintiff, her natural guardian, for the whole of it; and there being no evidence that the plaintiff did not receive the benefit of the said money in her support and maintenance by her mother or that the defendant did not act in the utmost good faith; nor that either the plaintiff or the mother had any other estate; and it also appeared that the whole of said money had been paid over by the defendant more than ten years before suit was commenced; held, the plaintiff was not entitled to recover; and her bill

should have been dismissed. *Maguire v. Doonan*, 24 W. Va. 507.

b. To Third Persons.

(1) As Dependent on Mode of Contracting.

"An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal." *Duval v. Craig*, 2 Wheat. 45. And the same rule applies to the contracts of guardians, trustees, and all other persons acting *en autre droit*, the addition to the signature of the word 'agent,' 'executor,' 'trustee,' etc., being regarded as a mere *descriptio personæ*, unless, indeed, it appear that the party so signing his name was recognized as contracting in his representative character when the contract was made, in which case he will not be personally bound. *Taylor v. Davis*, 110 U. S. 330, 4 Sup. Ct. Rep. 147; *Metcalf v. Williams*, 104 U. S. 93; *Staples v. Staples*, 85 Va. 76, 7 S. E. 199; 1 Pars. Cont. 128." *Carr v. Branch*, 85 Va. 597, 8 S. E. 476, 480. See also, post, "For Necessaries," IV, C, 1, b, (2).

(2) For Necessaries.

Personal Liability for Support of Ward.—A guardian is not personally responsible for the support and education of his wards unless he consents to become bound for them. *Barnum v. Frost*, 17 Gratt. 398.

Guardian Is Not Liable Personally for Support of Ward, Only Ward's Income.—A guardian, in the absence of express contract, is not liable personally for the support of his ward, but the remedy is in equity against the ward's income, and the income only, and though he gives his bonds therefor, if they show an intention not to bind himself personally, he will not be bound. *Moncure, P.*, dissenting. *Barnum v. Frost*, 17 Gratt. 398.

Guardian's Contract Personal at Common Law.—But when guardian's contract is express, at common law, his contract is deemed personal; but where the guardian's undertaking is to pay for the ward's board out of the profits of ward's estate and is signed as guardian, it binds the ward's estate. *Barnum v. Frost*, 17 Gratt. 398. *Moncure, P.*, dissenting. See *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. 227.

A guardian can not be sued for necessities for his ward, unless he expressly promises to pay therefor. There is no implied promise which will sustain such action against him for necessities furnished the ward without his order; but if he make an express promise to pay, an action against him as an individual can be sustained. *Pinnell v. Hinkle*, 54 W. Va. 119, 46 S. E. 171, citing *Broadus v. Rosson*, 3 Leigh 12.

Liability of Second Guardian for Supplies Furnished to Ward under a Former Guardian.—Where there is no contract, express or implied, on the part of the second guardian, no action can be maintained against him for supplies and services furnished to the ward during the guardianship of a former guardian. *Young v. Warne*, 2 Rob. 420.

(3) To Husband of Ward.

It seems, that the executor or administrator of a husband who had survived his wife, but had never taken administration on her estate, may sue the guardian of the wife for her estate committed to him. *Templeman v. Fauntleroy*, 3 Rand. 434.

(4) Suits against Guardian.

Wards Not Prima Facie Necessary Parties.—A demurrer to a bill against a guardian for board, etc., furnished to his wards by the plaintiff, ought not to be sustained on the ground that the wards should have been parties, but leave to file an answer should be given and, if on the coming in of said an-

swer, it should appear proper, the wards should be made parties. *Sutton v. Gatewood*, 6 Munf. 398.

Payments under Mistakes of Law.—

If an administrator, with full knowledge of all the facts, voluntarily pays to the guardian of the infant children of his intestate sums of money in excess of the amounts to which they are entitled, under a mistake of law arising out of a misapprehension of the facts, he can not maintain a suit against such guardian to compel him to refund the amounts so paid to him in excess. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

Analogy to Limitation of Actions.—

Where an administrator has invoked the aid of a court of equity to recover from a guardian of a distributee money alleged to have been paid by mistake to such guardian, and the evidence adduced in support of such payment shows that it was paid more than five years before the suit was brought, and such guardian relies upon and pleads the statute of limitations, the court will, in analogy to proceedings at law, hold such demand barred by the statute of limitations, unless the plaintiff can bring himself within some of the exceptions of that act. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

An administrator suing in a court of equity to recover money alleged to have been paid in ignorance of a material fact to a distributee in excess of what he was entitled to, can not avoid the bar of the statute of limitations on the ground that the mistake was not discovered until after the statutory limitations for the commencement of the action had expired, if it appears that such material fact was sooner known to him, or that he was informed of such other facts as would be sufficient to put him upon such inquiry as would have led to the discovery of such material fact before such cause of action was barred. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

2. Liability of Ward.

a. To Guardian.

See post, "Credits Allowed Guardian," V, D.

For Necessaries.—A guardian, having no funds legally applicable thereto, who furnishes necessaries to his ward, has the same right to enforcement and reimbursement thereof as any other person furnishing such necessaries. *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868. Compare *Brown v. Grant*, 29 W. Va. 117, 11 S. E. 900; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

"The fact that § 9, ch. 82, Code, provides that neither the ward personally, nor his real estate, shall be liable for disbursements authorized by the court, does not destroy his common-law liability for necessities. Nor does the fact that, under § 8, the guardian can not, in his guardianship settlements, be allowed his expenditures over and above the ward's annual income and the disbursements authorized by order of court, destroy the guardian's individual common-law right to hold his ward liable for necessities furnished him for the payment of which there are no funds or estate in his hands legally liable. In *Woerner, Guardianship*, 187, it is said, 'It is an old and familiar doctrine that infants and other persons under disability to contract are bound, nevertheless, for necessities, to the extent of their reasonable value, to those who furnish them by reason of their need or at the request of the infant. * * * For necessities so furnished by a guardian, he will be reimbursed out of the ward's estate.' *Reading v. Wilson*, 38 N. J. Eq. 446; *Brent v. Grace's Adm'r*, 30 Mo. 253, 256; *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. 227." *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868, 871.

In the case of *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868, it is said: "This law was never intended in all its strictness, to apply to estates of small or inconsiderable value or in cases of emergency or necessity."

"The ward suing the guardian for a settlement after he reaches his majority, a court of equity will not require the guardian to establish his individual claim for necessities at law, but, having jurisdiction for one purpose, will do complete justice between the parties. Nor will it allow a just claim for necessities in excess of the funds in the guardian's hands, to the extent of such funds, to be barred by the statute of limitations, but will presume, from the lapse of time the ward was in bringing his suit, taken together with other circumstances, that the ward, on coming of age, acquiesced in the application of such funds to the payment of such necessities." *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868, 871.

Overpayment to Ward.—S., being second husband of M., and guardian of her infant daughters by first husband; and M., having claim to dower of lands of first husband, descended her infant daughters, over and above provision made for her by first husband's will; S., continually during his wife's life and after her death, carries the whole profits of the lands descended, to the credit of his wards, and finally settles his accounts, allows them credit for the whole profits, and pays them the balance. One of the wards being married, a bill is filed by her husband and her, praying to open, surcharge and falsify the accounts previously settled; and then S. claims as against them, credit for one-third of the profits, accrued during his wife's life, as belonging to her in right of dower. Held, that as S. accounted for and paid these profits, with full knowledge of his right, or at least of the facts out of which his right arose, he can not now recover them back. *Lee v. Stuart*, 2 Leigh 76.

b. To Third Persons.

See also, ante, "Sale of Ward's Real Estate," IV, A, 2, g.

Taxation.—As to situs of ward's property for taxation, see the title TAXATION.

Jurisdiction of Equity.—A court of equity has jurisdiction of all claims against a ward's estate. *Barnum v. Frost*, 17 Gratt. 398.

Advancements to Guardian for the Benefit of Wards.—Persons dealing with a guardian are not obliged to show that advances made to a guardian were necessary for the infants, and the acknowledgment of the guardian is sufficient proof of the advancement and price of the goods, nor are such persons obliged to see that such advancements are not paid for out of the principal of the ward's estate, though if they are indeed aware of such fact they can not recover against the ward's estate. *Broadus v. Rosson*, 3 Leigh 12.

Bonds for Ward's Expenses.—Bonds executed by the guardian, as guardian, showing on their face that they are given for the ward's expenses, and which at the time he promises to pay out of the profits of the ward's estate as soon as he can collect them, will not relieve the ward's estate from liability for these expenses. *Barnum v. Frost*, 17 Gratt. 398.

Support and Education of Ward.—A guardian placing his ward with a third person, to be supported and educated, though he may undertake to pay the ward's expenses, does not thereby relieve the ward's estate, but the person with whom the ward has been placed may proceed in equity to subject the profits of the ward's estate to the payment of her expenses. *Barnum v. Frost*, 17 Gratt. 398.

Court May Order Sale of Personalty.—Out of annual proceeds of ward's estate, his maintenance and education may be provided. To pay expense therefor in excess of annual income, chancery court may order sale of his personalty. But neither ward himself nor his real estate is liable therefor. Va. Code, 1873, ch. 127, §§ 7, 8, 9; *Gayle v. Hayes*, 79 Va. 542. See also, *Cumming v. Simpson* (Va.), 1 S. E. 657; *Rinker v. Streit*, 33 Gratt. 663.

3. Liability of Third Person to Guardian or Ward.

a. For Legacy or Distributive Share.

Improper Payment of Legacy to Guardian.—Until a legacy is payable, the executor can not relieve himself and his sureties from responsibility for it, by paying over the legacy to the guardian of the legatee. *Swope v. Chambers*, 2 Gratt. 319.

Set-Off of Guardian's Individual Debt.—Where a court of competent jurisdiction has confirmed the final account of an administrator, and by its decree directed a certain sum of money to be paid to a guardian as the estate of his ward, such administrator can not set off against the amount so decreed to such guardian a debt due to him from such guardian in his individual capacity. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

Executor Not Entitled to Commissions.—When the parties entitled are infants, and the personal representative has neither given their guardian a complete statement in writing, nor paid the money over to the guardian, within the time aforesaid, but has only given information verbally and by informal memoranda to the guardian, concerning the receipts for the year, he is not entitled to commission on the shares of the infants. *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589.

b. For Fraudulent, Collusive or Unauthorized Transactions.

(1) In General.

Those Who Collude with Guardian in Breach of Trust, Held Equally Liable with Him.—"It is firmly established that a party who concert with a fiduciary in a misapplication of trust funds or in any other act contrary to the duty of the fiduciary becomes particeps criminis and will be held liable accordingly." *Staples, J., in Asberry v. Asberry*, 33 Gratt. 463.

And where such party receives the assets of the ward's estate in payment of a private debt of the guardian to

him, the law stamps such a transaction as conclusively fraudulent, and he will be held to account, however bona fide he may have acted. *Asberry v. Asberry*, 33 Gratt. 463.

(2) Vendors and Vendees.

It is proper for a purchaser of land from an administrator who is also a guardian, to execute bonds to the guardian for the purchase price, but if he colludes with the guardian in a breach of trust, he will be held ultimately responsible in case of the insolvency of other parties. *Broadus v. Rosson*, 3 Leigh 12.

The purchaser of the land executes bonds for the purchase money in such proportions as the guardian requires, with a view to enable him to transfer bonds to others, for his own purposes; the guardian assigns one bond to T. and another to N. (who are both apprised of the right in which he held them, and that he is in failing circumstances) partly for his own individual debts and for cash advanced him; the guardian dies insolvent. Held, the sureties of the guardian are primarily responsible to the wards, for so much of these bonds as the guardian misapplied to his own use; the assignees are bound to reimburse the sureties, the debt and costs recovered of them by the wards; each assignee is severally liable for what he received; if assignees prove unable to pay, the purchaser is bound to reimburse the sureties; and if the sureties fail, the wards may have recourse against the assignees first, and then the purchaser, they being apprised of, and aiding in, the guardian's breach of his trust. *Broadus v. Rosson*, 3 Leigh 12.

"In *Broadus v. Rosson*, 3 Leigh 12, the parties dealing with the guardian were fully aware of his breach of trust, and actively co-operated with him therein for their own benefit; and for that reason were held liable." *Hunter v. Lawrence*, 11 Gratt. 111, 133.

Previous Sanction of Court.—Vendor to guardian, receiving payment

out of ward's funds without previous sanction of court, is held to be a participant in the guardian's offense, and equally liable with him. *Boisseau v. Boisseau*, 79 Va. 73.

B. sold to guardian house and lot in D. for \$1,500, and received in part payment \$750 of the ward's estate, and for balance executed, as such guardian, his three bonds each for \$250, payable with eight per cent. per annum interest from date, in one, two and three years, all without previous sanction of court. Held: 1. The transaction was unauthorized and invalid. 2. B. should be required to refund the cash paid, with interest; and in default thereof, the property should be sold for the ward's benefit. *Boisseau v. Boisseau*, 79 Va. 73.

"In *Broadus v. Rosson*, 3 Leigh 12, 25, Tucker, P., speaking for the court, said: 'Where he (the vendor) is aware that he is receiving payment out of a fund which the law will not permit to be encroached upon without an order of the court, I think he stands on no more advantageous ground than the guardian himself.' And in *Asberry v. Asberry*, 33 Gratt. 463, 470, this court held, that as Evans knew that the guardian was using the ward's money in paying his own debt, therefore he knew, or must be held to know, that the guardian was thereby misapplying the funds and committing a breach of trust. In that case, the learned judge who delivered the opinion of the court, said: 'The learned counsel says that Evans acted in entire good faith, without a suspicion of anything improper in the transaction. It may be so. It is wholly immaterial. The law stamps the transaction as fraudulent, however innocent the intention of the parties, not actual fraud in this case, but fraud in law arising from a misapplication of trust funds. And this is what is meant by the learned judge of the circuit court in saying it was a collusive transaction.'" *Boisseau v. Boisseau*, 79 Va. 73, 78.

Innocent Purchaser of Bond.—The breach of trust of the guardian is not alone sufficient to invalidate his transactions with innocent parties, and an innocent purchaser of a bond from the guardian, payable to him, for value and without notice, will not be made to account to the injured ward, since their equities are equal and the purchaser has the advantage at law in having collected the money due on the bond. *Hunter v. Lawrence*, 11 Gratt. 111.

A bond executed to an executor is transferred by him to a guardian as part of the ward's estate; the guardian is himself a legatee for a large amount of the same testator, and is guardian of another legatee; and he receives the amount of these legacies from the executor in bonds and other evidences of debt. Upon the marriage of the last-mentioned legatee, he transfers to her husband the bond belonging to the first-named ward in part discharge of her legacy, he being at the time in good circumstances and his sureties as guardian being wealthy. The husband takes the bond at par, without knowing or suspecting that it is the property of the first-named ward; and takes it without a hope of gain or fear of loss, but simply as a mode of payment convenient to both parties. Years afterwards the guardian becomes insolvent by the failure of speculations in which he is then engaged. Held, the husband, who received the bond, is not responsible to the ward, whose property it was, for the amount thereof. *Hunter v. Lawrence*, 11 Gratt. 111.

"In *Bank of Virginia v. Craig*, 6 Leigh 399, 426, Judge Carr says: 'The power and legal title of Fox (the guardian) to dispose of the stock (the ward's property), is proved by many cases.' And in this opinion Judges Brockenbrough and Cabell concurred. In the same case, p. 428, Judge Tucker says: 'It is conceded, also, that, as a general rule, a guardian has power to dispose of the personal estate of his

ward; and though personally responsible for so doing, the vendee to whom he sells is not responsible if he has dealt fairly and justly, and without notice of any fraudulent intent." *Hunter v. Lawrence*, 11 Gratt. 111, 131. See also, *Brockenbrough v. Turner*, 78 Va. 438, 455.

Merchant Who Furnishes Goods.—Though a guardian has no right to expend the principal of his ward's estate, yet if he take up goods for his ward, the merchant who furnishes them is not bound to see that the profits of ward's estate are sufficient to pay for them and the principal is not applied to pay for them. *Broadus v. Rosson*, 3 Leigh 12.

c. Liability of Bank for Improper Sale by Guardian.

A guardian has power to dispose of his ward's personal estate, hence he can sell his ward's bank stock and have it transferred on the books of the bank and where such sale is improperly made, the guardian's sureties will be responsible and not the bank, where the only notice to the bank consists of a subpoena, with a restraining order endorsed on it by the clerk, served on the president. *Bank of Virginia v. Craig*, 6 Leigh 399.

V. Accounting and Settlement.

A. NECESSITY.

See post, "Accounting as a Prerequisite to Suit on the Bond," VI, B, 1.

A court ought not to undertake to make a decree in a case where there are mutual accounts, without referring such accounts to a commissioner to report. *Bland v. Wyatt*, 1 Hen. & M. 543.

When Accounting Prior to the Decree Not Necessary.—But it is not necessary that an account be taken before a decree can be rendered, where the property of the ward consists of a single claim and there is no doubt as to the amount due from the guardian. *Sage v. Hammond*, 27 Gratt. 651.

B. BEFORE WHOM ACCOUNTS MAY BE SETTLED.

Settlement before Commissioner Acting under Confederate Government Valid.—The settlement of a guardian's accounts before a commissioner of a county court acting under the confederate government of Virginia, is as valid as if made prior to the war, i. e., prima facie correct, but subject to be surcharged and falsified. *McClure v. Johnson*, 14 W. Va. 432.

C. HOW ACCOUNTS SHOULD BE KEPT AND STATED.

Accounts of Wards Should Be Kept Separately.—Where there is more than one ward, the proper way is to state the account of each ward separately, either from the beginning or from the time when the claims of the wards ceased to be the same in amount. *Armstrong v. Walkup*, 9 Gratt. 372. See *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87.

Accounts as Guardian and as Executor.—The accounts as guardian should be kept separate from those as executor. *Hannah v. Boyd*, 23 Gratt. 692.

D. CREDITS ALLOWED GUARDIAN.

1. In General.

A guardian should be credited with all proper disbursements. *Garrett v. Carr*, 1 Rob. 196, 209.

2. Support, Maintenance and Education.

a. In General.

A guardian is entitled to credit in his own account for the support and education of his ward, and the fact that he promised to support and educate them free of charge, if without consideration, is no defense, since he is under no obligation to do so. *Armstrong v. Walkup*, 9 Gratt. 372; *Sayers v. Cassell*, 23 Gratt. 525; *Hurst v. Hite*, 20 W. Va. 183, 205. *Semble contra*, *Hooper v. Royster*, 1 Munf. 119. But in this case, as in *Sayers v. Cassell*, although no direct allowance was made

for board, still no interest was allowed during the period the ward resided with the guardian. See also, *Jackson v. Jackson*, 1 Gratt. 143; *Brown v. Brown*, 2 Wash. 151; *Arrington v. Cheatham*, 2 Rob. 492; *Hauser v. King*, 76 Va. 731.

Suits to Ward's Estate and Condition.—D. qualified as guardian of C., in August, 1858, and acted as such until his death in April, 1861. His executor, W., acted as guardian of C. until April, 1862, and had the account of D. settled, showing due from him to C. \$4,133.98; for which sum W. gave his bond to B., who qualified as guardian of C. in April, 1862; and afterwards paid B., at different times \$2,551. B. ceased to act as guardian of C. in December, 1863, when S. became guardian. The income of the estate of C. in the hands of the guardians was not equal to the expenditures upon her; but her whole income, including that in the hands of her father's executors, during the whole period of the guardianship, was equal to her expenses; and these were only suitable to her estate and condition in life. Held, the guardians are entitled to have the whole income of C. applied to pay their expenditures upon her. *Bennett v. Claiborne*, 23 Gratt. 366, citing *Foreman v. Murray*, 7 Leigh 412.

The estate of D. is to be charged with the amount found due from him; and credited for the money paid by his executor, W., at its scaled value. *Bennett v. Claiborne*, 23 Gratt. 366.

Where Wards Are Kept in the Guardian's Family.—Where their circumstances do not require that they should be apprenticed, it is proper for the guardian to keep his wards in his family, and in such case the guardian is entitled to a reasonable compensation for their board and clothing. *Armstrong v. Walkup*, 12 Gratt. 608.

Where Guardian Makes Advances to Ward's Family.—Where a ward is supported by his mother, and the guardian makes large advances for the fam-

ily's support, including said ward, it is proper to allow the guardian a reasonable allowance for the support of said ward. *Cunningham v. Cunningham*, 4 Gratt. 43.

Excessive Charge for Board and Clothing.—In the case of *Williamson v. Howard*, 2 Rob. 39, 40, it was considered in the appellate court, that a guardian, who had been culpably in default in failing to render any account of his receipts or disbursements, was allowed by the court below more for the board and clothing of his ward, than he was entitled to; but as a particular sum payable by the ward had not been charged in the court below, it was deemed best to consider that as an equivalent for the excess of the charge for board and clothing, and (saving the parties the delay and expense of restating the guardian's account) to terminate the case by affirming the decree.

b. Necessary and Proper Expenditures.

A horse.—In *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. 227, a horse purchased on ward's written request was held to be a proper item of the support of a ward.

Ratification by Infant after Age.—Where a ward uses a horse purchased for her by her guardian, and after age, trades him off, and finally receives the proceeds, though her estate is not bound during minority by her guardian's note for the purchase price, such acts are deemed a ratification, and where a succeeding guardian buys up the note, he will be allowed credit for it in the settlement of his guardianship accounts. *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. 227.

Burden of Proof.—But the guardian and his sureties are bound to show that expenditures were necessary and actually made. *Broadus v. Rosson*, 3 Leigh 12.

c. Allowance to Parents.

See also, the title PARENT AND CHILD.

Allowance to Father as Guardian.—

A father, if of ability, is bound to maintain his infant children, even though they may have property of their own; yet, where the father is guardian as well, the court, if, from a comparison of the estates of father and children, it deems it proper, will authorize the income from the children's estates to be applied to their support. But when the application to allow the income to be so appropriated is not made, as it ought to be, in advance, and is delayed until the guardianship has terminated, the court will not permit it without the clearest proof that justice requires it. *Evans v. Pearce*, 15 Gratt. 513.

G., who was the guardian of two of his children, maintained and educated them at his own expense, and made no charge against them. He died in February, 1861, up to which time his estate was ample to pay his debts, but, by losses incurred since his death, it is not sufficient to pay them. In a question between creditors of G., his two children, for whom he was guardian, are not to be charged in the guardianship account with the expense of their maintenance or education. *Griffith v. Bird*, 22 Gratt. 73.

Even though the father, being guardian, be authorized by the court to use the income from the ward's estate for her support and education, yet if there is nothing in the record to show that he either intended to or did use her income for such purposes, and he had sufficient means to maintain her himself, no allowance will be made for such purposes after the guardianship has terminated. *Stigler v. Stigler*, 77 Va. 163. See also, *Griffith v. Bird*, 22 Gratt. 73; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776; *Myers v. Wade*, 6 Rand. 444.

In *Hauser v. King*, 76 Va. 731, the case of a father as guardian is distinguished from that of a committee of a lunatic who is entitled to allowance for

lunatic's support. The court says: "This is not like the case of a father called to account as guardian of his infant child. In such a case, as a general rule, and in the absence of peculiar circumstances warranting a departure from it, no allowance for support out of the ward's estate is made to the guardian, if of ability to maintain the ward, because the law imposes upon the father the duty to support his child. 'The court, however,' it is said, 'will look with liberality to the circumstances of each particular case and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all the circumstances, it appears to be proper.' *Evans v. Pearce*, 15 Gratt. 515, 516. See further, as to allowances to guardians, *Armstrong v. Walkup*, 9 Gratt. 372; *Griffith v. Bird*, 22 Gratt. 73; *Sayers v. Cassell*, 23 Gratt. 525."

Allowance to Mother as Guardian.—

Where the mother, testamentary guardian of her two daughters, marries again, she and her husband are entitled to compensation for the maintenance of the infant wards, in a manner suitable to their condition and including medical treatment, etc., where necessary. *Mears v. Sinclair*, 1 W. Va. 185.

In *Myers v. Wade*, 6 Rand. 444. Judge Coalter said: "Had the widowed mother possessed an estate sufficient for the maintenance and education of her infant children, although I am not prepared to say that she would have been bound to expend it in that way, yet, had she thought proper to do so, it would have been a voluntary donation, in no wise a bar to their future claim to their own estate."

d. Limited to Income of Ward's Estate.**(1) In General.**

Profits Exclusive of Increase of Slaves.—A guardian shall not be al-

lowed, for his disbursements for the maintenance and education of the ward, more than the profits of the ward's estate; and those profits shall be taken exclusive of the increase of slaves belonging to the ward. *Anderson v. Thompson*, 11 Leigh 439.

Extraordinary Circumstances.—The allowance to guardians or those who act as quasi guardians, for support, etc., of their wards, is limited to the income of ward's estate except under very extraordinary circumstances. *Jackson v. Jackson*, 1 Gratt. 143.

A guardian is entitled to compensation for the clothes, schooling, and other necessary expenses of her ward, in so far as such advances are suited to the estate and condition of said ward and did not, after said ward came to an age to be bound out, exceed the profits of his estate; unless it shall appear, that from extraordinary circumstances, such disbursements were unavoidable, without culpable neglect on the part of said guardian, in which case such disbursements should be allowed out of the principal with interest on same from the end of each year. *Hooper v. Royster*, 1 Munf. 119.

Not Confined to Income of Property in the Hands of Guardian.—A guardian, in the allowance to him for support of ward, is not to be confined to the income from the estate of the ward in his own hands, but that from the ward's estate in the hands of the administrator is to be included also, so as not to exceed the whole income. *Foreman v. Murray*, 7 Leigh 412. See also, *Bennett v. Claiborne*, 23 Gratt. 366.

A Deficit in First Years May Be Made Up by Surplus in Later Years.—If the expense of educating and maintaining infant wards exceed the annual income of their estates, until they are old enough to render services, then the surplus income from that time till they come of age ought to be set off against the surplus expenditure dur-

ing former period. *Myers v. Wade*, 6 Rand. 444.

But the surplus in the hands of the guardian at the end of any one year becomes part of the principal and can not be expended to meet disbursements of succeeding years without authority of court. *Garrett v. Carr*, 1 Rob. 196.

When Authorized by Will.—A guardian may be authorized by decedent's will to expend the principal of ward's estate. *Barton v. Bowen*, 27 Gratt. 849.

Guardian and Ward—Education of Ward—Application of Principal of Estate to.—In *Myers v. Wade*, 6 Rand. 444, decided in 1828, it was held, that a guardian can not apply any part of the principal of the infant's estate to his education or maintenance, without the previous consent of the court appointing the guardian, according to the provisions of the 26th section of the act concerning guardians. See also, *Garrett v. Carr*, 3 Leigh 407; *Broadus v. Rosson*, 3 Leigh 12. Compare post, "Under the Virginia Code," V, D, 2, d, (2).

A parent who is guardian of his children, is more bound than others to a strict observance of this rule; for there is a natural, if not a legal obligation on all parents to support their children, if of ability to do so. By *Green, J. Myers v. Wade*, 6 Rand. 444.

(2) Under the Virginia Code.

Personal Estate.—The guardian may, in a proper case, apply the principal of the ward's personal estate, to his maintenance and education, and, if the court would have authorized it in advance, it will sanction such an application if already made by the guardian. *Rinker v. Streit*, 33 Gratt. 663. See also, *Barton v. Bowen*, 27 Gratt. 849; *Sedgwick v. Taylor*, 84 Va. 823, 6 S. E. 226; *Cogbill v. Boyd*, 77 Va. 450, 455.

A guardian is not authorized to use the principal of the ward's real estate for the support and education of his

ward and a court of equity settling his account could not render the expenditure valid by its decree. *Rinker v. Streit*, 33 Gratt. 663.

Where the income of the estate of the ward is insufficient for her support and education, and her guardian expended the principal of the proceeds of the sale of her real estate upon her, and upon the settlement of his account after the termination of his guardianship, he was still in advance to his ward, it was held, that a court of equity in settling his account could not render the expenditure valid by its decree. *Rinker v. Streit*, 33 Gratt. 663.

Real Estate.—Chapter 123, § 13, Va. Code, 1873, which authorizes the chancery court in certain cases to allow the application of the real estate to the maintenance and education of a ward, does not authorize the court to sanction such application already made by the guardian; but the order of the court must be first made in order to authorize it. *Rinker v. Streit*, 33 Gratt. 663; *Gayle v. Hayes*, 79 Va. 542; *Cumming v. Simpson* (Va.), 1 S. E. 657; *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. 195. See also, *Harkrader v. Bonham*, 88 Va. 247, 16 S. E. 159.

Neither Ward Personally, Nor His Real Estate Liable.—If disbursements have been made beyond the income in accordance with § 2604, Va. Code, 1887, neither the ward personally nor his real estate is liable, so where the ward has no personal estate and the guardian has not applied to the court in advance to sell the ward's land for his maintenance and education, the guardian can not be reimbursed. *Harkrader v. Bonham*, 88 Va. 247, 16 S. E. 159; *Gayle v. Hayes*, 79 Va. 542.

(3) Under the West Virginia Code.

Application in Any Case Must Be in Advance, as Was the Old Statute in Virginia.—A guardian can not, without a previous order of court, use any part of the principal of the ward's personal estate for any purpose,

and a court can only make such order for maintenance or education, not for improvement of land or other purpose (opinion reserved as to a child too young to be bound out). *Windon v. Stewart*, 43 Va. 711, 28 S. E. 776; ch. 82, § 8, W. Va. Code, 1891. But see *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. 227; *MaGuire v. Doonan*, 24 W. Va. 507; *Jones v. Lemon*, 26 W. Va. 629, 634; *Brown v. Grant*, 29 W. Va. 117, 11 S. E. 900.

In *Brown v. Grant*, 29 W. Va. 117, 11 S. E. 900, it is said: "By the eighth and ninth sections of our amended Code, the power of the court to sanction the sale of even the personal estate of the ward, where it has been made without the order of the court, is taken away."

Under the laws of this state, a guardian who has made disbursements for his ward, in excess of the income of the ward's estate, can not make the ward personally, or his real estate, liable for such disbursements. So held, in a case which arose under the acts of 1872-73. *Brown v. Grant*, 29 W. Va. 117, 11 S. E. 900. Compare *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868.

3. Improvements and Repairs.

Beneficial Improvements.—The guardian or quasi guardian may be allowed compensation not only out of the income, but out of principal also of the ward's personal estate for improvements of ward's real estate, where they are obviously beneficial to the infant, the value of such improvements to be taken at the time of final accounting, by deducting the depreciation from decay from the amount expended on the improvements. *Jackson v. Jackson*, 1 Gratt. 143. Contra as to principal in West Virginia, *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

Articles Necessary for the Realty—Guardian's Oath Sufficient.—Where articles are proved by disinterested testimony, to have been purchased by the

guardian for the necessary purposes of the real estate, he should have credit for them out of the rents, without further proof than his oath that they were so applied. *Newton v. Poole*, 12 Leigh 112, 116.

Repairs Which Tenant Should Make.

—But a guardian can not allow the tenant for repairs which the tenant should make and get credit in his account against the ward. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

4. Payments and Advancements.

Claim of Mother and Stepfather.—

C. is appointed a guardian for A. and G., infant children of J. H., who enlisted in the United States army, and was killed in 1863, leaving a widow, who married a widower with eight children in the latter part of the year 1863, and by him she became the mother of eight more children. The guardian applied for and obtained a pension for his said wards, after considerable delay, in November, 1875. In December, 1875, the mother of said wards and her second husband presented a claim to said guardian for keeping, clothing, and schooling said wards for eleven years up to December 4, 1875, amounting to \$1,056, which was paid by said guardian out of said pension money as of that date, he taking their receipt for the amount so paid. Said guardian also paid said parties \$105 on the 23d day of June, 1877, and \$100 on the 6th day of January, 1879, for boarding, schooling, and clothing said wards, taking receipts for the amount so paid, but neither receiving nor requiring the production of an itemized account of the claim so presented; and upon a settlement of his accounts before a commissioner on the 20th day of December, 1882, said guardian was charged with \$1,505.53 as received in January, 1876, although really received in December, 1875, and \$30 every three months thereafter until February, 1878, making the aggregate amount received \$1,715.53, and cred-

ited with \$1,056 as of December 4, 1875, \$105 as of June 23, 1877, and \$100 as of June 6, 1879, and \$10 as of December 10, 1877, paid by said guardian to said parties aforesaid; said commissioner charging said guardian with no interest upon the amounts so received by him. Upon a bill filed to surcharge and falsify said account and the proceeding had therein, held, that the claim presented by the mother and stepfather of said wards stands on no different footing than it would if presented by a stranger. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87.

Itemized and Proved.—Credit will not be allowed a guardian for payments on account of his wards, even where he has the previous authority of the court to expend the principal of their estate, unless the accounts against the ward are itemized and sustained by satisfactory proof. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87.

An account of a mother and stepfather for keeping, clothing and schooling against an infant should not only be itemized, but should be sustained by satisfactory proof; and a guardian, although duly authorized to disburse the principal of his ward's estate for education and maintenance, should require such proof before paying the same. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87.

The administrators of a guardian, who received moneys arising from a judicial sale in a partition cause of land descended to the ward from her father, can not, in a settlement of the guardianship for such moneys, set off to the credit of the guardian's estate, against such moneys, a judgment recovered by the administrators of the guardian against the administrator of the father of the ward for a debt due from him in his lifetime. The judgment is no evidence of debt against the ward, as an heir of her father. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213.

An order made by a court upon a suggestion filed by the administrators

of the guardian, suggesting that by reason of an execution upon such judgment there is a liability on them as administrators, directing such administrators to apply to the payment of such execution any money or estate in their hands as administrators belonging to or for which they were liable to the administrator of the father of such ward, can not operate to give such administrators credit against such moneys of the wards in a settlement of the guardianship account, any more than the judgment. The suggestion under the statute is only a proceeding to enforce the lien of an execution upon a judgment, and can add no force to the judgment, nor subject estate which that execution could not reach. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213.

Payment of Debts of Ward's Father.

—A guardian having received the ward's personal estate from the administrator of his father, and paying a debt justly due from decedent's estate, is entitled to credit with the ward for such payment. *Foreman v. Murray*, 7 Leigh 412.

Cash Payments to Ward Must Be Ratified by Ward after His Majority.

—A guardian should not be credited with cash payments to his wards during their minority, unless the proof is clear that wards ratified said payment after majority. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87.

Claims Barred by Statute of Limitations or Otherwise.—Credit will not be allowed a guardian for payments made by him on account of his ward which were barred by the statute of limitations or illegality of consideration or any other fact within his knowledge. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87.

If the recovery of a claim for keeping, clothing and schooling presented by the ward's mother and stepfather, or any portion of it, could be prevented by illegality of consideration or lapse of time, or any other fact within his knowledge, the guardian must avail

himself of such defense, or he can obtain no credit for the amount paid. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87, 88.

Payments in Confederate Money.

Payments made by a guardian in confederate money are to be credited to him at their scaled value. *Bennett v. Claiborne*, 23 Gratt. 366.

A second guardian having received the amount of an ante war bond, and paid therewith ante war expenses of a ward incurred during the guardianship of a former guardian, these payments to the amount of said bond are not to be scaled; but all other disbursements of the second guardian are to be scaled. *Bennett v. Claiborne*, 23 Gratt. 366.

Where a guardian receives sums, due his ward, in sound money and makes payments to his successor in confederate money, he will be credited with only the scaled value of such payments; absence of fraudulent intent is no defense. Act of March 3, 1886, does not apply. *Jennings v. Jennings*, 22 Gratt. 313.

Where a guardian pays for the maintenance and education of his ward during the civil war with the proceeds of ante bellum debts, such payments are not to be scaled as of the date of payment, but he is not to be allowed a reasonable charge in sound money. *Barton v. Bowen*, 27 Gratt. 849.

In the case of *McDearman v. Robertson*, 1 Va. Dec. 354, 355, it was held, that the commissioner was right in scaling the amounts paid by the guardian in confederate money in 1863 and 1864, from their nominal amounts to the actual value of the same in gold, as of the dates when they were severally made.

Depreciated Paper Money.—By the appointment of a second guardian, in the room of a former one, the power of the former, as well as his habit of receiving and disbursing moneys, generally, on account of the ward, ceases; and therefore, payments made by him in depreciated paper money to the sub-

sequent guardian, are not subject to the scale. *Walker v. Walke*, 2 Wash. 195.

Payments by a former to a subsequent guardian, in depreciated paper money, should be accounted for at their nominal amount, and are not subject to the scale of depreciation. *Walker v. Walke*, 2 Wash. 195.

5. Compensation.

See also, the title TRUSTS AND TRUSTEES.

E. CHARGES AGAINST GUARDIAN.

Forfeiture of Compensation by Guardian.—A guardian forfeits his claim to compensation by failure to lay his accounts before a commissioner within six months after the expiration of each year. W. Va. Code, 1887, § 7. But guardian should be allowed any reasonable expenses incurred by him. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87. See also, *Jennings v. Jennings*, 22 Gratt. 313; *Strother v. Hull*, 23 Gratt. 652, 670.

In the case of *Jennings v. Jennings*, 22 Gratt. 313, a guardian not having invested the money of his wards but having used it for his own purposes and not having settled his account was held not entitled to compensation.

1. Property Received.

Chargeable with Property Received before Appointment.—If one who is not their guardian, receives the legacies of infants, and is afterwards appointed their guardian, such legacies become chargeable to him, as guardian, by operation of law. *Thurston v. Sinclair*, 79 Va. 101.

Absence of Commissioner during Civil War.—Where a guardian failed to settle his accounts within the time required by law, if it happened during the war, contrary to the general rule, extraneous testimony will be admitted to show that there was no commissioner. *McClure v. Johnson*, 14 W. Va. 432.

Produce of the Estate.—In the case

of *Garrett v. Carr*, 1 Rob. 196, 219, it is said: "He will, of course, credit himself with all his proper disbursements; and he ought to debit himself with every item of 'the produce of the estate;' an expression sufficiently broad to include not only the proceeds of crops, hires of slaves, etc., but all sums of money belonging to the ward and received by the guardian, from whatever source they may have come. It will clearly embrace money which he had actually received; as interest on a debt, from a debtor of the ward. It will also, in my opinion, embrace any interest due to the ward from the guardian, as guardian, at the date of the settlement."

Money Not Embraced in Statement.

—Where a fiduciary lays before a commissioner of accounts a statement of receipts for any year within six months after its expiration, and he be found chargeable for that year with any money not embraced in such statement, he shall have no commission on the money not so embraced in the statement, unless allowed by the court. Section 7, ch. 87, W. Va. Code. *Kester v. Hill*, 46 W. Va. 744, 34 S. E. 798.

Damages for Trespass.—A guardian who maintains an action for trespass to his ward's property must account to the ward for the damages recovered. *Truss v. Old*, 6 Rand. 556.

But such fiduciary is entitled to commission on money included in such statement. *Kester v. Hill*, 46 W. Va. 744, 34 S. E. 798.

Bank Stock Belonging to Ward.

Where a guardian misappropriates bank stock of his ward, no commissions will be allowed on the value of the stock; but only on the amount of the dividends. *Bank of Virginia v. Craig*, 6 Leigh 399.

Amount of Commissions.—In *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. 227, it is said: "The next exception is claimed because the commissioner had allowed the guardian a sum for look-

ing after the real estate of his ward. The commissioner in the case under consideration allowed the guardian ten per cent. for his trouble in looking after and managing her estate. This sum the commissioner thought reasonable, and the court below has approved his finding. Prof. Minor, in his *Institutes* (vol. 1, p. 490), says: 'A commission of 7½ and even 10 per cent. has been allowed under peculiar circumstances, where the estate was troublesome to manage, and the amount of money received small' (which comports with the facts in this case), citing *Fitzgerald v. Jones*, 1 Munf. 150, 156; *McCall v. Peachy*, 3 Munf. 288, 306; *Cavendish v. Fleming*, 3 Munf. 198, 202."

2. Services of Wards.

Wards are not entitled to charge their guardian for their services, where such are not needed and are of trifling value. *Armstrong v. Walkup*, 12 Gratt. 608. See, however, *Snively v. Harkrader*, 29 Gratt. 112.

3. Liability for Loss.

a. In General.

Where a guardian does an act, and it is sought to make him liable for a resulting loss, on the theory that his act was injudicious, if the act was in entire good faith, and the fault was only an error of judgment, and the act be one which, as a prudent man, he might have done in his own affairs, he can not be made liable. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776. See also, *Elliott v. Howell*, 78 Va. 297; *Kester v. Alexander*, 47 W. Va. 329, 34 S. E. 819; *Myers v. Zetelle*, 21 Gratt. 733.

b. Failure to Lease or Leasing for Inadequate Rent.

A guardian is entitled to possession of his ward's land till her majority, and the ward is entitled to have the land rented out, and if the guardian negligently fails to get rent it is his own fault and he is chargeable with what he might have received, if he had ex-

ercised due diligence. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

Where a guardian leases his ward's land, he is presumed to have acted in good faith, and he can not be charged with a higher rental, unless the rent be so inadequate as to carry the conviction of bad faith. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

c. Where Money Is Deposited by Guardian in His Own Name.

Deposits Lost by Destruction of Whole Currency of the Country.—"A bona fide deposit of the money of his wards by the guardian in his own individual name, provided that it can be shown that it was in fact the money of his wards, will acquit and protect the guardian from the responsibility for loss, which ensues, not from the form or designation of the deposit, but from the general and universal destruction of the whole currency and all the banking and financial interests of the state." *Fauntleroy, J.* And the declarations of the guardian, contemporaneous with the deposit, that the money belongs to his wards, are competent evidence to prove the fact. *Parsley v. Martin*, 77 Va. 376.

d. Failure to Collect.

Where a guardian is negligent in collecting a bond, and after ample time for collection, the obligors become insolvent, the guardian is liable. *Ergenbright v. Ammon*, 26 Gratt. 490.

If a guardian fails to collect a debt when the debtor's assets are ample, he will be charged with the amount of the debt. *Brown v. Brown*, 2 Wash. 151.

Claims of Doubtful Collectibility.—It is error to hold a guardian responsible for claims due his ward without first inquiring as to collectibility of said claims and as to whether the guardian is guilty of negligence in failing to collect them. *Lincoln v. Stern*, 23 Gratt. 816.

e. Failure to Invest.

Due Diligence Must Be Employed.—

It is the duty of a guardian to invest

properly the funds coming to his hands, belonging to his wards, and for his failure to do so, he will incur responsibility according to the nature of the case and its attendant circumstances. *Elliott v. Howell*, 78 Va. 297.

Reasonable Time.—A reasonable time ought to be allowed a guardian to put the money of his ward out at interest; and in this case six months were considered as such reasonable time. *Hooper v. Royster*, 1 Munf. 119.

Two Months.—In *Cunningham v. Cunningham*, 4 Gratt. 43, two months was held a proper time to be allowed a guardian for collecting and investing the annual profits of his ward's estate.

Six Months.—Interest is not to be charged to the guardian on money received by him, from the day of receipt, but he is to be allowed six months in which to invest it. *Armstrong v. Walkup*, 12 Gratt. 608; *Hooper v. Royster*, 1 Munf. 119.

Thirty Days.—The provision of § 2608, Va. Code, 1887, allowing the guardian thirty days, during which time no interest shall be charged against him to invest funds of his ward does not apply where he fails to make any investment thereof, and he is charged with interest from the date of receipt. *Snively v. Harkrader*, 29 Gratt. 112, 113. See the acts of 1855-56, p. 36.

In the case of *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87, 88, it was held, that pension money received by a guardian for his wards should have been invested or loaned within thirty days after it was received, and he should have been charged with interest thereon after that time, unless he should have sooner loaned or invested the same.

Guardian's Own Bond.—A guardian receiving from the administrator of the father of his wards his own bond bearing twelve per cent. interest, as a part of his ward's estate, and not investing the same, is to be charged the same rate of interest upon it to the termina-

tion of his guardianship. *Snively v. Harkrader*, 29 Gratt. 112, 113.

When Commission Should Be Credited.—In the stating of a guardian's account, his commissions on the money received by him should be credited at the time of the receipt of the money, and interest only charged on the balance. *Snively v. Harkrader*, 29 Gratt. 112, 113.

f. Where Guardian Receives or Invests in Depreciated Securities or Money.
(1) **Revolutionary.**

Money received by a guardian for a ward, during the paper money times, ought to be reduced by the scale of depreciation; to be applied as on the last day of the year in which it was received. *Hooper v. Royster*, 1 Munf. 119.

If money was received by a guardian for a ward, within six months previous to the first of January, 1777 (when the scale of depreciation commenced), it should be reduced according to the scale, as at the end of six months from the time when received. *Hooper v. Royster*, 1 Munf. 119.

Legacies—When Payment in Depreciated Paper Money Good.—A legacy paid in the year 1778, to the guardian of the legatee in depreciated paper money, is a good discharge of the executor, at the nominal amount, and the guardian having lent out part of the money, and received it back in depreciated paper, which he at last funded, is not liable for the loss by depreciation. *Sallee v. Yates*, 1 Wash. 226; *Yates v. Salle*, Wythe 163. See also, *Walker v. Walke*, 2 Wash. 195.

(2) **Confederate.**

See also, post, "Balance Due by Guardian," V, E, 5.

In the case of *Crawford v. Shover*, 29 Gratt. 69, 81, it is said: "It is not a good defense to the guardian in this case that he did not actually intend to injure the ward by the act complained of, if such injury was the necessary or actual result of such act; nor that he

derived no profit from the act complained of. *Jennings v. Jennings*, 22 Gratt. 313; *Crickard v. Crickard*, 25 Gratt. 410; *Moss v. Moorman*, 24 Gratt. 97."

Receiving Confederate Money from Former Guardian.—Where a second guardian receives confederate money from his predecessor, not knowing he had received sound currency, though he gives a receipt, the second guardian will only be responsible for the scaled value. *Jennings v. Jennings*, 22 Gratt. 313.

Ante War Debt.—Where a guardian receives an ante war debt and pays therewith ante war expenses, neither receipts nor disbursements are to be scaled. *Bennett v. Claiborne*, 23 Gratt. 366.

Unnecessarily Receiving Depreciated Currency.—Even under the statute March 5, 1863, where the ward's debts are good, ante bellum, specie debts, the guardian has no right to collect them in depreciated confederate currency and invest in confederate bonds, where there was no necessity for it; if he does so, he will be held responsible. *Ammon v. Wolfe*, 26 Gratt. 621. See also, *Crawford v. Shover*, 29 Gratt. 69.

The debt due to the wards being a good ante war debt, well secured, he was not authorized to collect in confederate money, and he could not be authorized under the statute so to invest it. *Ammon v. Wolfe*, 26 Gratt. 621.

"In *Campbell v. Campbell*, 22 Gratt. 649, 684, and in *Crickard v. Crickard*, 25 Gratt. 410, 421, it was held, by this court, that 'to authorize investments under the act of March 5th, 1863, three conditions must concur: 1st, the money must be in the hands of the fiduciary; 2nd, it must have been received in the due exercise of his trust; 3rd, for some cause, he must be unable to pay it over to the parties entitled. If they do not all exist, the order of the court or judge purporting to authorize such investment is

null, and the fiduciary is responsible for the money." *Ammon v. Wolfe*, 26 Gratt. 621, 626. See also, *Crawford v. Shover*, 29 Gratt. 69.

C. died in 1858, leaving a will by which he gave to S. \$8,000, and appointed W. his executor. J. qualified as guardian of S. M. owed to C., for land purchased in his lifetime, \$8,000, secured by the vendor's lien. The legacy to S. was reduced to \$5,500, and M. paid \$1,000 to W., who paid it over to J. And M. having died in June, 1863, his executor proposed to pay to W. a part of the debt of M. to C. W. declined to receive it, but it was understood between them, that if J., as guardian, would receive it, and J.'s receipt was brought to W., he would credit the amount on M.'s bond. J., having consulted counsel, and being informed that the judge would authorize the investment of the money in confederate bonds, J. and the executor went together to the agent of the confederate government and gave him \$4,500 to be invested in a bond, which was afterwards obtained. And at the same time J. filed his petition to the judge for leave to invest, which was authorized by an order in vacation, and J. gave a receipt for \$4,500 to W., and W. credited the bond of M. with the amount. On a bill filed by S. by his next friend, against J. and his sureties, held, that the money was not received in the due execution of his trust, and the judge had no authority to order the investment. *Crawford v. Shover*, 29 Gratt. 69.

By an amended bill by S., W. and the executors of M. were made defendants, and were charged with participating in and instigating the act of J. But the decree is against J. and his sureties, and the amended bill is dismissed. On appeal by J., held, that the plaintiff, S., being satisfied with the decree, and J. in his answer, both to the original and amended bill, having averred that he had acted on the advice of his counsel and with the ap-

proval of his own judgment, J. can not complain of the decree as not holding W. and M.'s executor liable with him to S. *Crawford v. Shover*, 29 Gratt. 69.

In the case of *McDearman v. Robertson*, 1 Va. Dec. 354, it was held, that there was no evidence that the investment was made of the funds of the ward or for him. The county court had no jurisdiction to authorize any such investment under the act of 1863, and its order was a nullity. And this was not a case in which an order of the circuit court authorizing such an investment would have protected the guardian. See *Campbell v. Campbell*, 22 Gratt. 649; *Crickard v. Crickard*, 25 Gratt. 410.

Failure to Exercise Diligence in Loaning Out Money Received during Civil War.—When a guardian received money of his ward, early in the civil war, in notes very little, if at all, depreciated and invested it in a confederate bond late in the war, when he no longer had the amount in kind, paying for it in greatly depreciated currency, he was charged with the full amount received with interest, and could not off-set the bond at its face value; the guardian failing to show that he could not have loaned it when received, and the act of the Virginia legislature of March 5, 1863, not authorizing the circuit court to approve such an investment, where the money was not in the hands of the fiduciary. *McClure v. Johnson*, 11 W. Va. 432.

Quære, can an investment in confederate bonds by a fiduciary be upheld under any circumstances? *McClure v. Johnson*, 14 W. Va. 432.

Investments in Guardian's Name.—Land of infants is sold in 1859, upon credits extending to January 8th, 1862. Their guardian collected a part of the money in May, 1862, and he invested it in March, 1863, \$3,500 in seven per cent. confederate bonds, which were found after his death enclosed in a paper endorsed Wolfe's heirs; but the bonds were taken in his own name.

Held, there is no sufficient evidence that the investment when made was intended for his wards. *Ammon v. Wolfe*, 26 Gratt. 621.

Entry of Rents and Hires.—In the case of *McDearman v. Robertson*, 1 Va. Dec. 354, where a commissioner's report was excepted to because the receipts of each year are brought into the account in the year in which the rents and hires accrued, making the fund bear interest a year too soon, and seriously affecting the result of the scaling during the war, it was held, that there was no error in the decree appealed from; the rents and hires were charged by the commissioner, as of the same dates they were entered in the ex parte accounts settled by the deceased guardian in his lifetime.

4. Liability for Interest.

See also, ante, "Failure to Invest," V, E, 3, e.

a. In General.

In the case of *Tabb v. Boyd*, 4 Call 453, interest was refused under the circumstances against a guardian for the misconduct of his wife as executrix of her first husband before her marriage with the guardian.

b. Simple.

See ante, "Rights, Duties and Liabilities upon Termination of Guardianship," III, F.

c. Compound.

Construction of Statute.—The 7th section of the act in 1 Rev. Code, 1819, p. 407, concerning guardians, requires every guardian to exhibit to the court which appointed him, once in every year, "accounts of the produce of the estate, of the sales and disposition of such produce, and of the disbursements;" and the 9th section provides that the balance appearing against the guardian "may be put out to interest for the benefit of the ward, upon such security as the court shall direct and approve; or the guardian, if it remain in his hands, shall account for the interest, to be computed from the time

his account was or ought to have been passed." *Garrett v. Carr*, 1 Rob. 196.

If, upon the first settlement of his accounts by the guardian, a balance remain in his hands on which he is to account for interest, such interest must, in his second annual account, be credited to the ward, like other profits of the estate; and if the interest and other profits credited in this second account exceed the disbursements, the surplus, whether it arise from the interest aforesaid or from other profits, will constitute a balance against the guardian, on which, if it remain in his hands, he must account for interest, which interest must, in the third annual account, be credited to the ward; and so on, toties quoties. But, from the time the guardianship terminates, the account is to be settled on the ordinary principals of debtor and creditor as to interest, compound interest being generally excluded on both sides. *Garrett v. Carr*, 1 Rob. 196; *Childers v. Deane*, 4 Rand. 406; *Cunningham v. Cunningham*, 4 Gratt. 43; *Handly v. Snodgrass*, 9 Leigh 484; *Armstrong v. Walkup*, 12 Gratt. 608; *Evans v. Pearce*, 15 Gratt. 513; *Martin v. Fielder*, 82 Va. 455, 4 S. E. 602; Va. Code, 1887, § 2606; 1 Min. Inst. (4th Ed.), pp. 486, 487. See also, *Crigler v. Alexander*, 33 Gratt. 674; *Lovett v. Thomas*, 81 Va. 245; *Knight v. Watts*, 26 W. Va. 175, 218; *Strother v. Hull*, 23 Gratt. 652.

Rents and Hires.—The case of a guardian indebted to his ward for the annual value of land occupied, and of a slave possessed by him, forms an exception to the general rule that interest is not to be allowed on estimated rents and hires. Such annual value must, in the annual account exhibited by the guardian, be credited to his ward, and the surplus beyond the disbursements will bear interest, like other profits of the estate. *Garrett v. Carr*, 1 Rob. 196.

Interest on Balance in Guardian's Hands Not Loaned within a Reasonable Time.—Interest should be charged

on balances in the hands of guardian at the end of any year, as prescribed in ch. 82, § 10, W. Va. Code, i. e., from the end of the year in which such balance arose, where such balance remains in the guardian's hands which should have been loaned out in a reasonable time. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. 87.

Any Person Acting as Guardian.—Under § 10, ch. 82, of the West Virginia Code, any person acting as guardian, whether duly appointed or not, is liable to be charged compound interest on balances found due at the end of each year while so acting, in like manner as regularly appointed guardians. *Kester v. Hill*, 46 W. Va. 744, 34 S. E. 798.

Failure to Settle Accounts.—When a guardian fails to settle his accounts annually, he will be charged compound interest, and interest will be charged on conjectural rents and profits. *Garrett v. Carr*, 1 Rob. 196. See also, *Jennings v. Jennings*, 22 Gratt. 313.

Where a guardian has returned no account to the court which appointed him, and a bill in equity is filed against him, the court of equity will charge him with interest from the time and in the manner that he would have been charged, if his account had been exhibited annually to the court which appointed him; and will settle the accounts, in other respects, upon the principles that would have governed the settlements, if regular returns had been made to that court. *Garrett v. Carr*, 1 Rob. 196, 197.

"The words of the law require annual settlements; its policy looked to the constant superintendence and control of the proper court; and no principle should be adopted, which, in the case of such failure to settle, would place the guardian in a more favorable position, or hold out inducements to him to neglect his duty. For this would be enabling him to profit by his own wrong. An account should therefore be raised against him annually,

and the disbursements applied to the annual receipts. This is necessary to satisfy the requisitions of the law, which requires interest to be computed from the time the account ought to have been settled." *Garrett v. Carr*, 1 Rob. 196, 209.

5. Balance Due by Guardian.

Fiduciary Debt.—The mere giving of bonds for the balance due by a guardian, is not a novation of the debt, and the debt is still a fiduciary one. *Smith v. Blackwell*, 31 Gratt. 291. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 589.

When Liable for Good Money with Compound Interest.—J. is appointed guardian of infants in September, 1857, and then receives from the administrator of their father \$791 in money, which he does not invest for his wards, but purchases a slave for himself. In February, 1863, on the motion of one of his sureties, he is required to give a new bond as guardian, which he declines to do; and he is thereupon removed, and H. is appointed guardian in his stead. J. never having settled his account as guardian, directly H. is appointed, pays to him \$690 in Confederate treasury notes, and transfers to him receipts for moneys he had paid for the wards; it not appearing that H. knew what kind of money J. had received. Held, J. not having invested the money he received, for the benefit of his wards, but having used it for his own purposes, and not having settled his account as guardian, he is to be charged with the amount received in good money, with compound interest, and to be credited with the payments made for the wards, and to H. at the scaled value thereof at the time of payment. *Jennings v. Jennings*, 22 Gratt. 313.

F. SUITS IN REFERENCE TO ACCOUNTING AND SETTLEMENT.

1. Actions for Accounting.

a. Jurisdiction.

In the case of *Barnum v. Frost*, 17

Gratt. 398, 405, it is said: "So far, then, as this bill seeks a discovery of the infant's income, a settlement of the guardian's accounts, and a satisfaction of the plaintiff's claim out of the ward's estate, for which the guardian's securities are responsible, it is peculiarly and exclusively a case of equitable resort; nor has any question on this head been raised by demurrer to the bill or otherwise."

Referring to the case of *Pratt v. Wright*, 13 Gratt. 175, the court in *Barnum v. Frost*, 17 Gratt. 398, 409, says: "It is also material to remark that it was also held, in this case, that 'the right to sue at law on the bond was not in exclusion of the jurisdiction of chancery to hold the guardian to an account, and his securities with him, to the payment of any balance found due to his ward.'"

b. Venue.

S. qualified as guardian of M. in Frederick county. Her father lived in Hampshire county, now in West Virginia, and he owned real estate in that county, which upon a bill filed by S. was sold, and the proceeds paid over to him, and brought by him to Frederick county where he lived. M. may sue for a settlement of his account as guardian in Frederick. In the opinion it is said: "He is a fiduciary which the plaintiffs allege has funds in this state, and is liable to be sued here. If he were sued in West Virginia upon his bond given there, a judgment obtained against him there would be of no avail against him here. The court is of opinion upon the authority of *Tunstall v. Pollard*, 11 Leigh 1, and subsequent decisions of this court, that the circuit court of Frederick county had jurisdiction of this suit." *Rinker v. Streit*, 33 Gratt. 663, 666.

c. Parties.

Suits against a Former Guardian for an Accounting Must Be in Name of Infant by His Next Friend.—A guardian has no authority to file a bill in his own name against a former guardian,

for an account of his transactions in relation to the wards' estate; the bill should have been filed in the names of the infants by their next friend or guardian. The guardian is liable to an action of account, at common law, by the infant after he arrives at age; and the infant, while under age, may, by his next friend, call the acting, or any preceding guardian, to account by bill in chancery. *Lemon v. Hansbarger*, 6 Gratt. 301. See also, *Morrison v. Householder*, 79 Va. 627.

If the guardian is sole plaintiff in the bill and has no further interest in the suit than as guardian, the bill must be dismissed. *Lemon v. Hansbarger*, 6 Gratt. 301; *Burdett v. Cain*, 8 W. Va. 282.

But if he is further interested in the suit and a proper party to it, the decree should be merely reversed and the cause remanded in order that proper parties may be made. *Sillings v. Bumgardner*, 9 Gratt. 273.

Justices Who Took Defective Guardian's Bond.—Although the decree, in a suit against a guardian for the settlement of his accounts, is evidence in an action to enforce the liability of justices for taking a defective bond, such justices are neither necessary nor proper parties in such suit, their interest arising only out of a collateral liability. *Austin v. Richardson*, 1 Gratt. 310.

Sureties.—Judge Baldwin, in a dictum in *Austin v. Richardson*, 1 Gratt. 310, says: "The sureties of a guardian are proper though not necessary parties" to a suit to settle a guardian's accounts.

Ward and Sureties.—In 1866, J. has a suit brought by his ward, by her next friend, against him, as executor and guardian, for the settlement of his accounts, and a commissioner reports the executorial account up to January, 1863, and then opens a guardian account from that day, and transfers the balance due from J. as executor to him

as guardian; and the report is confirmed by the court. The ward having had no agency in bringing or conducting the suit, and the sureties of the guardian not having been parties to it, neither the ward nor the sureties are bound by it. *Smith v. Gregory*, 26 Gratt. 248.

Relief on Answer of Ward Joined with Guardian as Defendant.—One person is guardian of two infant sisters, who are equally owners of moneys paid to the guardian for the common benefit of both infants, and one of the infants sues the guardian's administrator for a settlement of the account of her guardianship, making her sister a defendant, alleging in her bill that the moneys paid to the guardian were the common property of herself and her sister, but not alleging that her guardian was also guardian of her sister, and asking only payment of what was due her from her guardian's estate. The sister files an answer, alleging that the deceased was also her guardian, and received such moneys for the benefit of both her sister and herself, and praying that the account, as between her and her deceased guardian, be settled in the suit, and a decree given her for what is due her from the guardian. The plaintiff shows herself entitled to relief against her guardian's estate, and the proof, as between plaintiff and defendant, shows the sister also entitled to similar relief. Held, that it was proper to receive such answer, and to decree for each of the wards against the guardian's administrators. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213.

d. Evidence.

The Record in a Former Suit.—The record in a former suit is admissible evidence to establish the amount of indebtedness of the guardian in a suit to settle his accounts. *Morrison v. Householder*, 79 Va. 627. See also, *Roberts v. Colvin*, 3 Gratt. 358; *Hooper v. Royster*, 1 Munf. 119.

e. Decree.

Where one of several wards is still an infant, it is error to make a joint decree in their favor, though made with the consent of the infant's next friend. *Armstrong v. Walkup*, 9 Gratt. 372.

It is error to aggregate the principal and interest due on the guardian's account, and give a decree for the whole sum, with interest thereon. In the opinion it is said: "The court is further of opinion that although there was no error in holding that after the termination of the guardianship, the account should have been adjusted and stated upon the ordinary principles as between debtor and creditor; yet the court in the final decree has departed from these principles by compounding the interest from the time that the guardianship closed, and rendering a decree for the aggregate sum, embracing interest as well as the balance of principal due at the close of the guardianship, with interest on such aggregate sum of principal and interest from the 1st of November, 1842, until paid." *Cunningham v. Cunningham*, 4 Gratt. 43, 46.

f. Appeal.

The administrator of an intestate is also guardian of one of the distributees. Upon the termination of the guardianship, a bill is filed against the guardian and his sureties, to recover what is due upon the guardianship account. An amended bill is afterwards filed against the administrator and his sureties, to recover what is due on the administration account. Reports are made of both accounts. But, for reasons appearing to the court, the guardianship account is recommitted; and then, by consent of parties, the administration account is also recommitted. A further report is made upon the guardianship account, and none upon the administration account. Whereupon the cause is heard as to the guardian and his sureties, upon the further report so made, and a decree

is entered against them for the sum deemed by the court to be due upon the guardianship account. From this decree an appeal is taken by a party interested to get rid of or reduce the amount. In the appellate court it is urged by the appellee, that the balance stated as due on the guardian's account should be augmented, by incorporating in it the appellee's share of the balance due on the administration account. Held, this claim can not be sustained: 1st, because the case was heard and the decree rendered between the parties to, and on the claim made by, the original bill for the settlement of the guardianship account, as contradistinguished from the administration account, the settlement of which was sought by the amended bill; 2d, because the case was not prepared for hearing as to the administration account; it standing, as to that account, on a consent order recommitting the same, and the record of course furnishing no account on which a definite charge or decree in respect to the administration account could be made; 3d, because no claim was made in the court below by the appellee, to bring into the guardianship account any charge against the guardian arising out of the administration account. *Williamson v. Howard*, 2 Rob. 39.

Objections to Commissioner's Report Must Be Made in Lower Court.

It is too late to object in the appellate court to a charge of interest as having been received from the administrator, which he has in fact never received, when the guardian has failed to object to the commissioner's report made upon that basis. *Foreman v. Murray*, 7 Leigh 412, *Brockenbrough, J.*, and *Tucker, P.*, dissenting.

2. Actions to Surcharge and Falsify.

Submission to Jury—Re-Examination.—The accounts of a guardian are, under the provisions of chapter 234, acts, 1872-73, settled before a commission of the county court, who reports

a balance due from the guardian to his ward, the guardian excepts to the report, and the questions raised by the exceptions are submitted by the court to a jury, which finds against the exceptor; the court approves said finding, confirms the report, and orders the same to be recorded by its clerk. Held, the verdict of the jury in such proceeding does not come within the purview and protection of § 13, art. 3, of the constitution of this state. *Haught v. Parks*, 30 W. Va. 243, 4 S. E. 276.

Guardian's Accounts Settled before a Commissioner, Prima Facie Correct.

—A guardian's accounts duly settled before a commissioner are prima facie correct, but prima facie only, and are subject to be surcharged and falsified by a suit in proper time. *Haught v. Parks*, 30 W. Va. 243, 4 S. E. 276. See also, *Hannah v. Boyd*, 25 Gratt. 692; *Newton v. Poole*, 12 Leigh 116.

Multifariousness.—Infants by their next friend file their bill against their guardian, first to surcharge and falsify the settled account of their guardian, and to have him removed; and second, to have a sale of their lands. The guardian demurs to the bill, on the ground that it is multifarious. Held, that, as the court can not sell the infants' land on a bill filed by them, and no relief on that part of the bill can be given, the court will consider the case as if that part of the bill was not in it; and the demurrer was properly overruled. *Snavelly v. Harkrader*, 29 Gratt. 112. See generally, the title **MULTIFARIOUSNESS**.

Pending the case, some of the plaintiffs come of age, and they all unite in an amended bill asking the same relief against the guardian; and the plaintiffs who have come of age ask for a partition of the land and a sale of it, on the ground that it can not be divided in kind without injury to all. The guardian demurs to the amended bill on the same ground. Held, the court can not decree a partition and sale of

the land on this bill; and therefore it will be treated as if this part of the bill was not in it; and the demurrer was properly overruled. *Snavelly v. Harkrader*, 29 Gratt. 112.

Where the Bill Need Not Specify Errors.—Where errors appear on the settlement, even the bill need not specify those errors, but there may be at once a review of such settlement, and even where there is no error apparent on the settlement assailed, and in a case where no reference is at the time proper, yet if it turns out at last to have been proper from further developments in the case, the court will not on account of such premature reference alone, reverse the decree. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776; *Seabright v. Seabright*, 28 W. Va. 412.

Measure of Relief.—A bill to surcharge and falsify an ex parte confirmed settlement of a fiduciary does not overhaul the account, and restate all its items, but deals only with those items surcharged and falsified. In other respects the former account stands firm, as does also the balance shown by it, and the sum of items successfully surcharged and falsified is the measure of relief on such a bill. *Windon v. Stewart*, 48 W. Va. 488, 37 S. E. 603, citing *Shugart v. Thompson*, 10 Leigh 434. See also, *Newton v. Poole*, 12 Leigh 112.

G. CONCLUSIVENESS AND VALIDITY OF SETTLEMENT OR RELEASE OF GUARDIAN.

Settlement Made Soon after Age.—

Both deeds of gift and deeds of acquittance and discharge executed by a ward, soon after attaining her full age, at or before the time of setting the accounts and delivering up her estate are vacated by the laws on a principle of public policy, without proof of actual fraud, still more when circumstances of fraud exist, nor does lapse of time during coverture affect the female ward's right of avoidance. Wal-

ler v. Armistead, 2 Leigh 11, 21 Am. Dec. 594.

Where, however, a settlement with the guardian by the ward, made soon after age, is acquiesced in for twelve years, with full knowledge of the circumstances, and no proof of misrepresentation or concealment, such laches bars all remedy in equity. *Baylor v. Fulkerson*, 96 Va. 265, 31 S. E. 63.

The law is well established that settlements made soon after the ward comes of age, and especially before he is in possession of his estate, are viewed by a court of equity with a watchful and jealous eye. The law, however, does not prohibit the guardian from dealing with his recently emancipated ward, although it regards the transaction with jealousy, and a release of the guardian, or a gift to him, may consequently stand, if shown to have been made deliberately, and with sufficient opportunity for consultation and advice. Long and unexplained acquiescence is in this case as in other cases of like kind an effectual bar. *Baylor v. Fulkerson*, 96 Va. 265, 31 S. E. 63.

Devises Accepted by Wards in Satisfaction of Claims against Guardian's Estate.—Where wards accept devises from their guardian, either in satisfaction of their claims against him or on condition that they release all such claims, they are estopped to set up such claims afterwards. *Lewis v. Overby*, 31 Gratt. 601.

A Receipt in Full Not Conclusive on Ward.—A ward is not concluded by his receipt in full to his guardian, executed soon after attaining his majority, from showing, in equity, that his guardian is still indebted to him. *Shackleford v. Newbill*, 2 Pat. & H. 232.

Release of Guardian—Laches of Ward.—Where the ward, being of full age, executes a receipt in full to his guardian, on consideration of a sum received from a third party in satisfaction of ward's estate loaned by guard-

ian to this party, such receipt is a valid acquittance of the guardian, and if not, the ward's laches in acquiescing for six years, amounts to a waiver. *Kelly v. McQuinn*, 42 W. Va. 774, 26 S. E. 517.

Lease to Guardian Himself.—Where a guardian leases his ward's property to himself at a certain rental and settles with the guardian of her coheir on this basis and also with her after age, such acquiescence on ward's part bars her from setting up a claim against her guardian for twice as great a rental on the ground that the actual profits were twice as great. *Paxton v. Gamewell*, 82 Va. 706, 1 S. E. 92.

In 1870, D. and W. jointly owned and occupied a storeroom. D. dying, left a son and daughter—minors. J. qualified as guardian of son, and W. of daughter. W. continued to occupy storeroom at the annual rent of \$400, agreed on between himself and J. On that basis W. regularly settled the rent with J. until 1874, when his ward married G., with whom W. settled in full the rent on same basis until 1879, when G. became a lunatic after which W. settled the rent with G.'s wife until 1883, when she brought suit to compel W. to account to her for one-fourth of the actual rents and profits of the storeroom. It was held, that W. can not be made to account at a rate higher than that agreed on. *Paxton v. Gamewell*, 82 Va. 706, 1 S. E. 92.

Wards Entitled to Notice.—Wards, even if nonresidents, if they have already appeared in the suit, are entitled to notice of the taking of depositions and the settlement of their guardian's accounts. Va. Code, 1873, ch. 166, § 15; *Burwell v. Burwell*, 78 Va. 574. See the title DEPOSITIONS, vol. 4, p. 557.

Guardian's Accounts, Confirmed by Court, Are the Best Evidence.—The guardian's accounts, allowed by the court, are the best evidence of the guardian's management, as vouchers may be lost. *Tabb v. Boyd*, 4 Call 453. See also, *Campbell v. White*, 14 W.

Va. 122; *McCall v. Peachy*, 3 Munf. 288.

Compromise—Long Acquiescence in—Setting Aside.—A compromise of a suit for settlement of a deceased guardian's account, entered into by advice of counsel, and ratified by decree, after examination and explanation of settlements of the account reported by a commissioner, and of exceptions of both parties thereto, with access to all sources of information in possession of the guardian's administrator, could not be set aside, after acquiescence for eleven years, on the ground that it was unequal and unjust, and entered into in ignorance of the facts, and of the extent of the guardian's liability, in the absence of fraud or mutual mistake. *Epes v. Williams*, 2 Va. Dec. 485.

VI. Guardian's Bonds.

A. RIGHTS AND LIABILITIES.

1. For What the Bond Is Liable.

A guardian, who, in the absence of overruling necessity, receives confederate currency in discharge of an ante war debt well secured on land, is liable on his official bond for the loss so incurred; nor, in such case, will the order of a judge obtained in vacation which directs the investment of the money so received in confederate bonds, release him from liability. *Crawford v. Shover*, 29 Gratt. 69, 77 et seq.; *Jennings v. Jennings*, 22 Gratt. 313; *Campbell v. Campbell*, 22 Gratt. 649; *Bennett v. Claiborne*, 23 Gratt. 366; *Moss v. Moorman*, 24 Gratt. 97; *Crickard v. Crickard*, 25 Gratt. 410; *Kirby v. Goodykoontz*, 26 Gratt. 298; *Ammon v. Wolfe*, 26 Gratt. 621; *Tosh v. Robertson*, 27 Gratt. 270.

Bond Taken as Guardian.—Where a guardian is also administrator with the will annexed and sells his ward's land under authority of the will and takes bonds, payable to himself as guardian, he is responsible as guardian and his sureties likewise. *Broadus v. Rosson*, 3 Leigh 12.

Property Received after Termination of Guardianship.—The estate of the ward having come into the possession of the guardian, his bond of office binds him in his lifetime, and his estate after his death, for the interest, hires and profits received by him, whether received before or after the expiration of his authority as guardian. *Armstrong v. Walkup*, 12 Gratt. 608; *Sage v. Hammond*, 27 Gratt. 651. See ante, "Rights, Duties and Liabilities upon Termination of Guardianship," III, F.

Sale of Bank Stock.—If a guardian unnecessarily sell bank stock belonging to his ward, and appropriate the proceeds, he and his sureties shall be held to replace the stock, or account for and pay its present value, and the amount of dividends thereon accrued since the sale was made; and, in such case, there shall be no commissions allowed on the value of the stock, even in favor of the guardian's sureties, but commissions shall be allowed on the dividends. *Bank of Virginia v. Craig*, 6 Leigh 399.

Default in Another Fiduciary Capacity.—See also, the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 695.

"The law is well settled that where an executor or administrator having assets in his hands, becomes the guardian of the legatee or distributee, he may elect to hold the share of such legatee or distributee in his character of guardian; and thus while he charges his sureties in the guardian bond he exonerates those in the administration bond. And it is equally well settled that in order thus to shift the responsibility from one class of sureties to the other, some distinct act or declaration is necessary on the part of the executor or administrator, indicative of his intention to hold the fund in his character of guardian. *Myres v. Wade*, 6 Rand. 444; *Swope v. Chambers*, 2 Gratt. 319; *Alston v. Munford*, 1 Brock. 266, 278; note 6." *Smith v. Gregory*, 26 Gratt. 248, 257.

J., executor of G. settles his accounts in 1860, and is found indebted to his testator's estate. He then qualifies as guardian of the legatee of the testator, and closes on his books his executorial account, and opens a guardian's account; and transfers the balance due from him as executor to his debit as guardian. At this time he has no property of his testator's estate in his hands. He afterwards in 1863 lays his account before a commissioner, and requests him to settle it as an account as guardian; but the commissioner settles it as an executorial account, and it is returned to the court as such. Held, the executor could not transfer his indebtedness as executor to himself as guardian, so as to exonerate his sureties as executor from liability to the legatee for the amount. *Smith v. Gregory*, 26 Gratt. 248.

The account returned by the commissioner is to be looked to as showing in what character J. held the assets of the estate. *Smith v. Gregory*, 26 Gratt. 248.

Where the same party is executor and also guardian, until a legacy is payable, he can not elect to hold said legacy as guardian instead of executor and so relieve his sureties on his bond as executor and charge those on his guardian's bond, though after the legacy becomes payable very slight acts or declarations may suffice to transfer the liability. *Swope v. Chambers*, 2 Gratt. 319.

The sureties on the guardian's bond and not those on that of the administratrix are responsible, where, after the settlement of the accounts of the administratrix, a balance is found due to the intestate's estate and she then qualifies as guardian of the intestate's infant children and receives their distributive shares. *Myers v. Wade*, 6 Rand. 444. See also, *Smith v. Gregory*, 26 Gratt. 248.

2. To Whom the Bond Is Liable.

The condition of the guardian's bond

is to pay and deliver to the ward her estate, when thereto required by the justices. A creditor for necessities furnished to the ward, may be substituted to the rights of the ward, upon the bond, against the guardian and his sureties, for the payment of her debt. *Barnum v. Frost*, 17 Gratt. 398. See also, *quære* in *Pinnell v. Hinkle*, 54 W. Va. 119, 120, 46 S. E. 171.

Waste.—If the condition of the guardian's bond is as prescribed by the statute, and the guardian wastes the profits of his ward's estate, a creditor for the support of the ward, though she has taken the bonds of the guardian for the same, not thereby intending to release the ward's estate, may proceed in equity against the guardian and his sureties, and subject them to the payment of the amount due her. *Barnum v. Frost*, 17 Gratt. 398.

Guardian and His Sureties Are Liable on Their Bond for Support of Ward.—It is the duty of the guardian to support and educate his ward, Va. Code, 1887, § 2603, and if he fails to pay a just claim for such support, etc., he and his sureties will be liable on their bond to anyone furnishing it, if the ward's income is sufficient therefor and he wastes the assets, whether the condition of the bond is in the old form, "to pay and deliver to said orphans all the estate due them from said guardian, when thereto required, etc., or the new form, "for the faithful execution of his office." Moncure, P., dissenting, *Barnum v. Frost*, 17 Gratt. 398.

3. Sureties.

a. Liability of Guardian to Surety.

Discharge in Bankruptcy.—A debt owed by a guardian to his surety who has made payments for him is not a fiduciary debt within the meaning of the bankrupt act of 1867, which provides that a discharge in bankruptcy shall not affect fiduciary debts. *Cromer v. Cromer*, 29 Gratt. 280.

Release of Surety—Effect—Discharge of Obligation by Surety.—B. is

bound as surety for D. in a guardian's bond; the guardian dies indebted to his ward; the ward sues surety for the debt; the surety compromises the suit with the ward, and pays her a less sum than on a settlement of the guardian's accounts was justly due her; and the ward by deed assigns to the surety all her claims upon the guardian's estate, and by the same instrument releases the surety from all demands on the guardian's bond. Held, 1. that the deed releasing the obligation as to the surety, released it also as to his co-obligor the principal, and thus left nothing for the assignment to operate upon; and 2. that the surety, notwithstanding the assignment, was only entitled, in equity, to demand indemnity from his principal's estate, for the money actually paid by him to the ward in satisfaction of her claim. *Blow v. Maynard*, 2 Leigh 29.

b. Subrogation.

Generally, a surety is subrogated in equity to securities of his principal's creditor, whom he has paid; but a bond on which guardian and surety are both bound, once paid by surety in the lifetime of the principal without assignment or agreement to assign, is dead in equity as well as in law. *Cromer v. Cromer*, 29 Gratt. 280.

To Rights of Ward.—Sureties, who, by the exercise of a little diligence, could have protected themselves from loss, and who have been guilty of laches in not seeing that their principal exercised his trust faithfully and in allowing him to retain possession of his ward's estate for eight years after the ward came of age without an account, though during nearly all this period their principal was perfectly solvent, can not claim to be subrogated to the ward's rights against third parties, on indemnifying the ward. *Hunter v. Lawrence*, 11 Gratt. 111.

A ward has concurrent remedies against the sureties of a guardian and a fraudulent purchaser from the guard-

ian, and may pursue them at the same time. If he recovers from the sureties, they will be subrogated to ward's rights against the purchaser. *Asberry v. Asberry*, 33 Gratt. 463.

c. Scaling Liability.

In the case of *Call v. Ruffin*, 1 Call 333, the penalty of a guardian was reduced by the scale of depreciation, and the security rendered liable only for the reduced sum.

d. Release, Exoneration or Discharge.

Defective Bond.—Where the justices of a county court take a bond from a guardian and his sureties which is defective from the omission of the penalty, the sureties are discharged, and the justices are made liable for any losses which the guardian can not pay. Va. Code, 1819, ch. 108, § 5; 1887, § 2601. But the remedy is at law by trespass on the case and equity has no jurisdiction to enforce this liability, whether they are sued alone or along with the guardian, and where, on an appeal, the court of appeals entered an order directing the clerk who took the bond to be made a party, such decree is not to be taken as confirming the jurisdiction of a court of equity in such a suit. *Austin v. Richardson*, 1 Gratt. 310.

"The justices or judges, under this statute, are clearly not liable for errors of judgment, but only for willful misconduct or culpable negligence. If they take a bond, however defective in form, which in their honest judgment is sufficient, they are irresponsible; and so if they take security of whose sufficiency they are satisfied by his or other evidence, however erroneous their opinion. But if they refuse or fail to take bond, or take insufficient security, without knowledge or evidence of his circumstances, they incur the liability prescribed by the statute." *Austin v. Richardson*, 1 Gratt. 310, 322.

Release of Co-Obligor.—A and B are cosureties on a guardian's bond. The guardian fails to settle his accounts,

and on coming of age, the wards, for valuable consideration release A from all liability, with a proviso that it shall not be understood to operate a discharge to B. The principal is insolvent. Held, the release does not enure to B's benefit, but B is only liable for the proportion he would have been if A had not been discharged. *Hewitt v. Adams*, 1 Pat. & H. 34.

Where the surety of a guardian is compelled to pay a certain amount to one of the wards, he is entitled to recover only that amount of the guardian's estate, and where he compromises with two other wards for a less sum than is due them and takes an assignment of all their claims against the estate and a release from responsibility as surety, held, that such release of one obligor is a release of his co-obligor, the principal, and the bond is discharged. *Blow v. Maynard*, 2 Leigh 29.

B. ACTIONS.

1. Accounting as a Prerequisite to Suit on the Bond.

No decree should be rendered against the surety on the guardian's bond, before an account is taken of the administration of the guardian's estate. *Roberts v. Colvin*, 3 Gratt. 358.

An action at law on a guardian's bond can not be sustained until after a settlement of his accounts. *Pinnell v. Hinkle*, 54 W. Va. 119, 46 S. E. 171, citing *Roberts v. Colvin*, 3 Gratt. 358. Compare post, "Parties," VI, B, 4.

2. Jurisdiction.

See post, "Foreign Guardians," VII.

Courts of equity have jurisdiction of suits to hold guardians and their securities to account, and the nonresidence of the guardian will not oust them of their jurisdiction. *Pratt v. Wright*, 13 Gratt. 175.

"It is true, that in *Call v. Ruffin*, 1 Call 333, it was held, that the ascertainment, by previous suit against the guardian, of the demand against him, was not in all cases essential (as it

was in a suit upon an executor's bond) to the maintenance of a suit at law on the bond; but that case has never been understood by the courts as settling that the right so to proceed at law on the bond was in exclusion of the jurisdiction of chancery to hold the guardian to an account, and his securities with him, to the payment of any balance found due to his ward. If the guardian in this case was within the jurisdiction of the court, neither he or his sureties could be heard to object that the proceeding ought to have been by suit at law instead of by bill in equity." *Pratt v. Wright*, 13 Gratt. 175, 181.

3. Process.

A summons from a justice is against "B. L. Hinkle, guardian for Joseph E. and Mary Friend, infants." It is an action against Hinkle as an individual. In the opinion it is said: "The action is to be treated as one against Hinkle as an individual, the word guardian being mere descriptio personæ. *Thompson & Lively v. Mann*, 53 W. Va. 432 (44 S. E. 246); 3 Rob. (New) Prac. 265; *Snead v. Coleman*, 7 Gratt. 300." *Pinnell v. Hinkle*, 54 W. Va. 119, 121, 46 S. E. 171.

Service of Process.—In a suit by wards against the heirs of their guardian and the securities on her bond and their representatives, process must be served on all the parties. *Bland v. Wyatt*, 1 Hen. & M. 543.

4. Parties.

An action lies against the surety to a guardian's bond, without any previous suit against the principal. *Call v. Ruffin*, 1 Call 333. See also, *Spottswood v. Dandridge*, 4 Munf. 289; *Reed v. Hedges*, 16 W. Va. 167.

To avoid multiplicity of suits, a ward should have the right, in an action on the official bond of his guardian, to join the sureties with the guardian, without previously fixing any liability against him. *Magruder v. Goodwyn*, 2 Pat. & H. 561.

There is no good reason why a person having a valid claim against a guardian and his surety for a breach of the condition of the bond of the principal, for which principal and surety are alike expressly bound, should be required to exhaust his remedy against the principal before going against the surety. In such case a decree may at once be rendered against them both according to the condition of the bond. *Barnes v. Trafton*, 80 Va. 524; *Franklin v. Depriest*, 13 Gratt. 257.

And a joint decree may be taken against the principal and sureties without first going against the principal. *Barnes v. Trafton*, 80 Va. 524.

Where an executor dies without any personal representative, a court of equity may, at the suit of a legatee, and without any previous suit having been brought against the executor to convict him of a devastavit, convene the securities of the executor, or their representatives, and the persons who would be interested in any estate which the executor may have left, and make the securities liable for any misapplication or wasting of the assets which shall be established in the progress of such suit in chancery. Under like circumstances, a court of equity will give relief against the securities in a guardian's bond; and if the executor of the decedent was also guardian to the legatee, the two sets of securities, and their representatives, may be jointly sued. *Spottswood v. Dandridge*, 4 Munf. 289.

"The court also considers the case of *Taliaferro v. Thornton* and wife, as conclusive authority to show that a court of equity may give relief against the sureties on the guardian's bond. A bill in equity will unquestionably lie against the guardian himself, notwithstanding he has executed a bond on which he might also be sued at law. And if, in the case of an executor's bond (as is proved by *Taliaferro v. Thornton* and wife), the securities,

whose responsibility can not be brought to bear upon them until the inability of the principal be established, may be joined as defendants in the same suit with their principals, or their representatives, a fortiori may the securities of the guardians, whose responsibility is direct and immediate even in a court of law." *Spottswood v. Dandridge*, 4 Munf. 289, 298.

Where New Bond Is Given.—A guardian may come into court with his sureties and execute a new bond; said bond relates back to the time of the qualification of the guardian, and the sureties in the former bond, upon the execution of a new bond, are discharged and it is not necessary nor proper that they should be made parties to a suit for the settlement of the guardian's account. *Sayers v. Cassell*, 23 Gratt. 525.

H. is appointed guardian of two infants by the recorder of Jefferson county; and as such guardian, gives before such recorder one bond with security for both infants. Afterwards real estate in a suit for partition of real estate, in which the said infants have each an interest (in which suit the said H. and his wards were parties), is decreed to be sold by a special commissioner appointed for the purpose by the circuit court of Jefferson county; and the real estate is sold and the sale confirmed by the said court, and the dividend of each infant ward exceeds \$300, and the court afterward directs such special commissioner to pay the proceeds of such sale to H., the guardian, upon his executing bond with security in the penalty of \$6,000; and afterwards H. executes a bond in such penalty with condition substantially the same as that of his official bond with the same surety as in his official bond; said last bond should be regarded as additional security from the guardian; and in a suit by the wards to recover the amount due them both bonds may be joined in the same bill.

Reed v. Hedges, 16 W. Va. 167, 168. But see ante, "Additional Bond," IV, A, 2, g, (5).

If Suit against Justices Is Dismissed as to One, It Should Be Dismissed as to All.—In a suit against a guardian, the surviving justices, and the representative of a deceased justice, the suit is dismissed as to the surviving justices who answered, for lack of jurisdiction. Held, that it should also be dismissed against the representative of the deceased justice, against whom the bill was taken for confessed. *Austin v. Richardson*, 1 Gratt. 310.

5. Defenses.

a. Acceptance of Guardian's Individual Bond.

A bond given by a guardian, on a settlement with his ward after she comes of age, is no discharge of the guardian's bond, previously given by the guardian and his sureties; nor can it be given in evidence under the plea of conditions performed in bar of the specialty, though it may be given in evidence as proof of what is due. *Hamlin v. Atkinson*, 6 Rand. 574.

The acceptance of the ward after age of a bond from the guardian individually is no discharge of the security on the guardian's bond proper, and it can not be given in evidence under the plea of "conditions performed," though it is prima facie evidence of the amount due by the guardian. *Hamlin v. Atkinson*, 6 Rand. 574.

In *Smith v. Blackwell*, 31 Gratt. 291, 297, it is said: "The court is of opinion that the bonds executed by James Blackwell, deceased, in his lifetime, to his ward, James D. Blackwell, and which are the subject of this contention, were given for the balance due him by the said James Blackwell as his guardian; and that said bonds were given as an acknowledgment of the amount of his indebtedness to him and to get time for the payment thereof; that the giving of said bonds and their acceptance by the ward did not merge

the debt due to the ward by the obligor in his fiduciary character, and was not a discharge or extinguishment of the same until paid; and the bonds being executed for a pre-existing debt, due from the obligor as guardian, were not a novation of the debt, and did not change its fiduciary character. In *Hamlin v. Atkinson*, 6 Rand. 574, the question whether a bond taken by the ward for the amount appearing due from the guardian on settlement merged the original right of action, Judge Allen remarks in *Yerby v. Lynch*, 3 Gratt. 460, 'was in effect decided by this court. It was there decided that such subsequent bond was no discharge of the official bond unless given and received in full satisfaction. A bond to perform that for which the party was before bound by another bond is no discharge of the latter.' And in the same case Judge Stanard concedes 'the inefficiency of one security to merge another of equal or higher dignity.' And in the same case Judge Brooke said that the bond given by the guardian to the husband of his ward did not merge the official bond, is settled in the case of *Hamlin v. Atkinson*, 6 Rand. 574. 'In that case the bond of the guardian was given to his adult ward when she was sui juris and competent to contract for herself. Yet the court held, that a bond for the same thing did not extinguish the official bond, and the ward might recover from the sureties in that bond what was due to her from the guardian, treating the bond given her as proof of what was due; and in this the whole court concurred.' In a note, it is said, Judge Green, in a manuscript opinion in *Hamlin v. Atkinson*, said: 'The bond given by the guardian to his ward for the amount due to her by settlement was not a discharge of the surety in his official bond. No bond can, in any case, be a bar or satisfaction of another by the same person.' By giving and receiving the bonds in this case the debt did not lose its fidu-

ciary character, it not appearing that there was any agreement by the ward to receive it in full discharge and satisfaction of what was due to him from his guardian in his fiduciary character; of which it is necessary that the proof should be full and satisfactory. And the bond being for a debt which was fiduciary, it could not lose that character by lapse of time. It continues to be fiduciary until it is satisfied." See also, *Barnum v. Frost*, 17 Gratt. 398, 418.

b. Estoppel to Deny Guardianship.

Where a guardian's bond recites the principal to be guardian and that the money is to go to him as such, the obligors are estopped from either saying he was not guardian or was not receiving the money in that character. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433.

c. Limitations and Laches.

See also, ante, "Conclusiveness and Validity of Settlement or Release of Guardian," V, G.

The cause of action on a guardian's bond accrues on the ward's arriving at age. Va. Code, 1887, § 2921, and the statute of limitations begins to run from that time. *Magruder v. Goodwyn*, 2 Pat. & H. 561; *Morrison v. Householder*, 79 Va. 627.

Though the action on the bond is barred both against the guardian and his sureties, after ten years from the arrival of the ward at age, yet it seems an action may nevertheless be maintained against the guardian, on his general responsibility in equity, if not barred by the lapse of time as would, according to the general principles of equity, render the demand too stale. *Magruder v. Goodwyn*, 2 Pat. & H. 561.

An alleged fraudulent settlement of a guardian's account by the infant, while under age, will not prevent the statute of limitations from running against a suit on the guardian's bond. *Magruder v. Goodwyn*, 2 Pat. & H. 561.

Stay Law.—The period of the stay law is not to be computed in the period of the statute of limitations to suits on guardian's bonds. *Morrison v. Householder*, 79 Va. 627.

Exoneration of Sureties.—The lapse of time during which the ward was prosecuting his claim against the representative of the guardian, furnishes no ground for the exoneration of the surety under the statute of limitations. *Roberts v. Colvin*, 3 Gratt. 358.

Accurate Investigation of Facts Impossible.—In 1845, N. C. conveyed to McG., in trust for M., wife of P. H., slaves and other personalty, c. q. t., to possess and use same during her life, unless interference of trustee might be necessary to prevent disposal thereof by the husband, remainder to her children. M. died in 1855, her husband and children surviving. Later, in 1855, McG. qualified as guardian of the children, with S. as his surety. McG. sold two of the slaves for \$2,200. Exactly when, or in what capacity he sold them, is unknown. Soon after M.'s death, her husband and children left this state, and in the state of A. he qualified as their guardian. In 1857, P. H., as such foreign guardian, obtained an ex parte order from the circuit court of W. county that McG., trustee, transfer to him all the said trust property, and take his receipt therefor. It is alleged that McG., in 1857, gave to P. H. his note for \$2,063.16, for what was due from him as guardian; that T., as trustee, had paid to P. H. on the note \$1,364; that the balance remained unpaid; that P. H. died in 1870, and that the note was burned accidentally in 1873; but that the note was given by McG. as guardian, or that it was unpaid and destroyed was not clearly proved. S. died about 1879, and his real estate was partitioned among his heirs, and U. qualified as his and as P. H.'s and as S.'s administrator, but had received no assets. It is unproved that McG. did not transfer to the foreign guardian

the trust property in obedience to the ex parte order, or that he ever received or held anything as such guardian. In 1882, A. C. H., and the other children of M., brought their bill in the said circuit court against the administrator and heirs of S., as surety on the guardian bond of McG., to subject the real estate of S. to the payment of the amount due them by McG. as such guardian. The defendants demurred and answered. At the hearing, the circuit court decided that the plaintiffs were not entitled to recover against defendants. Held, under the circumstances of this case, wherein, by the lapse of time, laches of the parties, loss of evidence, and the death of the parties, an accurate investigation of the facts is impossible, and every presumption is against the claim of the plaintiffs, they are entitled to no relief in this cause. *Hill v. Umberger*, 77 Va. 653.

6. Appeal.

Where a decree has been recovered by a ward against his guardian and his sureties and the ward is satisfied, the guardian can not object for the first time in an appellate court, that others who participated with him in his breach of trust should be held equally liable with him. *Crawford v. Shover*, 29 Gratt. 69.

VII. Foreign Guardians.

A. JURISDICTION.

A court of equity has jurisdiction to hold a guardian to account, and his sureties with him, to the payment of any balance found due to the ward; though the guardian lives out of the state and has no property within it. The court says: "His absence does not oust the court of chancery of its jurisdiction. His sureties or their representatives are within the jurisdiction of the court, and no reason is perceived why the suit may not proceed, as in other cases where some of the defendants are within and others without

the jurisdiction of the court. His absence may be the occasion of inconvenience and trouble in making up the account, but it presents no legal bar to the relief sought." *Pratt v. Wright*, 13 Gratt. 175, 182.

Guardian May Submit Himself to the Jurisdiction of a Foreign Court.—Although the general rule is that a guardian can not be sued, as such, out of the state in which he qualified, yet if he sues in a foreign court, if found within its jurisdiction, he may be proceeded against under its decree. *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. 818.

B. TRANSFER OF ESTATE TO FOREIGN GUARDIAN.

A decree ordering the payment to a foreign guardian of a ward's money without his compliance with the provisions of the statute Va. Code, 1887, ch. 118, § 2629, is erroneous. *Snively v. Harkrader*, 29 Gratt. 112; *Taliaferro v. Day*, 82 Va. 79.

Pending suit against a guardian, all the plaintiffs go off to their relations, in the state of Illinois, and one of these qualifies in that state as guardian of the infants; and they then amend their bill, stating these facts and filing a copy of the proceedings in the Illinois court with a copy of the guardian's bond, and asking that their property may be turned over to their Illinois guardian. The account of the guardian having been settled, showing the amount due to each of his wards, the cause came on to be heard, when the court made a decree removing the first guardian, and that he should pay over to the Illinois guardian the amounts severally reported be due to his wards. Held, the Illinois guardian may file his petition in this cause for the removal of personal property of his wards, and the proceedings prescribed by said statute may be had therein. *Snively v. Harkrader*, 29 Gratt. 112, 113.

In a suit by infants who have removed out of the state, by their next friend, against their Virginia guardian,

they ask that their property may be transferred to their foreign guardian; and the court decrees that the amount ascertained to be due from the Virginia guardian to the several plaintiffs shall be paid to the foreign guardian, and that he may sue out execution upon the decree. Upon appeal, so much of the decree as directs the payment to the foreign guardian is reversed, and he is directed to proceed according to the statute to have the infants' estate removed, and when that is done the circuit court may decree that said several sums shall be paid over to him. Without any further proceeding, several executions are sued out in the name of the infants for the amounts due them respectively, the executions being made returnable in less than four weeks; and the Virginia guardian enjoins the executions. Held, every execution should conform accurately to the judgment or decree which it is used to enforce; and as the decree directed the money to be paid to the foreign guardian, and authorized him to sue out execution, the executions were irregularly and unlawfully issued. *Snively v. Harkrader*, 30 Gratt. 487.

The court of appeals having reversed so much of the decree of the circuit court as directed the money to be paid to the foreign guardian, and authorized him to sue out execution, it was irregular and illegal to issue the executions until the circuit court had decreed the payment of the money. *Snively v. Harkrader*, 30 Gratt. 487.

Although under the statute, Va. Code, 1873, ch. 183, § 40, the defendants in the executions might have moved the court or the judge in vacation to quash them, as this must be done upon notice to the plaintiffs, and could only be done by publication as to these foreign plaintiffs, under the circumstances the defendants were entitled to enjoin the executions. *Snively v. Harkrader*, 30 Gratt. 487.

Requirement of Notice.—Although the application by a foreign guardian

for the removal of the assets from the state, is a summary proceeding, four weeks' notice must be given by publication. Va. Code, 1887, § 2631. And if the court finds that the order for removal was improper, it may take all necessary steps to protect the rights of all involved. *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. 818.

Appointment of Receiver.—Where the guardian of nonresident infant children of a deceased father, who was a citizen of this state and to whom a homestead in money had been set apart, asks to transfer said money out of the state, it is proper for the court to appoint a receiver to take charge of the funds and invest them, so that the principal money may be forthcoming when the youngest of such children attains the age of twenty-one years. *Clendenning v. Conrad*, 91 Va. 410, 411, 21 S. E. 818.

VIII. Guardianship De Facto.

A. WHEN GUARDIANSHIP DE FACTO ARISES.

"Whoever enters upon an infant's estate, is treated as his bailiff or guardian, and charged accordingly." *Garrett v. Carr*, 3 Leigh 407, 416. See also, *Martin v. Fielder*, 82 Va. 455, 4 S. E. 602.

Executors and Administrators.—Where an executor undertakes to fulfill the duties of guardian, instead of having a guardian appointed according to law, he must be treated as such in his transactions with the infant. *Garrett v. Carr*, 3 Leigh 407. See also, *Bennett v. Claiborne*, 23 Gratt. 366; *Arrington v. Cheatham*, 2 Rob. 492.

Where the administrator buys the shares of the adult heirs of decedent and takes possession of the whole tract including the shares of two infant heirs, he will be held to account as guardian de facto of the infant heirs. *Martin v. Fielder*, 82 Va. 455, 4 S. E. 602. See also, *Waller v. Armistead*, 2 Leigh 11. 21 Am. Dec. 594.

Father Holding Child's Estate.—A father is liable for the rents and profits of the estate of his minor child as guardian de facto, as long as he holds the same. *Peale v. Thurmond*, 77 Va. 753.

A father, by retaining in his possession the lands and slaves to which two of his infant children became entitled on the death of their mother and receiving the rents and hires, rendered himself responsible as their guardian de facto. *Evans v. Pearce*, 15 Gratt. 513.

Signing as Guardian.—Where the only evidence that the defendant was guardian or attempted to act as such is that he signs himself "guardian" in a receipt to the commissioner of the court, it is insufficient to charge him either as guardian or guardian de facto. *Maguire v. Doonan*, 24 W. Va. 507.

Never Appointed or Acted as Guardian.—When there is no proof that defendant was ever legally appointed or qualified as guardian, especially when he never acted as guardian, it is error to treat him as guardian. *Lincoln v. Stern*, 23 Gratt. 816.

B. NATURE OF THE RELATION.

A guardian de facto is a fiduciary. *Peale v. Thurmond*, 77 Va. 753.

C. POWERS, DUTIES AND LIABILITIES.

1. In General.

"The case of *Davis v. Harkness*, 1 Gilman (Illinois) 173, was a suit by the children and heirs of Harkness against the administrator of their stepfather for moneys received by him, which belonged to the estate of their father, to which they were entitled. The court treated the stepfather as guardian, and treated the debt against his estate as a fiduciary debt, and as a preferred debt in the administration of his estate. The court says: 'Upon principle, too, as well as authority, should the infant be en-

titled to an account against him as guardian. It would be a strange rule of equity, indeed, if the infant were not as well protected against the violence of the wrongdoer, as he is against the speculations of an appointed guardian. If he receive the money of an infant, and use it, he is estopped from denying that he received it as guardian, and so is his representative.' In the case of *Garrett v. Carr*, 3 Leigh 407, the court treated the executors as guardians de facto of the infant children of their testator, and held them to account as such. In the case of *Evans v. Pearce*, 15 Gratt. 513, a father, who was tenant in common with two of his children, was treated as guardian de facto; and was charged with conjectural rents and hires, and with compound interest. In the case of *Peale v. Thurmond*, 77 Va. (2 Hansbrough), page 753, the father was charged as guardian de facto so long as he held the corpus of the infant's estate. Infants can not protect themselves, and a court of equity will treat whoever receives what belongs to them as their guardian; in the language of Judge Robertson, in *Evans v. Pearce*, 15 Gratt. 513: 'One who makes himself guardian de facto is certainly not entitled to be treated with more favor than if he had been legally appointed.' See *Kent's Comm.*, 2 vol., p. 231, note C." *Martin v. Fielder*, 82 Va. 455, 459, 4 S. E. 602. See also, *Anderson v. Smith*, 102 Va. 697, 48 S. E. 29.

"In *Schouler's Dom. Rel.*, § 326, speaking of quasi guardianship, it is said: 'The general principle thus recognized is that any person who takes possession of an infant's property, takes it in trust for the infant. Hence, courts of equity will always protect the helpless in such cases by holding the person who acts as guardian strictly accountable.'" *Martin v. Fielder*, 82 Va. 455, 459, 4 S. E. 602.

2. As to Profits.

a. In General.

Account of Rents and Profits.—"If

a stranger enters into and occupies an infant's lands, he is compellable, at law, to render an account of rents and profits and will be chargeable as guardian or bailiff.' Story's Equity Juris., § 511." *Martin v. Fielder*, 82 Va. 455, 458, 4 S. E. 602. See also, *Garrett v. Carr*, 3 Leigh 407, 416; *Anderson v. Smith*, 102 Va. 697, 48 S. E. 29.

Confined to Profits.—A de facto guardian, like any other, must confine himself strictly to the profits of the estate. *Anderson v. Thompson*, 11 Leigh 439.

As Guardian during Nonage of Infant.—One who enters upon the estate of an infant and takes the profits thereof, and continues to do so for several years after the infant becomes of age, will be held a guardian de facto of the infant during his nonage, and as agent afterwards. *Anderson v. Smith*, 102 Va. 697, 48 S. E. 29.

"If a man intrudes upon an infant, he shall receive the profits but as guardian; and the infant shall have an account against him in chancery as guardian. And if a man, during a person's infancy, receive the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him; yet he shall account for the profits throughout, and not during infancy alone.' Toublanque's Equity, book 2, ch. 2, p. 235, to side." *Martin v. Fielder*, 82 Va. 455, 459, 4 S. E. 602; *Anderson v. Smith*, 102 Va. 697, 48 S. E. 29.

Recovery of Mesne Profits.—"Whoever enters upon the estate of an infant," says Chancellor Kent, in his Commentaries, side page 229, note B, 'is considered, in equity, as entering in the character of guardian; and after the infant comes of age he may, by bill in chancery, recover the mesne profits.'" *Anderson v. Smith*, 102 Va. 697, 707, 48 S. E. 29; *Martin v. Fielder*, 82 Va. 455, 4 S. E. 602.

Administrator.—Administrator pur-

chasing the adult heirs' shares of their ancestor's land, and entering upon and receiving the rents and profits of the whole, will in equity be held accountable as guardian de facto of the infant heirs during their nonage, and as their agent afterwards, for their share of those rents and profits. *Peale v. Thurmond*, 77 Va. 753; *Martin v. Fielder*, 82 Va. 455, 4 S. E. 602. See also, *Anderson v. Smith*, 102 Va. 697, 48 S. E. 29; *Waller v. Armistead*, 2 Leigh 11, 21 Am. Dec. 594.

b. Interest.

The same rules as to compounding interest and the charge of interest on conjectural profits apply to guardians de facto as to those legally appointed. *Evans v. Pearce*, 15 Gratt. 513. See also, *Martin v. Fielder*, 82 Va. 455, 4 S. E. 602.

In 1851, H. dies, leaving several infant children, and a considerable estate, real and personal. He directs by his will, that on the marriage of his eldest daughter, Ann, she shall have possession of the home place, if she will keep the younger children with her, and take good care of them; and this she does. He directs his executor to manage his estate until January 1st, 1861, when it is all to be divided equally among his children. S., the husband of Ann, becomes administrator c. t. a., takes possession of the estate, and does not invest the money, nor does he settle his administration account. Held, the accounts of S., as administrator c. t. a., up to January 1st, 1861, are to be settled as guardian's accounts, and the interest to be compounded; and his sureties are responsible for the amount so found against him up to that time. *Strother v. Hull*, 23 Gratt. 652.

In such case, though S. is responsible after the 1st of January, 1861, for compound interest upon the shares of such of the children as he continued to act for as guardian de facto, his sureties are not so chargeable. *Strother v. Hull*, 23 Gratt. 652, 653.

"There can be no doubt, as a general rule, that executors and administrators are not to be charged with compound interest; but it is as well established that this general rule will be modified when required by the nature of the trust or the express terms of the will. When the beneficiaries are minors, and accumulation for their benefit is the ruling intention of the will, compound interest will be charged, whether the fiduciary be an executor or guardian. He will be treated as having done what it was his duty to do, and his accounts will be settled as a guardian's accounts. *Garrett v. Carr*, 1 Rob. 196; same case, 3 Leigh 407. In that case, 1 Rob. 213, Judge Allen, referring to the case of *Raphael v. Boehm*, 11 Ves. R. 82, said, 'the direction was to take an account against the executor (who was a trustee) with a computation of interest on all sums received by him while in his hands; and that the master do in such computation make half-yearly rests. The object of the direction was to charge compound interest. Lord Eldon remarks in that case, that "where there is an express trust to make improvement of the money, if he will not honestly endeavor to improve it, there is nothing wrong in considering that he has lent the money to himself, upon the same terms upon which he could have lent it to others; and as often as he ought to have lent it, if it be principal, and as often as he ought to have received it and lent to others, if the demand be interest, and interest upon interest." And in another place, "the court would shamefully desert its duty to infants by adopting a rule that an executor might keep money in his hands without being answerable as if he had accumulated.'" And Judge Allen goes on to say: 'These remarks apply with great force to the case under consideration, where the estate was considerable, the wards young, and accumulation for their benefit the governing intention of the will.'" *Strother v. Hull*, 23 Gratt. 652, 663.

Will Requiring Investment.—"As to compound interest, an executor acting as a de facto guardian, under a will requiring him to invest a fund for accumulation, or to pay interest to some designated person, is chargeable with compound interest when he fails to so invest it and uses the money himself." *Van Winkle v. Blackford*, 54 W. Va. 621, 655, 4 S. E. 589. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 483.

Legacy.—For several years an infant legatee resides with and is maintained by her grandmother, who is chargeable with the payment of the legacy, the annual interest of which is less than the annual value of the maintenance. Held, the grandmother shall not be charged with interest on the legacy during the period of such maintenance. *Arrington v. Cheatham*, 2 Rob. 492.

3. As to Expenditures.

The same rules as to allowance for expenditures in excess of income apply to guardians de facto as to guardians de jure. *Gayle v. Hayes*, 79 Va. 542.

4. As to Advancements.

Where the father is guardian de facto of his daughter he is entitled to credit for an advancement made to the husband of his daughter to help him out of financial difficulties. *Peale v. Thurmond*, 77 Va. 753.

5. Limitations.

Neither the statute of limitations nor lapse of time constitute any bar to a claim of a ward against her guardian de facto, such guardian being a fiduciary. *Peale v. Thurmond*, 77 Va. 753.

D. WHEN PROPER TO DECREE WHOLLY AGAINST ADMINISTRATOR OF GUARDIAN.

In decreeing against the estate of a guardian de facto, it is proper to decree wholly against his administrator

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| when the real estate has been divided and the personalty has not, when they both go to the same parties, although the plaintiff's claim is for rents and profits out of real estate which has | been divided up, and one heir has gotten the real estate in suit, since the coheirs would have to contribute and thus circuitry of action is avoided. <i>Martin v. Fielder</i> , 82 Va. 455, 4 S. E. 602. |
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Guilty, Plea of.

See references under GENERAL ISSUE, ante, p. 712.

Gun.

See the title WEAPONS.

Gunpowder.

See the titles EXPLOSIONS AND EXPLOSIVES, vol. 5 p. 799; NUISANCES.

Gutters.

See the title DRAINS AND SEWERS, vol. 4, p. 824.





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